

DICEY'S CONFLICT OF LAWS

UNDER THE GENERAL EDITORSHIP OF

J. H. C. MORRIS

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CORRIGENDA

Page lxxix, line 6 from bottom—*For* ‘ marriage ’ *read* ‘ residence

Page 286, line 10—*For* ‘ marriage ’ *read* ‘ residence ’.

PREFACE

THE first edition of this book was published in 1896, the third in 1922 (a few days before the original author's death) and the fifth in 1932. Since that date an enormous development has taken place in the Conflict of Laws. In England the courts have been busy with problems arising out of the Russian Revolution, the Italo-Abyssinian war, the Spanish civil war, and the second world war and the world-wide movement of populations associated with these events. Important new statutes have been enacted by the legislature. The literature of the subject has shown a sudden and remarkable tendency to expand. The American Law Institute's *Restatement* was published in 1934, and was followed in 1935 by the three-volume *Treatise* of Professor Beale, the Reporter of the *Restatement*. In England Professor Cheshire's book, first published in 1935, has gone through three editions. Collections of selected essays on the Conflict of Laws have been published by Professors Cook and Lorenzen in the United States and by Dean Falconbridge in Canada. Refugee scholars have enriched the literature of the subject both in England and in the United States. Increasing attention is being paid to the Conflict of Laws by the periodical legal journals.

In view of this mass of new material it seemed clear that if this book was to continue to be of service to modern practitioners, the time had come for a reconsideration of the original author's views, some of which (first formulated over half a century ago) seemed to require modification. Accordingly one new chapter and several entirely new sections have been added to this edition and several old chapters have been completely re-written. The editing of another man's book is always a delicate and invidious task. This is especially true when the book is a classic and the editors never enjoyed the advantage of collaboration with the author. But Dicey's *Conflict of Laws* is essentially a practitioners' book, not a work on

theoretical jurisprudence. Our main object, therefore, has been to make the work as accurate a statement of the modern law as possible; and when we had to choose between accuracy and loyalty to the author's views, we unhesitatingly chose the former. Although we have preserved as much of the author's text as possible, we have not hesitated to make changes when these seemed necessary. We have been more cautious in altering Rules than in altering Comment; indeed we were struck by the remarkably few alterations which the Rules required. Such changes in the Rules as have been made since the third edition (the last to be revised by the author himself) are indicated in italics in the Table of Principles and Rules.

The technique of Rule, Comment and Illustrations is not one which all of us would have adopted if we had been writing our own book on the Conflict of Laws. The method has the disadvantage that it is sometimes apt to produce a false impression of certainty when authority is scanty or conflicting. Provided this disadvantage is borne in mind, and the tentative character of some of the Rules is fully appreciated, the method undoubtedly possesses advantages for the practising lawyer; and we were satisfied that to have abandoned it would have been to go beyond our province as editors. It has been observed that 'there is a regrettable tendency on the part of judges to treat Dicey's propositions as a final statement, perfect in form and merely subject to be checked or modified here and there' (Falconbridge, p. 332). If this tendency exists in England, the blame certainly cannot be attributed to Dicey, who emphasised the tentative character of many of his Rules, and the slender basis of precedent on which some of them rested (see p. 35, *post*).

The following are the most important changes in the form and arrangement of the book:—

(1) The chapter on British Nationality has been deleted, after prolonged hesitation and as a result of the General Editor's casting vote. The reasons for this step are as follows. First, the subject has little to do with the Conflict of Laws. ~~It is impossible to think of more than half a dozen examples,~~

none of them of fundamental importance, in which the jurisdiction of English courts, the choice of law which they apply, or the recognition of foreign judgments in England, is affected by a person's nationality. This is much more obviously true today than it was in 1896; and Dicey himself admitted it when he said 'The civil rights and liabilities of the parties before an English court are, subject to the rarest exceptions, not affected by their nationality' (3rd ed., p. 699). It is significant that Nationality law is not included in any modern textbook on the Conflict of Laws in the English language. Secondly, the British Nationality Act, 1948 (which passed into law while this edition was in the press), by introducing the conception of citizenship of the United Kingdom and Colonies as a sub-status of British nationality, has enormously complicated the subject, so that an adequate account of the modern law would have had to occupy a disproportionate amount of space. However, for the convenience of practitioners who have been accustomed to find an account of nationality within the pages of Dicey, an Appendix on British Nationality and Citizenship of the United Kingdom and Colonies is in course of preparation by Mr. C. Parry, and will appear shortly as a separate publication.

(2) The disappearance of thirty-two Rules on British nationality, and the insertion of a number of new Rules on other subjects, have rendered it desirable in our judgment to re-number the Rules. In this respect we follow a precedent set by the original author, who added five Rules to the second edition and ten to the third, and in each case re-numbered the whole.

(3) The Appendices have all been deleted and such of their contents as seemed of value to modern lawyers have been incorporated in the text. The reason for this is that the Appendices frequently seemed to qualify the Comment and even the Rules in important respects; and we believe that busy practitioners prefer to find their law in one place rather than in two. Some of these Appendices merely repeated verbatim material which is to be found in every law library, for example Order XI, rule 1 of the Rules of the Supreme Court, and the

Wills Act, 1861; others are now wholly out of date, for instance that on the Matrimonial Causes Bill, 1921; others give characteristic expression to views of the author which are now hardly tenable in view of decisions of the courts since his death, and yet could not have been brought up to date without losing their essential character.

(4) Most of the references to American cases have been deleted. The first edition contained references to many such cases, for which an American lawyer assumed sole responsibility. They were omitted from the second edition for reasons given in the Preface thereto, but restored in the fifth. Our reasons for omission are first, the publication of Professor Beale's *Treatise* in 1935; secondly, the great difficulty under present conditions in England of keeping any collection of American cases up to date, and the consequent risk of referring to cases that no longer represent the law. Those who wish to investigate the American law will find copious references to the *Restatement* and hence (since the section numbers correspond) to Professor Beale's *Treatise*. On the other hand, a large number of modern cases from the Dominions have been included, in the hope that they will be of use to Dominion and indeed to English readers. In fact, of the 400 new cases added to this edition, over half were decided by courts outside England, and no less than 33 different series of law reports were searched for new material, in addition to the periodic *Digests*. But no attempt has been made to give a full conspectus of Continental literature, references to which are only made on particular occasions and for special reasons.

(5) The Illustrations now appear in smaller type. This change was not of the editors' choosing, but was dictated by the irreducible factor of the paper shortage.

(6) We have added a Table of Statutes and a Table of References to foreign law reports. We believe that not every English lawyer is aware that 'W.L.D.' stands for Witwatersrand Local Division, or appreciates the distinction between 'S.A.L.R.' and 'S.A.S.R.'.

The division of responsibility between the individual editors and the general editor is as follows. The general

editor collected the new material, organised the work, co-ordinated the contributions of the individual editors, and supervised the task of proof correction and cross-referencing. Each individual editor was given a free hand in the treatment of his sections of the book, within the limits of the agreed editorial policy; but all were invited to make changes in their drafts in the interests of the harmony of the whole, and all responded loyally to the invitation. It follows that responsibility for editorial policy belongs to the editors collectively, but not to any individual editor, since some of the decisions were only arrived at by a majority vote. Responsibility for avoiding clashes between different contributions is that of the general editor, who is well aware that his efforts in this direction are not likely to prove entirely successful. Each of the individual editors is responsible for those parts of the book which appear before his name in the Table of Contents.

Some apology is needed to the profession (and the publishers) for the long delay since the appearance of the last edition. I was invited to undertake the work of revision in June, 1945; but by October, 1946, I realised that the task was beyond my strength, and therefore invited seven learned friends to help me. I should like to have included more practising lawyers on my editorial board, but unfortunately no practitioner whom I approached was able to accept my invitation. All the editors are busy people and we could only press forward the work of revision in our spare time: for most of us have been engaged on work of even greater importance, namely the teaching of ex-servicemen who fought for their country during the war, and who have since returned to throng the Universities. For my part I confess that I lay down my task with relief; and there have been times when I have felt, like Mr. Tangle in *Jarndyce v. Jarndyce*, that I have read nothing else since I left school.

It remains for me to express my cordial thanks to my associate editors for their patience, loyalty, and public spirit; without their help this edition could never have been produced. I also express my grateful thanks to Dean Falconbridge, K.C., Dean of the Osgoode Hall Law School, for much kind

encouragement and general advice; to Lord Justice Scott, who saved me from adopting a faulty rearrangement; to Messrs. W. A. N. Wells, B.A., R. A. Blackburn, B.A., P. Bennett, B.A., P. Donovan, B.A., and M. J. Fox, B.C.L., B.A. (all of Magdalen College) for preparing the Index; and to Mrs. Cross and Mrs. Morris for valuable secretarial assistance. Finally, I express my gratitude to the publishers for supporting me with their usual courtesy and consideration throughout every stage of the production of this book.

The law is stated as at the date of this Preface.

J. H. C. M.

MAGDALEN COLLEGE,

OXFORD.

January 1, 1949.

PREFACE TO FIRST EDITION

My aim in this book is to apply to the whole field of private international law the method of treatment already applied to a large part thereof in my book on the law of domicil. In the following pages the principles of private international law recognised by English courts—or, to use an exactly equivalent expression, the principles adhered to by English judges when dealing with the conflict of laws—are treated as a branch of the law of England: these principles are exhibited in the form of systematically arranged Rules and Exceptions, and each of these Rules and Exceptions is, when necessary, elucidated by comment and illustrations. Hence this treatise has a twofold character. It is, or rather it contains, a second and carefully corrected edition of *The Law of Domicil as a Branch of the Law of England*. It is also a complete digest of and commentary on the law of England with reference to the conflict of laws.

* * *

That the attempt to form a digest of private international law, as administered by the English courts, should result in anything like complete success, is more than I can hope. This branch of law has been created within little more than a century by a series of judicial decisions, and is now, to the great benefit of the public, year by year extended and developed through the legislative activity of our judges. This development has not yet reached its term. No one therefore can finally sum up its results. That even the endeavour to form a digest of private international law should be possible, is due to the labours of my predecessors. This field of law has been fully explored by Story, Westlake, Foote, Wharton, and Nelson. The works of these authors have, during the composition of this treatise, never been long out of my hands. I have

also sought the guidance, when I could obtain it, of English writers who have dealt either directly or indirectly with special departments of private international law; thus on the difficult subject of foreign judgments I have been greatly aided by Mr. Piggott's ingenious and exhaustive monograph: nor have I neglected to consult foreign jurists, such as Savigny, Bar, and Fœlix, who, even when they disagree with the conclusions arrived at by English judges, often throw considerable light, if it be only by way of contrast, on the doctrines maintained in England with regard to the conflict of laws.

1896.

A. V. DICEY

TABLE OF FOREIGN CASE REFERENCES

A.D.	Appellate Division (South Africa).
Ark.	Arkansas Reports (U.S.A.).
Atl.	Atlantic Reporter (U.S.A.).
B.C.R.	British Columbia Reports (Canada).
Bom.	Bombay Reports (India).
Cal.	California Reports (U.S.A.).
Cal.App.	California Appellate Reports (U.S.A.).
Can S.C.R.	Canada Supreme Court Reports.
C.L.R.	Commonwealth Law Reports (Australia).
Conn.	Connecticut Reports (U.S.A.).
C.P.D.	Cape Provincial Division (South Africa).
Cush.	Cushing's Massachusetts Reports (U.S.A.).
Cypr.L.R.	Cyprus Law Reports.
D.	Session Cases, 2nd Series (Dunlop) (Scotland).
D.L.R.	Dominion Law Reports (Canada)
E.D.C.	Eastern Districts Court (South Africa).
E.L.D.	Eastern Districts Local Division (South Africa).
Ex.C.R.	Exchequer Court Reports (Canada).
F.	Session Cases, 5th Series (Fraser) (Scotland).
F., Fed.	Federal Reporter (U.S.A.).
G.L.R.	Gazette Law Reports (New Zealand).
Gr.	Grant's Upper Canada Chancery Reports.
Ill.	Illinois Reports (U.S.A.).
Ill.App.	Illinois Appeal Reports (U.S.A.).
I.L.R.All.	Indian Law Reports (Allahabad).
I.L.R.Bom.	Indian Law Reports (Bombay).
I.L.R.Calc.	Indian Law Reports (Calcutta).
Ind.App.	Indian Appellate Reports.
Ind.L.R.Mad.	Indian Law Reports (Madras).
Ir.R.	Irish Reports.
Kan.	Kansas Reports (U.S.A.).
La.	Louisiana Reports (U.S.A.).
L.C.J.	Lower Canada Jurist.
L.C.L.J.	Lower Canada Law Journal.
L.C.R.	Lower Canada Reports.
L.N.	Legal News (Quebec).
M., Macph.	Session Cases, 3rd Series (Macpherson) (Scotland).
Macq.	Macqueen's Reports (Scotland).
Mad.L.R.	Madras Law Reports (India).
Man.R.	Manitoba Reports (Canada)
Mass.	Massachusetts Reports (U.S.A.).
Md.	Maryland Reports (U.S.A.).
Metc.	Metcalf's Massachusetts Reports (U.S.A.).
Mich.	Michigan Reports (U.S.A.).
M.L.R.S.C.	Montreal Law Reports (Quebec).
Mo.	Missouri Reports (U.S.A.).
M.P.R.	Maritime Provinces Reports (Canada).
N.B.Eq.R.	New Brunswick Equity Reports (Canada).
N.E.	Northeastern Reporter (U.S.A.).
N.H.	New Hampshire Reports (U.S.A.).

N.I.	Northern Ireland Reports.
N.J.Eq	New Jersey Equity Reports (U.S.A.)
N.J.L.	New Jersey Law Reports (U.S.A.)
N.L.R.	Natal Law Reports (South Africa).
N.Mex.	New Mexico Reports (U.S.A.).
N.P.D.	Natal Provincial Division (South Africa)
N.S.R.	Nova Scotia Reports (Canada).
N.S.W.Eq.	New South Wales Equity Reports (Australia).
N.S.W.L.R.	New South Wales Law Reports (Australia).
N.W.	North Western Reporter (U.S.A.).
N.Y.	New York Court of Appeals Reports (U.S.A.).
N.Y.Supp.	New York Supplement (U.S.A.).
N.Z.L.R.	New Zealand Law Reports.
O.A.R.	Ontario Appeal Reports (Canada).
O.B. & F.	Ollivier, Bell and Fitzgerald (New Zealand).
Ohio App.	Ohio Appellate Reports (U.S.A.).
O.L.R.	Ontario Law Reports (Canada).
O.R.	Ontario Reports (Canada).
O.R.C	Orange River Colony (South Africa)
O.W.N.	Ontario Weekly Notes (Canada).
Pac.	Pacific Reporter (U.S.A.).
Q.L.J.	Quebec Law Journal.
Q.L.R.	Quebec Law Reports.
Q.R.S.C.	Quebec Reports Superior Court.
R.	Session Cases, 4th Series (Rettie) (Scotland).
R.L.	Revue Légale (Quebec)
S.	Session Cases, 1st Series (Shaw) (Scotland).
S.A.L.R.	South Africa Law Reports.
S.A.R.	South African Republic Supreme Court.
Sask.L.R.	Saskatchewan Law Reports (Canada).
S.A.S.R.	South Australia State Reports.
S.C.	Session Cases (Scotland).
S.C.	Supreme Court Reports (Cape of Good Hope).
S.C.R.	Canada Supreme Court Reports.
Sc.L.T.	Scots Law Times
S.L.R.	Scottish Law Reporter.
S.R.	Southern Rhodesia Reports.
S.R.(N.S.W.)	State Reports New South Wales (Australia).
St.R.Qd.	State Reports Queensland (Australia).
Terr.L.R.	Territories Law Reports (Canada).
T.H.	Witwatersrand High Court (Transvaal).
T.P.D.	Transvaal Provincial Division (South Africa).
T.S.	Transvaal Supreme Court (South Africa).
U.C.C.P.	Upper Canada Common Pleas.
U.C.Q.B., U.C.R.	Upper Canada Queen's Bench.
U.S.	United States Reports.
Va.	Virginia Reports.
V.L.R.	Victoria Law Reports (Australia).
Wall.	Wallace's United States Supreme Court Reports.
Wash.	Washington Reports (U.S.A.).
Wis.	Wisconsin Reports (U.S.A.).
W.L.D.	Witwatersrand Local Division (South Africa).
W.L.R.	Western Law Reports (Canada).
W.N. (N.S.W.).	Weekly Notes New South Wales (Australia).
W.W. & A.'B.	Wyatt Webb and A'Beckett (Australia).
W.W.R.	Western Weekly Reports (Canada).

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B.Y.B.I.L.	British Year Book of International Law.
Camb.L.J.	Cambridge Law Journal.
Can.Bar Rev.	Canadian Bar Review.
Col.L.Rev.	Columbia Law Review.
Conv.(N.S.)	Conveyancer and Property Lawyer (New Series).
H.L.R.	Harvard Law Review.
Ill.L.Rev.	Illinois Law Review.
Jo.Comp.Leg.	Journal of the Society of Comparative Legislation.
Jur.Rev.	Juridical Review.
L.Q.R.	Law Quarterly Review.
Mich.L.Rev.	Michigan Law Review.
Minn.L.Rev.	Minnesota Law Review.
M.L.R.	Modern Law Review.
N.Y. Law Q.	New York Law Quarterly.
So.Calif.L.Rev.	Southern California Law Review.
South Afr.L.J.	South African Law Journal.
Tul.L.Rev.	Tulane Law Review.
U. of Pa.(Penn.) L.Rev.	University of Pennsylvania Law Review.
U. of Tor.L.J.	University of Toronto Law Journal.
Yale L.J.	Yale Law Journal.

TABLE OF PRINCIPLES AND RULES¹

INTRODUCTION

GENERAL PRINCIPLES

Jurisdiction and Choice of Law.

GENERAL PRINCIPLE No. 1.—Any right which has been acquired under the law of any civilised country *which is applicable according to the English rules of the conflict of laws* is recognised and, in general, enforced by English courts, and no right which has not been acquired *in virtue of an English rule of the conflict of laws* is enforced or, in general, recognised by English courts (p. 11).

GENERAL PRINCIPLE No. 2.—English courts will not enforce a right otherwise acquired under the law of a foreign country *which is ordinarily applicable in virtue of English rules of the conflict of laws*:

(A) where the enforcement of such right *involves the enforcement of foreign penal or confiscatory legislation or a foreign revenue law*;

(B) where the enforcement of such right is inconsistent with the policy of English law, or with the moral rules upheld by English law, or with the maintenance of English political *and judicial* institutions;

(C) where the enforcement of such right involves interference with the authority of a foreign State within the *limits of its territory* (p. 17).

Jurisdiction.

GENERAL PRINCIPLE No. 8.—The courts of any country are considered by English law to have jurisdiction over (*i.e.*, to be able to adjudicate upon) any matter with regard to which *they* can give an effective judgment, and are considered by English law not to have jurisdiction over (*i.e.*, not to be able to adjudicate upon) any matter with regard to which *they* cannot give an effective judgment (p. 22).

SUB-RULE.—When with regard to any matter (*e.g.*, divorce) the courts of no one country can give a completely effective judgment,

¹ Words in italics in the Principles and Rules indicate changes made therein or additions made thereto since the third (1922) edition of this work.

but the courts of several countries can give a more or less effective judgment, the courts of that country where the most effective judgment can be given *are considered to have a preferential jurisdiction* (p. 23).

GENERAL PRINCIPLE No. 4.—The *courts* of any country *are considered by English law to be able to exercise jurisdiction, i.e., are courts of competent jurisdiction, over any person who voluntarily submits to their jurisdiction* (p. 24).

PART ONE

PRELIMINARY MATTERS

CHAPTER I

INTERPRETATION OF TERMS

1. GENERAL DEFINITIONS

In the following Rules and Exceptions, unless the context or subject-matter otherwise requires, the following terms have the following meanings.

1. 'This Digest' means the Rules and Exceptions contained in Parts 1 to 3 of this treatise.

2. 'Court' means His Majesty's High Court of Justice in England.

3. 'Person' includes a corporation or body corporate.

4. 'Country' means the whole of a territory subject under one sovereign to one system of law.

5. 'State' means the whole of the territory (the limits whereof may or may not coincide with those of a country) subject to one sovereign.

6. 'Foreign' means not English.

7. 'Foreign country' means any country which is not England.

8. 'England' means the territory of England, including the Principality of Wales and the town of Berwick-on-Tweed, *and the territorial waters adjacent thereto*, and includes any ship of the Royal Navy wherever situate.

9. 'United Kingdom' means the United Kingdom of Great Britain (England and Scotland) and Northern Ireland, the islands and the territorial waters adjacent thereto, but does not include Eire, the Isle of Man or the Channel Islands.

10. '*British territory*' means all countries subject to the Crown, including the United Kingdom, and the territorial waters adjacent thereto, *but does not include any protectorate, protected State, mandated territory or trust territory.*

11. 'Domicile' means the country which in accordance with the Rules in this Digest is considered by English law to be a person's permanent home.

12. '*Independent person*' means a person who as regards his domicile is not legally dependent, or liable to be legally dependent, upon the will of another person.

13. 'Dependent person' means any person who is not an independent person as hereinbefore defined, and includes :

- (i) an infant;
- (ii) a married woman.

14. 'An immovable' means a thing which can be touched but which cannot be moved, and includes, unless the contrary is expressly stated, a chattel real.

15. 'A movable' means a thing which is not an immovable, and includes :

- (i) a thing which can be touched and can be moved, and
- (ii) a thing which is the object of a claim, and cannot be touched, or, in other words, a chose in action (thing in action).

16. 'Lex domicilii', or 'law of the domicile', means the law of the country where a person is domiciled.

17. 'Lex loci contractus' means the law of the country where a contract is made.

18. 'Lex loci solutionis' means the law of the country where a contract is to be performed.

19. 'Lex loci actus' means the law of the country where a legal act takes place.

20. 'Lex situs' means the law of the country where a thing is situate.

21. 'Lex fori' means the local or *domestic* law of the country to which a court, wherein an action is brought, or other legal proceeding is taken, belongs (p. 39).

2/ MEANING OF 'LAW OF A COUNTRY' (THE PROBLEM OF RENVOI)

In this Digest the law of a given country (e.g., the law of the country where a person is domiciled)

- (i) means, when applied to England, the local or *domestic* law of England;
- (ii) means, when applied to any foreign country, *usually* the the local or *domestic* law of that country, *sometimes any domestic law* which the courts of that country apply to the decision of the case to which the Rule refers (p. 47).

CHAPTER 2

DOMICILE

1. DOMICILE OF NATURAL PERSONS

(1) NATURE OF DOMICILE

RULE 1.—The domicile of any person is the country which is considered by English law to be his permanent home.

This is—

- (1) in general, the country which is in fact his permanent home;
- (2) in some cases, the country which, whether it be in fact his home or not, is determined to be so by a rule of English law (p. 77).

RULE 2.—No person can at any time be without a domicile (p. 84).

RULE 3.—No person can have at the same time more than one domicile (p. 85).

RULE 4.—A domicile once acquired is retained until it is changed

- (1) in the case of an independent person, by his own act;
- (2) in the case of a dependent person, by the act of some one on whom he is dependent (p. 86).

(2) ACQUISITION AND CHANGE OF DOMICILEDomicile of Independent Persons.

RULE 5.—Every independent person has at any given moment either

- (1) the domicile received by him at his birth (which domicile is hereinafter called the domicile of origin), or,
- (2) a domicile (not being the same as his domicile of origin) acquired or retained by him while independent by his own act (which domicile is hereinafter called a domicile of choice) (p. 87).

Domicile of Origin.

RULE 6.—Every person receives at (or as from) birth a domicile of origin.

- (1) In the case of a legitimate child born during his father's lifetime, the domicile of origin of the child is the domicile of the father at the time of the child's birth.
- (2) In the case of an illegitimate, or posthumous, or legitimated child, the domicile of origin is the domicile of his mother at the time of his birth.
- (3) In the case of a foundling, the domicile of origin is the country where he is found (p. 88).

Domicile of Choice.

RULE 7.—Every independent person can acquire a domicile of choice, by the combination of residence (*factum*), and intention of permanent or indefinite residence (*animus manendi*), but not otherwise (p. 89).

Change of Domicile.

RULE 8.

- (1) The domicile of origin is retained until a domicile of choice is in fact acquired.
- (2) A domicile of choice is retained until it is abandoned, whereupon either
 - (i) a new domicile of choice is acquired ; or
 - (ii) the domicile of origin is resumed (p. 97).

Domicile of Dependent Persons (Infants and Married Women).

RULE 9.—The domicile of every dependent person is the same as, and changes (if at all) with, the domicile of the person on whom he is, as regards his domicile, legally dependent (p. 101).

SUB-RULE 1.—Subject to the Exceptions hereinafter mentioned, the domicile of an infant is during infancy determined as follows :—

- (1) The domicile of a legitimate or legitimated infant is, during the lifetime of his father, the same as, and changes with, the domicile of his father.
- (2) The domicile of an illegitimate infant, or of an infant whose father is dead, is, whilst the infant lives with his mother, the same as, and changes with, the domicile of the mother.
- (3) The domicile of an infant without living parents, or of an illegitimate infant without a living mother, *probably cannot* be changed by his guardian.
- (4) *The domicile of an adopted infant is, during the lifetime of the adopting parent, the same as, and changes with, the domicile of that parent* (p. 102).

Exception 1 to Sub-Rule 1.—The domicile of an infant is not automatically changed merely by a change of his mother's domicile by reason of re-marriage (p. 106).

Exception 2 to Sub-Rule 1.—The change of an infant's home by a mother, if made with a fraudulent purpose, *possibly* does not change the infant's domicile (p. 106).

SUB-RULE 2.—The domicile of a married woman is during coverture the same as, and changes with, the domicile of her husband (p. 107).

RULE 10.—A domicile cannot be acquired by a dependent person through his own act (p. 109).

PART TWO

JURISDICTION

§ 1

JURISDICTION OF THE HIGH COURT

CHAPTER 3

GENERAL RULES AS TO JURISDICTION

1. WHERE JURISDICTION DOES NOT EXIST

(1) *In respect of Persons.*

RULE 19.—The court has (subject to the Exceptions hereinafter mentioned) no jurisdiction to entertain an action or other proceeding against—

- (1) any foreign sovereign;
- (2) any ambassador or other diplomatic agent representing a foreign sovereign and *duly accredited here*;
- (3) any person belonging to the suite of such ambassador or diplomatic agent;
- (4) *any person or organisation specially protected by an English statute.*

An action or proceeding against the property of any of the foregoing is, for the purpose of this Rule, an action or proceeding against such person or organisation (p. 181).

Exception 1.—The court has jurisdiction to entertain an action against a foreign sovereign, or an ambassador, diplomatic agent, or other person or organisation coming within the terms of Rule 19 (2), (3) and (4), if such defendant, *duly authorised when necessary*, appears before the court, voluntarily waives any privilege and submits to the jurisdiction of the court, but such submission does not confer on the court the power to enforce any decree made by execution in any form (p. 188).

Exception 2.—The court has jurisdiction to entertain an action against a person belonging to the suite of an ambassador or diplomatic agent, if such person engages in trade (p. 141).

(2) *In respect of Subject-Matter.*

RULE 20.—Subject to the Exceptions hereinafter mentioned, the court has no jurisdiction to entertain an action for

- (1) the determination of the title to, or the right to the possession of, any immovable situate out of England (foreign land); or
- (2) the recovery of damages for trespass to such immovable (p. 141).

Exception 1.—Where the court has jurisdiction to entertain an action against a person under either Rule 27, or under any of the Exceptions to Rule 28, the court has jurisdiction to entertain an action against such person respecting an immovable situate out of England (foreign land), on the ground of either—

- (a) a contract between the parties to the action; or
- (b) an equity between such parties;

with reference to such immovable (p. 145).

Exception 2.—Where the court has jurisdiction to administer an estate or a trust, and the property includes movables or immovables situated in England and immovables situated abroad, the court has jurisdiction to determine questions of title to the foreign immovables for the purposes of the administration (p. 149).

Exception 3.—The court has jurisdiction to entertain an action in rem against a ship to enforce a maritime lien on the ship for damage done to an immovable situate out of England, and perhaps has jurisdiction to entertain any Admiralty action in respect of foreign land, whether in rem or in personam (p. 150).

RULE 21.—The court has no jurisdiction to administer a foreign charity under the supervision of the court or to settle a scheme for such a charity (p. 151).

RULE 22.—The court has no jurisdiction at common law to entertain an action—

- (1) for the enforcement, either directly or indirectly, of a penal, revenue, or political law of a foreign State; or
- (2) where the grounds of the action involve an act of State (p. 152).

2. WHERE JURISDICTION EXISTS

(1) *In respect of Persons.*

RULE 23.—Subject to Rule 19, and to the Exception hereinafter mentioned, no class of persons is, as such, excluded or exempt from the jurisdiction of the court, *i.e.*, any person may be a party to an action or other legal proceeding in the court (p. 161).

Exception.—The court has no jurisdiction during the continuance of war to entertain an action brought by an alien enemy, unless he is living here under the licence or protection of the Crown, and the cause of action is personal to himself.

The term ‘alien enemy’ includes any British subject or citizen of an allied or neutral State voluntarily residing during a war with Great Britain in an enemy or enemy-occupied country (p. 162).

RULE 24.—The court has jurisdiction in an action over any person who has by his conduct precluded himself from objecting to the jurisdiction of the court (p. 166).

(2) *In respect of Subject-Matter.*

RULE 25.—The court has jurisdiction to entertain proceedings for the determination of any right over, or in respect of,

(1) any immovable,

(2) any movable,

situate in England.

This Rule must be read subject to the Rules governing the jurisdiction of the court in particular kinds of action or proceedings (p. 168).

RULE 26.—Subject to Rules 19 to 22, the court exercises—

(1) Jurisdiction in actions in personam;

(2) Admiralty jurisdiction;

(3) Jurisdiction in relation to marriage, *guardianship* and legitimacy;

(4) Jurisdiction in bankruptcy *and winding-up*;

(5) Jurisdiction in matters of administration and succession; to the extent, and subject to the limitations, hereinafter stated in the Rules having reference to each kind of jurisdiction (p. 170).

CHAPTER 4

JURISDICTION IN ACTIONS IN PERSONAM

RULE 27.—When the defendant in an action in personam is, at the time for the service of the writ, in England, the court has jurisdiction in respect of any cause of action, in whatever country such cause of action arises, *subject however in the case of actions under the Carriage by Air Act, 1932, to the limitations therein contained* (p. 171).

RULE 28.—When the defendant in an action in personam is, at the time for the service of the writ, not in England, the court has (subject to the Exceptions hereinafter mentioned) no jurisdiction to entertain the action (p. 180).

Exception 1.—The court *may assume* jurisdiction to entertain an action against a defendant who is not in England, whenever the whole subject-matter of the action is land situate in England (with or without rents or profits), or the perpetuation of testimony relating to such land (p. 183).

Exception 2.—The court *may assume* jurisdiction whenever any act, deed, will, contract, obligation, or liability affecting land or hereditaments situate in England, is sought to be construed, rectified, set aside, or enforced in the action (p. 184).

Exception 3.—The court *may assume* jurisdiction whenever any relief is sought against any person domiciled or ordinarily resident in England (p. 186).

Exception 4.—The court *may assume* jurisdiction when the action is [for the administration of the personal estate of any deceased person who at the time of his death was domiciled in England, or] for the execution (as to property situate in England) of the trusts of any written instrument, of which the person to be served with a writ (defendant) is a trustee, which ought to be executed according to the law of England (p. 188).

Exception 5.—The court *may assume* jurisdiction whenever the action is one brought against a defendant not domiciled or ordinarily resident in Scotland to enforce, rescind, dissolve, annul, or otherwise affect a contract, or to recover damages or other relief for or in respect of the breach of a contract [which either is]—

- (i) made in England; or
- (ii) made by or through an agent trading or residing in England on behalf of a principal trading or residing out of England; or
- (iii) by its terms or by implication is to be governed by English law,

or is one brought against a defendant not domiciled or ordinarily resident in Scotland or [Northern] Ireland in respect of a breach committed in England of a contract wherever made, even though such breach was preceded or accompanied by a breach out of England which rendered impossible the performance of the part of the contract which ought to have been performed in England (p. 189)

Exception 6.—The court *may assume* jurisdiction whenever the action is founded on a tort committed in England (p. 192).

Exception 7.—The court *may assume* jurisdiction whenever any injunction is sought as to anything to be done in England, or any nuisance in England is sought to be prevented or removed, whether damages are or are not also sought in respect thereof (p. 198).

Exception 8.—Whenever any person out of England is a necessary or proper party to an action properly brought against some other person duly served with a writ in England, the court *may assume* jurisdiction to entertain an action against such first-mentioned person as a co-defendant in the action (p. 194).

Exception 9.—The court *may assume* jurisdiction when the action is brought by a mortgagee or mortgagor in relation to the mortgage of personal property situate in England, and seeks relief of the nature or kind following, that is to say, sale, foreclosure, delivery of possession by the mortgagor, redemption, reconveyance, delivery of possession by the mortgagee, but

does not seek (unless and except so far as permissible under Exception 5) any personal judgment or order for payment of any moneys due under the mortgage (p. 197).

Exception 10.—*The court may assume jurisdiction when the action is brought under the Carriage by Air Act, 1932* (p. 198).

Exception 11.—Notwithstanding anything contained in any of the Exceptions to Rule 28, the parties to any contract may agree (a) that the court shall have jurisdiction to entertain any action in respect of such contract, and, moreover, or in the alternative, (b) that service of any writ of summons in any such action may be effected at any place within or out of England, on any party or on any person on behalf of any party, or in any manner specified or indicated in such contract. Service of any such writ of summons at the place (if any), or on the party, or on the person (if any), or in the manner (if any) specified or indicated in the contract shall be deemed to be good and effective service wherever the parties are resident, and if no place, or mode, or person be so specified or indicated, service out of England of such writ may be ordered (p. 199).

Exception 12.—The court has jurisdiction to entertain an action against any two or more persons being liable as co-partners, and carrying on business in England, when sued in the name of the firm (if any) of which such persons were co-partners at the time of the accruing of the cause of action (p. 201).

CHAPTER 5

ADMIRALTY JURISDICTION

RULE 29.—The court has jurisdiction to entertain an action in rem against any ship, or res (such as cargo) connected with a ship, if

(1) the action is an Admiralty action; and

(2) the ship or res is in *any port or river of England*, or within three miles of the coast of England,

and not otherwise (p. 205).

RULE 30.—*The Admiralty jurisdiction of the court may be exercised either by proceedings in rem or by proceedings in personam; the plaintiff may in most instances, at his option, bring an action either in rem, against the ship or other res, or in personam against the owner of or other person interested in the ship or res, or both in rem against the ship and in personam against the owner or such other person* (p. 206).

SUB-RULE 1.—*The court has jurisdiction in respect of questions as to the title to or ownership of a ship, or the proceeds of sale of*

a ship remaining in the Admiralty registry, arising in an action of possession, salvage, damage, necessities, wages or bottomry (p. 207).

SUB-RULE 2.—The court has jurisdiction in respect of any question arising between the co-owners of a ship registered at any port in England as to the ownership, possession, employment or earnings of that ship, or any share thereof, with power to settle any account outstanding and unsettled between the parties in relation thereto, and to direct the ship, or any share thereof, to be sold, or to make such order as the court thinks fit (p. 209).

SUB-RULE 3.—The court has jurisdiction in respect of any claim for damage received by a ship, whether received within the body of a county or on the high seas (p. 209).

SUB-RULE 4.—The court has jurisdiction in respect of any claim for damage done by a ship (p. 210).

SUB-RULE 5.—The court has jurisdiction in respect of any claim in the nature of salvage for services rendered to a ship (including, subject to the provisions of the Merchant Shipping Act, 1894, services rendered in saving life from a ship), whether rendered on the high seas or within the body of a county, or partly on the high seas and partly within the body of a county, and whether the wreck in respect of which the salvage is claimed is found on the sea or on the land, or partly on the sea and partly on the land (p. 210).

SUB-RULE 6.—The court has jurisdiction in respect of any claim in the nature of towage, whether the services were rendered within the body of a county or on the high seas (p. 211).

SUB-RULE 7.—The court has jurisdiction in respect of any claim for necessities supplied to a foreign ship, whether within the body of a county or on the high seas, and, unless it is shown to the court that at the time of the institution of the proceedings any owner or part-owner of the ship was domiciled in England, in respect of any claim for any necessities supplied to a ship elsewhere than in the port to which the ship belongs (p. 211).

SUB-RULE 8.—The court has jurisdiction in respect of any claim by a seaman of a ship for wages earned by him on board the ship, whether due under a special contract or otherwise, and any claim by the master of a ship for wages earned by him on board the ship and for disbursements made by him on account of the ship (p. 211).

SUB-RULE 9.—The court has jurisdiction in respect of any claim in respect of a mortgage of any ship, being a mortgage duly registered in accordance with the provisions of the Merchant Shipping Acts, 1894–1948, or in respect of any mortgage of a ship which is, or the proceeds whereof are, under the arrest of the court (p. 212).

SUB-RULE 10.—The court has Admiralty jurisdiction in respect of any claim for building, equipping or repairing a ship, where, at

the time of the institution of the proceedings, the ship is, or the proceeds thereof are, under the arrest of the court (p. 212).

SUB-RULE 11.—*The court has jurisdiction in respect of any matter concerning booty of war, or the distribution thereof, which may be referred to the court by His Majesty in Council (p. 212).*

SUB-RULE 12.—*The court has Admiralty jurisdiction in respect of any claim—*

(1) *arising out of an agreement relating to the use or hire of a ship; or*

(2) *relating to the carriage of goods in a ship; or*

(3) *in tort in respect of goods carried in any ship;*

unless it is shown to the court that at the time of the institution of the proceedings any owner or part-owner of the ship was domiciled in England (p. 213).

SUB-RULE 13.—*The court possesses, in addition to the heads of jurisdiction set out in the preceding twelve sub-rules, any other jurisdiction formerly vested in the High Court of Admiralty (p. 213).*

SUB-RULE 14.—*The court also possesses Admiralty jurisdiction which, under or by virtue of any enactment which came into force after the commencement of the Judicature Act, 1873, and is not repealed by the Supreme Court of Judicature (Consolidation) Act, 1925, was immediately before the commencement of that Act vested in or capable of being exercised by the High Court constituted by the Act of 1873 (p. 214).*

SUB-RULE 15.—*The court is a prize court within the meaning of the Naval Prize Acts, 1864 to 1916, as amended by any subsequent enactment, and has all such jurisdiction on the high seas and throughout His Majesty's dominions and in every place where His Majesty has jurisdiction as, under any Act relating to naval prize or otherwise, the High Court of Admiralty possessed when acting as a prize court (p. 215).*

CHAPTER 6

JURISDICTION IN RESPECT OF DIVORCE—NULLITY OF MARRIAGE—GUARDIANSHIP—LEGITIMACY AND LEGITIMATION

1. DIVORCE

(1) *Where Court has Jurisdiction.*

RULE 31.—*The court has jurisdiction to entertain proceedings for the dissolution of the marriage of any parties domiciled in England at the commencement of the proceedings.*

This jurisdiction is not affected by—

- (1) the residence of the parties; or
- (2) the allegiance of the parties; or
- (3) the domicile of the parties at the time of the marriage;
or
- (4) the place of the ^{residence} marriage; or
- (5) the place where the offence, in respect of which divorce is sought, is committed.

The matrimonial jurisdiction of the court is confined to marriages which are 'the voluntary union for life of one man and one woman to the exclusion of all others' (p. 216).

SUB-RULE.—On a petition for divorce presented by a husband domiciled in England, the court has jurisdiction to award costs and (if claimed by the husband) damages against a co-respondent named in the petition, whatever his place of residence or nationality or domicile may be (p. 228).

(2) *Where Court has no Jurisdiction.*

RULE 32.—Subject to the statutory Exceptions hereinafter mentioned, the court has no jurisdiction to entertain proceedings for the dissolution of the marriage of any parties not domiciled in England at the commencement of the proceedings (p. 230).

First Statutory Exception.—Where a wife has been deserted by her husband, or where her husband has been deported from the United Kingdom under any law for the time being in force relating to the deportation of aliens, and the husband was immediately before the desertion or deportation domiciled in England, the court has jurisdiction notwithstanding that the husband has changed his domicile since the desertion or deportation (p. 234).

Second Statutory Exception.—The court has jurisdiction to dissolve a marriage celebrated between September 3, 1939, and the day appointed by His Majesty in Council under the Matrimonial Causes (War Marriages) Act, 1944, notwithstanding that the parties are not domiciled in England, provided

- (a) the husband was, at the time of the marriage, domiciled outside the United Kingdom and the wife was, immediately before the marriage, domiciled in England;
- (b) the parties have not, since the celebration of the marriage, resided together in the country in which the husband was domiciled at the time of the marriage; and residence
- (c) proceedings are brought not later than five years after the appointed day (p. 235).

(3) *Choice of Law.*

RULE 33.—In all cases in which it has jurisdiction, the court will (semble) apply the English domestic law of divorce (p. 236).

2. JUDICIAL SEPARATION AND RESTITUTION OF CONJUGAL RIGHTS

RULE 34.—The court has jurisdiction to entertain a suit for judicial separation or the restitution of conjugal rights when the parties thereto

- (1) were *in law* resident in England at the time of the institution of the suit; or
- (2) were domiciled in England at the time of the institution of the suit; or
- (3) had a matrimonial home in England when the events occurred on which a claim for separation is based, or their cohabitation ceased; or
- (4) *come within the provisions of s. 13 of the Matrimonial Causes Act, 1937 (p. 237).*

3. DECLARATION OF NULLITY OF MARRIAGE

(1) *Jurisdiction.*

RULE 35.—The court has jurisdiction to entertain a suit for a declaration of nullity of marriage—

- (1) where *both parties are domiciled in England at the date of the presentation of the petition; or*
- (2) *where the petitioner is domiciled in England at the date of the presentation of the petition and the marriage is alleged to be void; or*
- (3) where the marriage was celebrated in England; or
- (4) where *both parties are resident in England at the date of the presentation of the petition; or*
- (5) *(semble) where the petition is founded upon a decree of nullity pronounced by a foreign court which is alleged to have been a court of competent jurisdiction; or*
- (6) if the case comes within the provisions of s. 13 of the *Matrimonial Causes Act, 1937, or the Matrimonial Causes (War Marriages) Act, 1944 (p. 244).*

(2) *Choice of Law.*

RULE 36.—(1) *The question whether a marriage is void for want of capacity of either party will be determined by the law of his or her ante-nuptial domicile, and the question whether a marriage is formally valid will be determined by the law of the place of celebration, in accordance with Rules 168 and 169.*

(2) *If the marriage complies with Rule 168 as regards capacity and form, the question whether the marriage is voidable will (semble) be determined by the law of the husband's domicile at the date of the marriage or possibly by the law of the husband's domicile at the date of the presentation of the petition for nullity (p. 259).*

4. APPOINTMENT OF GUARDIANS

RULE 37.—(1) *The court has jurisdiction to appoint a guardian to an infant who is either—*

- (a) *a British subject; or*
- (b) *domiciled in England; or*
- (c) *resident in England,*

and the fact that the infant possesses no property in England is immaterial.

(2) *The fact that an infant is entitled to or possessed of property in England does not of itself confer jurisdiction upon the court to appoint a guardian to him (p. 269).*

5. DECLARATION OF LEGITIMACY

RULE 38.

- (1) Any British subject, or any person whose right to be deemed a British subject depends wholly or in part on his legitimacy, or on the validity of a marriage, being domiciled in England or *Northern* Ireland, or claiming any real or personal estate situate in England, may apply by petition to the court, praying the court for a decree declaring that the petitioner is the legitimate child of his parents, and that the marriage of his father and mother, or of his grandfather and grandmother, or his own marriage, was a valid marriage.
- (2) Any person, being so domiciled or claiming as aforesaid, may apply by petition to the court for a decree declaratory of his right to be deemed a British subject.
- (3) The court has jurisdiction to hear and determine such application, or applications, which may be included in the same petition, and to make such decree thereon as the court thinks just; and the decree made by the court, except as hereinafter mentioned, is binding to all intents and purposes upon the Crown and all other persons whomsoever.
- (4) The decree of the court does not in any case prejudice any person, unless such person has been cited or made a party to the proceedings, or is the next of kin, or other real or personal representative of, or derives title under or through, a person so cited or made a party; nor shall such sentence or decree of the court prejudice any person, if subsequently proved to have been obtained by fraud or collusion.
- (5) *The Attorney-General must be supplied with a copy of any petition under this Rule and be a respondent on the hearing of the petition.*
- (6) *No proceedings under this Rule affect any final judgment or decree already issued by a court (p. 270).*

6. DECLARATION OF LEGITIMATION

RULE 39.—(1) *Any person claiming that he or his parent or any remoter ancestor became or has become a legitimated person, whether domiciled in England or elsewhere, and whether a British subject or not, may apply to the High Court or a county court for a declaration that he or his parent or any remoter ancestor became or has become a legitimated person by the subsequent marriage of his parents.*

(2) *A county court to which a petition is presented may, if it considers that the case is one which, owing to the value of the property involved or otherwise, ought to be dealt with by the High Court, and shall, if so ordered by the High Court, transfer the matter to the High Court.*

(3) *The regulations as to applications for a declaration of legitimacy set out in Rule 38 are so far as relevant applicable to a claim for a declaration of legitimation (p. 273).*

CHAPTER 7

JURISDICTION IN BANKRUPTCY AND IN REGARD
TO WINDING-UP OF COMPANIES

1. BANKRUPTCY

Interpretation of Terms.

RULE 40.—In this Rule, and in all the Rules of this Digest which refer to an English bankruptcy, the following terms have, unless the contrary appears from the context, the following meanings :—

(1) 'The court' means the court having jurisdiction in bankruptcy under the Bankruptcy Act, 1914, and includes—

- (i) the High Court; and
- (ii) the county courts.

(2) The expression 'debtor', unless the context otherwise implies, includes any person, whether a British subject or not, who at the time when any act of bankruptcy was done or suffered by him—

- (a) was personally present in England; or
- (b) ordinarily resided or had a place of residence in England; or
- (c) was carrying on business in England personally, or by means of an agent, or manager; or
- (d) was a member of a firm or partnership which carried on business in England.

- (3) 'An act of bankruptcy' is committed by a debtor who commits any one or more of the following acts :

(a) if in England or elsewhere he makes a conveyance or assignment of his property to a trustee or trustees for the benefit of his creditors generally ;

(b) if in England or elsewhere he makes a fraudulent conveyance, gift, delivery, or transfer of his property, or any part thereof ;

(c) if in England or elsewhere he makes any conveyance or transfer of his property or any part thereof, or creates any charge thereon, which would, under the Bankruptcy Act, 1914, or any other Act, be void as a fraudulent preference if he were adjudged bankrupt ;

(d) if with intent to defeat or delay his creditors he does any of the following things, namely, departs out of England, or being out of England remains out of England, or departs from his dwelling-house, or otherwise absents himself, or begins to keep house ;

(e) if execution against him has been levied by seizure of his goods under process in an action in any Court, or in any civil proceeding in the High Court, and the goods have been either sold or held by the sheriff for twenty-one days ;

(f) if he files in the court a declaration of his inability to pay his debts or presents a bankruptcy petition against himself ;

(g) if a creditor has obtained a final judgment or final order against him for any amount, and, execution thereon not having been stayed, has served on him in England, or, by leave of the court, elsewhere, a bankruptcy notice under the Bankruptcy Act, 1914, and he does not, within seven days after service of the notice, in case the service is effected in England, and in case the service is effected elsewhere, then within the time limited in that behalf by the order giving leave to effect the service, either comply with the requirements of the notice, or satisfy the court that he has a counter-claim, set off, or cross demand which equals or exceeds the amount of the judgment debt or sum ordered to be paid, and which he could not set up in the action in which the judgment was obtained, or the proceedings in which the order was obtained ;

(h) if the debtor gives notice to any of his creditors that he has suspended, or that he is about to suspend, payment of his debts.

- (4) 'A petition' means a petition presented to the court either by a creditor (called a petitioning creditor) or by a debtor (called a petitioning debtor) that the court shall make a receiving order, which is the first step towards a debtor being adjudicated a bankrupt (p. 276).

(1) WHERE COURT HAS NO JURISDICTION

RULE 41.—The court has no jurisdiction on a bankruptcy petition being presented by a creditor or a debtor to adjudicate bankrupt any person who

- (1) is not a debtor as defined in Rule 40 (2), ante; or
- (2) has not committed or suffered any act of bankruptcy as defined in Rule 40 (3), ante (p. 281).

RULE 42.—A creditor is not entitled to present a bankruptcy petition against a debtor, and the court has no jurisdiction to adjudicate a debtor a bankrupt unless—

- (a) the debt owing by the debtor to the petitioning creditor or, if two or more creditors join in the petition, the aggregate amount of debts owing to the several petitioning creditors amounts to fifty pounds; and
- (b) the debt is a liquidated sum payable either immediately or at some future time; and
- (c) the act of bankruptcy on which the petition is grounded has occurred within three months before the presentation of the petition; and
- (d) the debtor is domiciled in England, or within a year before the date of the presentation of the petition has ordinarily resided, or had a dwelling-house or place of business in England, or (except in the case of a person domiciled in Scotland or Northern Ireland or a firm or partnership having its principal place of business in Scotland or Northern Ireland) has carried on business in England, personally or by means of an agent or manager, or (except as aforesaid) is or within the said period has been a member of a firm or partnership of persons which has carried on business in England, by means of a partner or partners or an agent or manager.

Provided that in any case where, under the Debtors Act, 1869, s. 5, application is made by a judgment creditor to a court having bankruptcy jurisdiction for the committal of a judgment debtor, the court may, if it sees fit, decline to commit, and, in lieu, with the consent of the judgment creditor, make a receiving order as against the debtor (p. 284).

(2) WHERE COURT HAS JURISDICTION

(a) *On Creditor's Petition.*

RULE 43.—Subject to the effect of Rules 41 and 42, the court, on a bankruptcy petition being presented by a creditor, has jurisdiction to adjudge bankrupt any debtor (being otherwise liable to be adjudged bankrupt) who has committed the act of bankruptcy on which the petition is grounded within three months before the presentation of the petition.

The jurisdiction of the court is not affected

- (1) by the fact that the debt owing to the petitioning creditor was not contracted in England; or
- (2) by the absence of the debtor from England at the time of the presentation of the petition; or
- (3) by the fact that either the creditor or the debtor is an alien (p. 287).

(b) *On Debtor's Petition.*

RULE 44.—The court has, on a bankruptcy petition being presented by a debtor alleging that the debtor is unable to pay his debts, jurisdiction to adjudge the debtor bankrupt *provided that he is a debtor within the meaning of Rule 40 (2)* (p. 289).

RULE 45.—The jurisdiction of the court to adjudge bankrupt a debtor on the petition of a creditor, or on the petition of the debtor, is not *excluded* by the fact of the debtor being already adjudged bankrupt by the court of a foreign country, whether such country forms part of British territory or not (p. 290).

2. WINDING-UP OF COMPANIES

(1) WHERE COURT HAS NO JURISDICTION

RULE 46.—The court has no jurisdiction to wind up

- (1) any company registered in Scotland or in *Northern Ireland*; or
- (2) any unregistered company having a principal place of business situate in Scotland or in *Northern Ireland*, but not having a principal place of business situate in England; or
- (3) any unregistered foreign company which, though carrying on business in England, has no *place of business in England*.

The term 'the court', in this Rule and in Rule 47, means any court in England having jurisdiction to wind up a company under the Companies Act, 1948, and includes the High Court and any other court in England having such jurisdiction (p. 291).

(2) WHERE COURT HAS JURISDICTION

RULE 47.—Subject to the effect of Rule 46, the court has jurisdiction to wind up

- (1) any company registered in England; or
 - (2) any unregistered company having a principal place of business in *Scotland or Northern Ireland and also in England*; or
 - (3) any unregistered foreign company having a *place of business in England* (p. 298).
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CHAPTER 8

JURISDICTION IN MATTERS OF ADMINISTRATION
AND SUCCESSION*Interpretation of Terms.*

RULE 48.—In this Digest, unless the context or subject-matter otherwise requires,

- (1) 'Property' means and includes :—
 - (i) any immovable ;
 - (ii) any movable.
- (2) 'Administrator' includes an executor.
- (3) 'Personal representative' includes an administrator, and also any person who, however designated, is under the law of any country entitled in such country to represent a deceased person, and, as his representative, to deal with the property of the deceased by way of administration.
- (4) 'Foreign personal representative' means the personal representative of the deceased under the law of a foreign country.
- (5) 'Administration' means the dealing according to law with the property of a deceased person by a personal representative.
- (6) 'Succession' means beneficial succession to the property of a deceased person.
- (7) 'Grant' means a grant of letters of administration, or of probate of a will.
- (8) 'English grant' means a grant made by the court.
- (9) 'Assets' means such property of a deceased person as an administrator who has obtained an English grant is bound to account for or is chargeable with (p. 297).

1. ADMINISTRATION

RULE 49.—The court has jurisdiction to make a grant in respect of the property of a deceased person, either

- (1) where such property is locally situate in England at the time of his death; or
- (2) where such property has, or the proceeds thereof have, become locally situate in England at any time since his death;

but the circumstance that the deceased left no property whatsoever in England is not by itself a bar to a grant.

The locality of the deceased's property under this Rule is not affected by his domicile at the time of his death (p. 301).

2. SUCCESSION

RULE 50.—The court has no jurisdiction with regard to the succession to the property of a deceased person unless there is before

the court some person authorised under an English grant to deal with such property, and in respect thereof to represent the deceased (p. 311).

RULE 51.—Where the court *exercises its jurisdiction to make a grant, the court has, in general, jurisdiction to determine any question with regard to the succession to and claims against the assets of a deceased person (p. 312).*

CHAPTER 9

STAYING ACTION—*LIS ALIBI PENDENS*— ARBITRATION PROCEEDINGS

RULE 52.—The court has jurisdiction to interfere, whenever there is vexation and oppression, to prevent the administration of justice being perverted for an unjust end, and for this purpose to stay or dismiss an action or other proceeding, *or to restrain the institution or continuation of proceedings or enforcement of judgments in foreign courts.*

But this jurisdiction will not be exercised against a party to an action unless his proceedings are clearly shown to be vexatious and oppressive (p. 316).

SUB-RULE 1.—The court has jurisdiction to stay an action or *restrain proceedings in a foreign court, as vexatious or oppressive, if proceedings are taken by the same plaintiff in respect of the same subject and against the same defendant both in the court and in a court of a foreign country.*

- (1) If such foreign court is a court of the United Kingdom or (semble) of any country forming part of British territory, the plaintiff's proceedings are *primâ facie* vexatious.
- (2) If such foreign court is a court of any country not forming part of British territory, the plaintiff's proceedings are *primâ facie* not vexatious (p. 320).

SUB-RULE 2.—*When an agreement for the submission to arbitration of differences on commercial or other matters, capable of settlement by arbitration, has been entered into by subjects or citizens of two or more of the contracting States which have ratified the International Protocol on Arbitration Clauses of 1923, then, on the application of any party to such a submission, the court shall, unless satisfied that the agreement or arbitration has become inoperative or cannot proceed, stay any legal proceedings which may have been commenced against that party by any other party to the agreement (p. 322).*

SUB-RULE 3.—*When a foreign judgment is capable of registration under the Foreign Judgments (Reciprocal Enforcement) Act, 1933, then the court must stay any legal proceedings in England for the recovery of money due under such foreign judgment (p. 324).*

CHAPTER 10

EXTRA-TERRITORIAL EFFECT OF ENGLISH JUDGMENT; ENGLISH BANKRUPTCY; ENGLISH GRANT OF ADMINISTRATION.

1. ENGLISH JUDGMENT

RULE 53.—A judgment of the court (called in this Digest an English judgment) has, subject to the Exceptions hereinafter mentioned, no direct operation out of England.

The extra-territorial effect (if any) of an English judgment is a question of foreign law (p. 325).

Exception 1.—An English judgment for any debt, damages, or costs may be rendered operative in *Northern Ireland* or *Scotland* by registration of a certificate thereof in accordance with the provisions of Rule 88 (p. 325).

Exception 2.—Any order of an English Bankruptcy Court shall be enforced in *Scotland* and *Northern Ireland* and is enforced in *Eire* in the courts having jurisdiction in bankruptcy there in the same manner as if the order had been made by the court which is required to enforce it (p. 326).

Exception 3.—Any order made by the court in England having jurisdiction to wind up a company in the course of such winding-up shall be enforced in *Scotland* and *Northern Ireland* in the courts that would respectively have jurisdiction in respect of that company if registered in *Scotland* or *Northern Ireland*, and in the same manner in all respects as if the order had been made by these courts (p. 326).

Exception 4.—The powers and authority with regard to the administration and management of the estate of a lunatic or defective conferred by the Lunacy Act, 1890, and amending Acts on the Judge in Lunacy shall apply to the property of a lunatic or defective, whether immovable or movable, situate in any British territory (p. 326).

Exception 5.—The powers of the court in England to make vesting orders under the Trustee Act, 1925, shall extend to all property in British territory except *Scotland* (p. 326).

2. ENGLISH BANKRUPTCY AND WINDING-UP OF COMPANIES

(1) BANKRUPTCY

(a) *As an Assignment.*

RULE 54.—An assignment of a bankrupt's property to the trustee in bankruptcy under the Bankruptcy Act, 1914 (English bankruptcy), is, or operates as, an assignment of the bankrupt's

(1) immovables (land);

(2) movables;

whether situate in England or elsewhere (p. 327).

(b) *As a Discharge.*

RULE 55.—A discharge under an English bankruptcy from any debt or liability is in any British territory where the *Imperial Bankruptcy Acts apply* a discharge from such debt or liability, wherever or under whatever law the same has been contracted or has arisen (p. 333).

(2) WINDING-UP

RULE 56.—The winding-up of a company under the Companies Act, 1948, impresses the whole of the property of the company in the United Kingdom with a trust for the application in the course of the winding-up, for the benefit of the persons interested in the winding-up (p. 333).

3. ENGLISH GRANT OF ADMINISTRATION

RULE 57.—An English grant has no direct operation out of England.

This Rule must be read subject to Rules 61 to 63 (p. 335).

RULE 58.—An English grant extends to all the movables of the deceased, wherever situate, at the time of his death, at least in such a sense that a person who has obtained an English grant (who is hereinafter called an English administrator) may—

(1) sue in an English court in relation *not only to property in England, but also* to movables of the deceased situate in any foreign country;

(2) *legitimately take steps to receive or recover* in a foreign country movables of the deceased situate in such country (p. 336).

RULE 59.—When a person dies domiciled in England, *the English administrator should apply to the court of any foreign country, in which there are situate movables of the deceased, in order to obtain authority, under a grant of administration or otherwise, to act as personal representative of the deceased in such foreign country, in regard to such movables* (p. 337).

RULE 60.—The following property of a deceased person passes to the administrator under an English grant:—

(1) any property of the deceased which at the time of his death is locally situate in England;

- (2) any movables of the deceased, or the proceeds of any property of the deceased, which, though not situate in England at the time of the death of the deceased, are received, recovered, or otherwise reduced into possession by the English administrator as such administrator;
- (3) any movables of the deceased which after his death are brought into England before any person has, in a foreign country where they are situate, obtained a good title thereto under the law of such foreign country (*lex situs*), and reduced them into possession (p. 338).

Extension of English Grant to Northern Ireland, Scotland, and Other British Territories.

RULE 61.—An English grant made to the administrator of any person duly stated to have died domiciled in England will, on production of the said grant to, and deposit of a copy thereof with, the proper officer of the High Court of Justice in *Northern Ireland*, be sealed with the seal of the said court, and be of the like force and effect, and have the same operation in *Northern Ireland*, as a grant of probate or letters of administration made by the said court.

The latter grant is hereinafter referred to as a *Northern Irish* grant (p. 342).

RULE 62.—An English grant made to the administrator of any person duly stated to have died domiciled in England will, on production of the said grant to, and deposit of a copy thereof with, the clerk of the Sheriff Court of the County of *Edinburgh*, be duly indorsed with the proper certificate by the said clerk, and thereupon have the same operation in *Scotland* as if a confirmation had been granted by the said court (p. 342).

RULE 63.—Whenever the Colonial Probates Act, 1892, is by Order in Council applied to any British possession, *i.e.*, to any part of British territory not forming part of the United Kingdom, or to any dependent territory, adequate provision is made for the recognition in that possession or territory of an English grant (p. 343).

JURISDICTION OF FOREIGN COURTS

CHAPTER 11

GENERAL RULES AS TO JURISDICTION

Interpretation of Terms.

RULE 64.—In this Digest

- (1) 'Proper Court' means a court which is authorised by the law of the country to which it belongs, or under whose authority it acts, to adjudicate upon a given matter.
- (2) 'Court of competent jurisdiction' means a court which has, according to the principles maintained by English courts, the right to adjudicate upon a given matter.

When in this Digest

- (i) it is stated that the courts of a foreign country 'have jurisdiction', it is meant that they are courts of competent jurisdiction;
- (ii) it is stated that the courts of a foreign country 'have no jurisdiction', it is meant that they are not courts of competent jurisdiction.
- (3) 'Foreign judgment' means a judgment, decree, or order of the nature of a judgment (by whatever name it be called), which is pronounced or given by a foreign court (p. 345).

1. WHERE JURISDICTION DOES NOT EXIST

(1) *In respect of Persons.*

RULE 65.—The courts of a foreign country have no jurisdiction over, *i.e.*, are not courts of competent jurisdiction as against—

- (1) any sovereign;
- (2) any ambassador, or other diplomatic agent, accredited to the sovereign of such foreign country.

An action or proceeding against the property of any of the persons enumerated is, for the purpose of this Rule, an action or proceeding against such person (p. 347).

(2) *In respect of Subject-Matter.*

RULE 66.—The courts of a foreign country have no jurisdiction—

- (1) to adjudicate upon the title, or the right to the possession, of any immovable not situate in such country; or

- (2) (*semble*) to give redress for any injury in respect of any immovable not situate in such country (p. 348).

2. WHERE JURISDICTION DOES EXIST

RULE 67.—Subject to Rules 65 and 66, the courts of a foreign country have jurisdiction (*i.e.*, are courts of competent jurisdiction)—

- (1) in an action or proceeding in personam;
 - (2) in an action or proceeding in rem;
 - (3) in matters of divorce, or *nullity* of marriage;
 - (4) in matters of administration and succession,
- to the extent, and subject to the limitations, hereinafter stated in the Rules having reference to each kind of jurisdiction (p. 350).

CHAPTER 12

JURISDICTION IN ACTIONS IN PERSONAM

RULE 68.—In an action in personam in respect of any cause of action, the courts of a foreign country have jurisdiction in the following cases :—

First Case.—Where at the time of the commencement of the action the defendant was resident or present in such country, so as to have the benefit, and be under the protection, of the laws thereof.

Second Case.—(*Semble*) where the defendant is, at the time of the judgment in the action, a subject or citizen of such country.

Third Case.—Where the party objecting to the jurisdiction of the courts of such country has, by his own conduct, submitted to such jurisdiction, *i.e.*, has precluded himself from objecting thereto—

- (a) by appearing as plaintiff in the action or counter-claiming; or
- (b) by voluntarily appearing as defendant in such action; or
- (c) by having expressly or impliedly contracted to submit to the jurisdiction of such courts (p. 351).

RULE 69.—In an action in personam the courts of a foreign country do not acquire jurisdiction either—

- (1) from the mere possession by the defendant at the commencement of the action of property locally situate in that country; or

- (2) from the presence of the defendant in such country at the time when the obligation in respect of which the action is brought was incurred in that country (p. 362).

CHAPTER 13

JURISDICTION IN ACTIONS IN REM

RULE 70.—In an action or proceeding in rem the courts of a foreign country have jurisdiction to determine the title to any immovable or movable within such country (p. 365).

CHAPTER 14

JURISDICTION IN MATTERS OF DIVORCE AND NULLITY OF MARRIAGE

1. DIVORCE

(1) WHERE COURTS HAVE JURISDICTION

RULE 71.—The courts of a foreign country have jurisdiction to dissolve the marriage of any parties domiciled in such foreign country at the commencement of the proceedings for divorce.

This Rule applies to—

- (1) an English marriage;
- (2) a foreign marriage (p. 368).

SUB-RULE.—*Where* the courts of a foreign country have jurisdiction to dissolve a marriage, *such courts also* have jurisdiction to entertain an action against a co-respondent in a divorce suit for damages due from such co-respondent to the husband in favour of whom such divorce is granted, and this without reference to the residence or the domicile of such co-respondent at the commencement of the suit (p. 373).

(2) WHERE COURTS HAVE NO JURISDICTION

RULE 72.—Subject to the Exceptions hereinafter mentioned, the courts of a foreign country have no jurisdiction to dissolve the marriage of parties not domiciled in such foreign country at the commencement of the proceedings for divorce (p. 374).

Exception 1.—If the courts of a foreign country, where the parties are not domiciled, dissolve their marriage, and if the divorce would be *recognised* by the courts of the country where, at the *date of the decree*, the parties are domiciled, it *will be recognised in England* (p. 376).

Exception 2.—The court of any British possession to which the Indian and Colonial Divorce Jurisdiction Acts, 1926–40, apply may, subject to the provisions of these Acts, dissolve the marriages of British subjects domiciled in England or in Scotland, and such divorces shall, when registered in England or Scotland, have effect as if they had been duly pronounced by the English or Scottish courts (p. 379).

Exception 3.—Any divorce granted under the provisions of the Matrimonial Causes (War Marriages) Act, 1944, or under legislation of any part of British territory outside the United Kingdom or of any protected State, which is declared by Order in Council to correspond substantially with the provisions of the above Act, will be recognised as valid in England (p. 380).

2. DECLARATION OF NULLITY OF MARRIAGE

RULE 73.—The courts of a foreign country have jurisdiction to pronounce a decree of nullity of marriage if

- (1) the parties were domiciled in such foreign country at the commencement of the proceedings for nullity; or
- (2) *semble*, if the marriage was celebrated in such foreign country; or
- (3) *semble*, if the decree would be recognised as annulling the marriage in the country where the parties were domiciled at the date of the decree; or
- (4) if the decree was pronounced under legislation to which recognition in England is accorded by Order in Council made under section 4 of the Matrimonial Causes (War Marriages) Act, 1944 (p. 381).

CHAPTER 15

JURISDICTION IN MATTERS OF ADMINISTRATION AND SUCCESSION

RULE 74.—The courts of a foreign country have jurisdiction to administer, and to determine the succession to, all immovables and movables of a deceased person locally situate in such country.

This jurisdiction is unaffected by the domicile of the deceased (p. 386).

RULE 75.—The courts of a foreign country have jurisdiction to determine the succession to all movables wherever locally situate of a testator or intestate dying domiciled in such country (p. 386).

CHAPTER 16

EFFECT OF FOREIGN JUDGMENTS IN ENGLAND

1. GENERAL

(1) *No Direct Operation.*

RULE 76.—A foreign judgment has no direct operation in England.

This Rule must be read subject to the effect of Rules 88 to 90 (p. 388).

(2) *Invalid Foreign Judgments.*

RULE 77.—Any foreign judgment which is not pronounced by a court of competent jurisdiction is invalid *in England*.

Whether a court which has pronounced a foreign judgment is, or is not, a court of competent jurisdiction in respect of the matter adjudicated upon by the court is to be determined in accordance with Rules 64 to 75 (p. 388).

RULE 78.—A foreign judgment which is obtained by fraud is invalid *in England*.

Such fraud may be either

- (1) fraud on the part of the party in whose favour the judgment is given; or
- (2) fraud on the part of the court pronouncing the judgment (p. 390).

RULE 79.—A foreign judgment may sometimes be invalid *in England* on account of the proceedings in which the judgment was obtained being opposed to natural justice (*e.g.*, owing to want of due notice to the party affected thereby *or the denial of the opportunity of presenting his case to the court*). But in such a case the court is generally not a court of competent jurisdiction (p. 396).

RULE 80.—A foreign judgment shown to be invalid *in England* under any of the foregoing Rules 77 to 79, is hereinafter termed an invalid foreign judgment (p. 398).

RULE 81.—An invalid foreign judgment has (subject to the Exception hereinafter mentioned) no effect *in England* (p. 398).

Exception.—An invalid foreign judgment in rem may have an effect in England as an assignment, though not as a judgment (p. 399).

(3) *Valid Foreign Judgments.*

RULE 82.—A foreign judgment, which is not an invalid foreign judgment under Rules 77 to 79, is valid *in England*, and is hereinafter termed a valid foreign judgment (p. 400).

RULE 83.—Any foreign judgment is presumed to be a valid foreign judgment unless and until it is shown to be invalid (p. 400).

RULE 84.—A valid foreign judgment is conclusive as to any

matter thereby adjudicated upon, and cannot be impeached for any error either

(1) of fact; or

(2) of law (p. 401).

RULE 85.—A valid foreign judgment has in *England* the effects stated in Rules 86 to 94; and these effects depend upon the nature of the judgment (p. 402).

2. PARTICULAR KINDS OF JUDGMENTS

(1) JUDGMENT IN PERSONAM

(a) *As Cause of Action.*

RULE 86.—Subject to the Exceptions hereinafter mentioned, a valid foreign judgment in personam may be enforced by an action for the amount due under it if the judgment is

(1) for a debt, or definite sum of money; and

(2) final and conclusive;

but not otherwise.

Provided that a foreign judgment may be final and conclusive, though it is subject to an appeal, and though an appeal against it is actually pending in the foreign country where it was given (p. 403).

Exception 1.—An action (semble) cannot be maintained on a valid foreign judgment if the cause of action in respect of which the judgment was obtained was of such a character that it would not have supported an action in England (p. 408).

Exception 2.—No proceedings for the recovery of a sum payable under a valid foreign judgment capable of registration in England in accordance with the provisions of Part I of the *Foreign Judgments (Reciprocal Enforcement) Act, 1933*, other than proceedings by way of registration may be taken in any court in England (p. 409).

SUB-RULE.—A valid foreign judgment does not of itself extinguish the original cause of action in respect of which the judgment was given (p. 410).

(b) *As Defence.*

RULE 87.—A valid foreign judgment in personam, if it is final and conclusive on the merits (but not otherwise), is a good defence to an action in *England* for the same matter when either

(1) the judgment was in favour of the defendant; or

(2) the judgment, being in favour of the plaintiff, has been satisfied (p. 411).

(c) *Extension of Certain Judgments in Personam of Superior Courts in British Territory and in Certain Foreign Countries to England.*

RULE 88.—A judgment of a Superior Court in any part of the United Kingdom for any debt, damages, or costs, has, on a

certificate thereof being duly registered in a Superior Court of any other part of the United Kingdom, from the date of such registration the same force and effect as a judgment of the court in which the certificate is registered, and may be enforced by execution, or otherwise, in the same manner as if it had been a judgment originally obtained at the date of such registration as aforesaid in the court in which the certificate is registered.

The term 'Superior Court' means in this Rule—

- (1) as applied to England, the High Court of Justice in England;
- (2) as applied to *Northern* Ireland, the High Court of Justice in *Northern* Ireland;
- (3) as applied to Scotland, the Court of Session in Scotland.

This Rule does not apply to any judgment (decreet) pronounced in absence in an action proceeding on an arrestment used to found jurisdiction in Scotland (p. 418).

RULE 89.—When Part II of the Administration of Justice Act, 1920, is applied by Order in Council to any part of British *territory* outside the United Kingdom, a judgment creditor who has obtained a judgment in a Superior Court in such part of British *territory*, under which a sum of money is made payable, may apply to a Superior Court in the United Kingdom, at any time within twelve months (or such longer period as may be allowed by the court) after the date of the judgment, to have the judgment registered in the court, and, if they think it is just and convenient that the judgment should be enforced in the United Kingdom, the court may order the judgment to be registered accordingly, and from the date of registration the judgment shall be of the same force and effect, and proceedings may be taken upon it, as if it were a judgment of the court in which it is registered.

Provided that no judgment shall be ordered to be registered if—

- (a) the original court acted without jurisdiction; or
- (b) the judgment debtor, being a person who was neither carrying on business nor ordinarily resident within the jurisdiction of the original court, did not voluntarily appear or otherwise submit or agree to submit to the jurisdiction of that court; or
- (c) the judgment debtor, being the defendant in the proceedings, was not duly served with the process of the original court and did not appear, notwithstanding that he was ordinarily resident or was carrying on business within the jurisdiction of that court or agreed to submit to the jurisdiction of that court; or
- (d) the judgment was obtained by fraud; or
- (e) the judgment debtor satisfies the registering court either that an appeal is pending, or that he is entitled and intends to appeal against the judgment; or

- (f) the judgment was in respect of a cause of action which for reasons of public policy or for some other similar reason could not have been entertained by the registering court (p. 417).

RULE 90.—(1) *When Part I of the Foreign Judgments (Reciprocal Enforcement) Act, 1933, is applied by Order in Council to any foreign country or to any part of British territory (including protectorates and (former) mandates) outside the United Kingdom, a judgment creditor under a judgment to which Part I of the Act applies may apply to the High Court at any time within six years after the date of such judgment (or the date of the last judgment on appeal therefrom) to have the judgment registered in the High Court and (subject to proof of the prescribed matters and to the other provisions of the Act) on any such application the court shall order the judgment to be registered.*

Provided that no judgment shall be ordered to be registered if—

- (a) *it has been wholly satisfied; or*
 - (b) *it could not be enforced by execution in the country or territory of the original court.*
- (2) *Subject to the provisions of the Act with respect to the setting aside of registration—*
- (a) *a registered judgment shall, for the purposes of execution, be of the same force and effect; and*
 - (b) *proceedings may be taken on a registered judgment; and*
 - (c) *the sum for which a judgment is registered shall carry interest; and*
 - (d) *the registering court shall have the same control over the execution of a registered judgment,*
- as if the judgment had been a judgment originally given in the registering court and entered on the date of registration.*

Provided that execution shall not issue on the judgment so long as it is competent to any party to make an application to have the registration set aside (or so long as any such application is not finally determined).

(3) *Any judgment of a Superior Court of a foreign country or other territory to which Part I of the Act applies given after the application of Part I of the Act to such country or territory is capable of registration in accordance with this Rule if—*

- (a) *it is final and conclusive as between the parties thereto; and*
- (b) *there is payable thereunder a sum of money (not being a sum payable in respect of taxes or other charges of a like nature or in respect of a fine or other penalty).*

(4) *On the application of any party against whom it is enforceable a judgment registered in accordance with this Rule—*

- (a) *shall be set aside if—*

- (i) *it shall have been registered in contravention of the Act; or*
 - (ii) *it shall have been given by a court without jurisdiction; or*
 - (iii) *it shall have been given against a judgment debtor who, being the defendant in the original proceedings, did not receive notice of those proceedings in sufficient time to enable him to defend and did not appear; or*
 - (iv) *it shall have been obtained by fraud; or*
 - (v) *its enforcement would be contrary to public policy; or*
 - (vi) *the rights under the judgment are not vested in the person registering it; and*
- (b) *may be set aside if the registering court is satisfied that the matter in dispute in the original court had previously to the date of the judgment of that court been the subject of a final and conclusive judgment by a court having jurisdiction in the matter (p. 420).*

(2) JUDGMENT IN REM

RULE 91.—A valid foreign judgment in rem in respect of the title to a movable gives a valid title to the movable in England to the extent to which such title is given by or under the judgment in the country where the judgment is pronounced (p. 428).

RULE 92.—A valid foreign judgment in rem given by a Court of Admiralty can be enforced in the High Court by proceedings against the ship or other property affected by the judgment (p. 430).

(3) JUDGMENT, OR SENTENCE, OF DIVORCE, OR NULLITY OF MARRIAGE, OR JUDICIAL SEPARATION

RULE 93.—A valid foreign judgment, or sentence, of divorce, or of nullity of marriage, or of judicial separation, has in England the same effect as a decree of divorce, or of nullity of marriage, or of judicial separation, granted by the court in England, as regards the status of the parties to the marriage which is dissolved or annulled, or in respect of which a decree of judicial separation is pronounced (p. 430).

(4) JUDGMENT IN MATTERS OF SUCCESSION

RULE 94.—A valid foreign judgment in matters of succession is binding upon, and is to be followed by, the court (p. 432).

3. ARBITRATION AWARDS

RULE 95.—A foreign arbitration award has no direct operation in England, but, if it fulfils the conditions requisite for the validity of a foreign judgment, it may be enforced by an action at the discretion of the court (p. 433).

RULE 96.—(1) A foreign award—

- (a) *in pursuance of an agreement, not governed by the law of England, to which the Protocol on Arbitration Clauses of September 24, 1923, is applicable;*
- (b) *between parties who are subject to the jurisdiction of States which are declared by Order in Council to be parties to the Convention on the Execution of Arbitral Awards of September 26, 1927;*
- (c) *in a territory to which the Convention is declared to apply;*

shall be enforceable by action, or under the provisions of the Arbitration Act, 1889, s. 12, i.e., by leave of the court, in the same manner as a judgment or order to the same effect.

(2) Such an award shall be treated as binding for all purposes on the persons as between whom it was made, and may be relied on by way of defence, set-off, or otherwise in any legal proceeding.

(3) To be enforceable an award must have—

- (a) *been made in pursuance of an agreement for arbitration which was valid under the law by which it was governed;*
- (b) *been made by the tribunal provided for in the agreement or constituted in manner agreed upon by the parties;*
- (c) *been made in conformity with the law governing the arbitration procedure;*
- (d) *become final in the country in which it was made;*
- (e) *been in respect of a matter which may lawfully be referred to arbitration under the law of England;*

and the enforcement thereof must not be contrary to the public policy or the law of England.

Provided that an award shall not be deemed final, if any proceedings for the purpose of contesting the validity thereof are pending in the country in which it was made.

(4) An award shall not be enforceable if the court dealing with the case is satisfied that—

- (a) *the award has been annulled in the country in which it was made; or*
- (b) *the party against whom it is sought to enforce the award was not given notice of the arbitration proceedings in sufficient time to enable him to present his case, or was under some legal incapacity, and was not properly represented; or*
- (c) *the award does not deal with all the questions referred or contains decisions on matters beyond the scope of the agreement for arbitration:*

Provided that, if the award does not deal with all the questions referred, the court may, if it thinks fit, either postpone the enforcement of the award or order its enforcement, subject to the giving

of such security by the person seeking to enforce it as the court may think fit.

(5) If a party seeking to resist the enforcement of a foreign award proves that there is any ground other than the non-existence of the conditions specified in paragraphs (a), (b) and (c) of s. 3 of this Rule, or the existence of the conditions specified in paragraphs (b) and (c) of s. 4 of this Rule entitling him to contest the validity of the award, the court may, if it thinks fit, either refuse to enforce the award or adjourn the hearing until after the expiration of such period as appears to the court to be reasonably sufficient to enable that party to take the necessary steps to have the award annulled by the competent tribunal (p. 434).

CHAPTER 17

EFFECT IN ENGLAND OF FOREIGN BANKRUPTCY; FOREIGN GRANT OF ADMINISTRATION

1. FOREIGN BANKRUPTCY

(1) AS AN ASSIGNMENT

Bankruptcy in Ireland or Scotland.

RULE 97.—An assignment of a bankrupt's property to the representative of his creditors—

- (1) under the Irish Bankrupt and Insolvent Act, 1857 (Irish Bankruptcy); or
- (2) under the Bankruptcy (Scotland) Act, 1913 (Scottish Bankruptcy),

is, or operates as, an assignment to such representative of the bankrupt's

(i) immovables (land);

(ii) movables;

wherever situate (p. 437).

Bankruptcy in any Foreign Country, except Ireland or Scotland.

RULE 98.—An assignment of a bankrupt's property to the representative of his creditors, under the bankruptcy law of any foreign country, other than Ireland or Scotland, is not, and does not operate as, an assignment of any immovables of the bankrupt situate in England. *But in a proper case the English courts may authorise the sale of English immovables by such a representative* (p. 438).

RULE 99.—An assignment of a bankrupt's property to the

representative of his creditors, under the bankruptcy law of any foreign country, *to whose jurisdiction he is properly subject*, whether the bankrupt is domiciled there or not, is or operates as an assignment of the movables of the bankrupt situate in England (p. 440).

English and Foreign Bankruptcy.

RULE 100.—Where a debtor has been made bankrupt in more countries than one, and, under the bankruptcy law of each of such countries, there has been an assignment of the bankrupt's property, which might, under any of the foregoing Rules, operate as an assignment of his property in England, effect will be given in England to that assignment which is earliest in date (p. 443).

(2) AS A DISCHARGE

RULE 101.—A discharge from any debt or liability under the bankruptcy law of *a foreign country* is a discharge therefrom in England *if it is a discharge under the proper law of the contract* (p. 444).

RULE 102.—Subject to Rule 103, the discharge from any debt or liability under the bankruptcy law of a foreign country is not a discharge therefrom in England *if it is not a discharge under the proper law of the contract* (p. 447).

RULE 103.—A discharge from any debt or liability under a Bankruptcy Act of the Imperial Parliament, and hence under—

(1) an English bankruptcy; or

(2) an Irish bankruptcy; or

(3) a Scottish bankruptcy,

is, in any British *territory*, a discharge from such debt or liability, wherever, or under whatever law, the same *is to be paid or satisfied* (p. 448).

2. FOREIGN GRANT OF ADMINISTRATION

RULE 104.—A grant of administration or other authority to represent a deceased person under the law of a foreign country has no operation in England.

This Rule must be read subject to the effect of Rules 108 to 110 (p. 450).

RULE 105.—Where a person dies domiciled in a foreign country, leaving movables in England, the court will in general make a grant to his personal representative under the law of such foreign country (p. 451).

RULE 106.—(1) A foreign personal representative has (semble) a good title in England to any movables of the deceased (*whether tangible, i.e., goods, or intangible, i.e., debts or other choses in*

action) to which he has in a foreign country acquired a good title under the *lex situs* and has reduced into possession.

(2) A *foreign personal representative, appointed by a court of the domicile of the deceased, or a beneficiary whose position under the law of the domicile of the deceased is equivalent to that of a personal representative, may apply to the court in England for an order for the transfer to him for distribution of the net balance of assets under the English administration of the estate of the deceased, but is not entitled as of right to such an order* (p. 455).

RULE 107.—A foreign personal representative is not, as such, under any liability in England, and cannot, as foreign personal representative, be sued in England.

Provided that

- (1) if the foreign personal representative sends or brings into England movables of a deceased which have not been so appropriated as to lose their character as part of the property of the deceased, an action, to which the English administrator must be a party, may be brought for their administration in England;
- (2) the foreign personal representative may by his dealing with the property of the deceased incur personal liability in England as a trustee or a debtor (p. 458).

Extension of Northern Irish Grant and Scottish Confirmation to England.

RULE 108.—A Northern Irish grant in respect of the personal estate of a person who died domiciled in Northern Ireland will, on production of the said grant to, and deposit of a copy thereof with, the proper officer of the High Court of Justice in England, be sealed with the seal of the said court, and be thereupon of the like force and effect, and have the same operation in England, as an English grant (p. 460).

RULE 109.—A Scottish confirmation of the executor of a person duly stated to have died domiciled in Scotland, which includes besides the personal estate situate in Scotland also personal estate situate in England, will, on production of such confirmation in the High Court in England and deposit of a copy thereof in the principal probate registry, be sealed with the seal of the said court, and have thereupon in England the like force and effect as an English grant (p. 460).

Extension of Colonial, Indian, etc. Grant to England.

RULE 110.—Whenever the Colonial Probates Act, 1892, is by Order in Council made applicable to any British possession, *i.e.*, to any part of British territory not forming part of the United

Kingdom, or to any protectorate, protected State, or (former) mandated territory, the grant of probate or letters of administration may, on

(1) payment of the proper duty; and

(2) production of the said grant to, and deposit of a copy thereof with, the High Court in England,

be sealed with the seal of the said court, and shall thereupon be of the like force and effect, and have the same operation in England, as an English grant (p. 461).

PART THREE

CHOICE OF LAW

CHAPTER 18

STATUS

RULE 111.—Transactions taking place in England are not affected by any status existing under foreign law which is penal (p. 465).

RULE 112.—Any status existing under the law of a person's domicile is recognised by the court as regards all transactions taking place wholly within the country where he is domiciled (p. 469).

RULE 113.—In cases which do not fall within Rule 111, the existence of a status existing under the law of a person's domicile is recognised by the court, but such recognition does not necessarily involve the giving effect to the results of such status (p. 471).

CHAPTER 19

STATUS OF CORPORATIONS

RULE 114.—The existence *or dissolution* of a foreign corporation duly created *or dissolved* under the law of a foreign country is recognised by the court (p. 476).

RULE 115.—The capacity of a corporation to enter into any legal transaction is governed both by the constitution of the corporation and by the law of the country where the transaction occurs (p. 477).

CHAPTER 20

FAMILY RELATIONS

1. HUSBAND AND WIFE

RULE 116.—The authority of a husband as regards the person of his wife while in England is not affected by the nationality or the domicile of the parties, but is governed wholly by the law of England (p. 480).

2. PARENT AND CHILD

RULE 117.—The authority of a parent as regards the person of his child while in England is not affected by the nationality or the domicile of the parties, but is governed wholly by the law of England (p. 480).

RULE 118.—The rights of a parent domiciled in a foreign country over the movables in England belonging to an infant are governed by the law of England (p. 483).

3. GUARDIAN AND WARD

RULE 119.—A guardian appointed under the law of a foreign country for a child domiciled in that country can exercise, subject to the discretion of the court, control over the person of his ward in England, and over movables belonging to his ward situate in England (p. 484).

4. LEGITIMACY, LEGITIMATION AND ADOPTION

(1) LEGITIMACY

RULE 120.—(1) A child born anywhere in lawful wedlock is legitimate.

(2) A child not born in lawful wedlock is (semble) legitimate in England if, and only if, he is legitimate by the law of the domicile of each of his parents at the date of his birth.

Provided that a child who is legitimate under clause (2) of this Rule cannot (semble) succeed as heir to English real estate or to a dignity or title of honour, or to an entailed interest in personalty, nor can anyone except his issue inherit such a dignity or title or estate from him as heir (p. 487).

(2) LEGITIMATION

(a) Legitimation at Common Law.

RULE 121.—At common law the law of the father's domicile at the time of the birth or conception of a child born out of lawful wedlock and the law of the father's domicile at the time of the subsequent marriage of the child's parents, determine whether the child becomes, or may become, legitimate in consequence of the subsequent marriage of the parents (legitimatio per subsequens matrimonium).

Case 1.—If both the law of the father's domicile at the time of the birth of the child and the law of the father's domicile at the time of the subsequent marriage allow of legitimatio per subsequens matrimonium, the child becomes, or may become, legitimate on the marriage of the parents.

Case 2.—If the law of the father's domicile at the time of the birth of the child does not allow of legitimatio per subsequens

matrimonium, the child does not *at common law* become legitimate on the marriage of the parents.

Case 3.—If the law of the father's domicile at the time of the subsequent marriage of the child's parents does not allow of *legitimatio per subsequens matrimonium*, the child does not become legitimate on the marriage of the parents.

Provided that a person born out of lawful wedlock cannot *succeed as heir to English real estate or to a dignity or title of honour or to an entailed interest in personalty*, nor can anyone, except his issue, inherit such a dignity or title or estate from him as *heir* (p. 496).

(b) *Legitimation under the Legitimacy Act, 1926.*

RULE 122.—(1) Where the parents of an illegitimate person marry or have married one another, whether before or after January 1, 1927, and the father of the illegitimate person was or is, at the time of the marriage, domiciled in a country other than England, by the law of which the illegitimate person became legitimate by virtue of such subsequent marriage, that person, if living, is recognised in England as having been so legitimated from January 1, 1927, or from the date of the marriage, whichever last happens, notwithstanding that his father was not at the time of the birth of such person domiciled in a country in which legitimation by subsequent marriage was permitted by law.

(2) A person so recognised as having been legitimated or who would, had he survived the marriage of his parents, have been so recognised, and his spouse, children or more remote issue are entitled to take any interest—

- (a) in the estate of an intestate dying after the date of legitimation;
- (b) under any disposition coming into operation after the date of legitimation;
- (c) by descent under an entailed interest created after the date of legitimation;

in like manner as if the legitimated person had been born legitimate. This paragraph applies only if and so far as a contrary intention is not expressed in the disposition, and has effect subject to the terms of the disposition and to the provisions therein contained.

(8) Nothing in this Rule affects the succession to any dignity or title of honour, or renders any person capable of succeeding to or transmitting a right to succeed to any such dignity or title, or operates to sever from any such dignity any property real or personal or any interest therein which is limited in such a way as to devolve along with any such dignity or title.

(4) Nothing in this Rule operates to legitimate a person whose father or mother was married to a third person when the illegitimate person was born (p. 507).

(3) ADOPTION

RULE 123.—(1) *If a person adopts a stranger in blood, the law of the domicile of the adopter and of the person adopted at the date of the adoption determines (semble) whether the adopted person has the status of an adopted child.*

(2) *The question whether an adopted child can succeed as a child to movables or immovables under an intestacy or a will is (semble) determined by the law governing the succession, that is, the law of the domicile of the testator or intestate at the date of his death in the case of movables and the lex situs in the case of immovables (p. 511).*

5. LUNATIC AND CURATOR, OR COMMITTEE

RULE 124.—(1) *The powers and authorities conferred by the Lunacy Act, 1890, the Mental Deficiency Act, 1913, or the Mental Treatment Act, 1930, upon the judge in lunacy in respect of the management and administration of the property of a lunatic or a defective extend to the lunatic's or defective's property of whatever kind situate in any British territory.*

(2) *The powers of management and administration of the estate of a lunatic so found by inquisition in England, vested in the judge in lunacy, and the committee of the lunatic's estate, extend to the personal property in Northern Ireland or Eire of the lunatic provided it does not exceed £2,000 in value or the income thereof does not exceed £100 a year, and similar provisions apply to the personal property in England of lunatics so found on inquisition in Northern Ireland, or Eire, under the Lunacy Regulation (Ireland) Act, 1871.*

(3) *The powers of management and administration conferred in England with regard to cases in which the property of a person of unsound mind does not exceed £2,000 in value or the income £100 a year, and the like powers conferred in Northern Ireland or Eire under s. 68 of the Lunacy Regulation (Ireland) Act, 1871, extend to the property in Northern Ireland, Eire, or England, as the case may be, of the person of unsound mind if the total of his property in both countries does not exceed £2,000 or the income does not exceed £100.*

(4) *The committee of the estate of a person found lunatic by inquisition in England has the same powers with regard to the lunatic's personal property in Scotland as a tutor at law after cognition or a curator bonis to a person of unsound mind in Scotland, and a tutor at law or curator bonis duly appointed in Scotland has the same powers with respect to the lunatic's personal property in England as a committee of the estate of a lunatic so found by inquisition (p. 515).*

RULE 125.—(1) *A person appointed by a foreign decree or commission the curator or committee of a lunatic resident in a foreign country (hereinafter called a foreign curator) does not acquire the*

right as such curator to control the person of the lunatic in England, though, in a proper case, on application to the judge in lunacy, arrangements may be made for the handing over of the lunatic to the foreign curator.

(2) The foreign curator of a lunatic may, at the discretion of the court, enforce by action claims in respect of movable property of the lunatic in England.

(3) The foreign curator of a lunatic resident out of England may, at the discretion of the judge in lunacy, secure the transfer to himself of stock standing in the name of or vested in the lunatic (p. 516).

CHAPTER 21

NATURE OF PROPERTY

RULE 126.—The law of a country where a thing is situate (*lex situs*) determines whether

(1) the thing itself *is to be considered an immovable or a movable*; or

(2) any right, obligation, or document connected with the thing, is to be considered an *interest in an immovable or in a movable* (p. 521).

CHAPTER 22

IMMOVABLES

RULE 127.—All rights over, or in relation to, an immovable (land) are (subject to the Exceptions hereinafter mentioned) governed by the law of the country where the immovable is situate (*lex situs*) (p. 529).

Exception 1.—The *formal and material validity, interpretation, and effect of a contract, and capacity to contract*, with regard to an immovable are governed by the proper law of the contract.

The proper law of such contract is, in general, but not necessarily, the law of the country where the immovable is situate (*lex situs*) (p. 541).

Exception 2.—Where there is a marriage contract, or settlement, the terms of the contract or settlement govern the mutual rights of husband and wife in respect of all English immovables (land) within its terms, which are then possessed or are afterwards acquired.

The marriage contract, or settlement, will be construed with reference to the proper law of the contract, *i.e.*, in the absence of reason to the contrary, by the law of the husband's actual domicile at the time of the marriage.

The husband's actual domicile at the time of the marriage is hereinafter termed the 'matrimonial domicile' (p. 541).

Exception 3.—Under Exceptions 1 and 2 to Rule 181 [*i.e.*, under the Wills Act, 1861, ss. 1 and 2], a will made by a British subject may, as regards such immovables in the United Kingdom as form part of his personal estate (chattels real), be valid as to form, though not made in accordance with the formalities required by the *lex situs* (p. 544).

Exception 4.—An assignment of a bankrupt's property to the representative of his creditors under the English, or the Irish, or the Scottish Bankruptcy Acts, is an assignment of the bankrupt's immovables, wherever situate (p. 544).

Exception 5.—The limitation to an action or other proceeding in England with regard to a foreign immovable is probably governed by the *lex fori* (p. 545).

Exception 6.—*A will of immovables is in general to be interpreted with reference to the law of the testator's domicile at the time when the will was made, but this presumption may be displaced by any facts, such as the use of technical terms, which indicate that the testator had in mind the law of the place where the immovables are situate or any other law* (p. 547).

Exception 7.—*The question whether a will of immovables has been revoked by the subsequent marriage of the testator is determined by the law of the testator's domicile at the moment of the marriage* (p. 548).

Exception 8.—*The court has no jurisdiction to make an order under the Inheritance (Family Provision) Act, 1938, for the maintenance of a testator's dependants, out of the rents and profits of immovables in England unless the testator was domiciled in England at the date of his death* (p. 549).

Exception 9.—*The question whether a legatee of movables under a will must elect between the legacy and foreign land is determined by the law of the testator's domicile.*

If a testator devises foreign immovable property (foreign land) under a will which on any ground is inoperative to pass the same to the devisee, and also either—

- (1) devises English immovable property (English land) to the heir of the foreign immovable property, or
- (2) being domiciled in England, bequeaths movable property wherever situate to the heir of the foreign immovable property,

the court will not allow such heir to take any benefit under the will as regards (1) the English immovable property, or (2) the movable

property, unless he fulfils the conditions of the will with respect to the foreign immovable property or compensates for his failure to do so, *i.e.*, the heir is put to his election (p. 550).

CHAPTER 23

MOVABLES

1. TANGIBLE AND INTANGIBLE THINGS

RULE 128.—The validity and effect of a transfer or assignment of movables depend on whether the movables are tangible or intangible (p. 557).

2. TRANSFER OF TANGIBLE THINGS

RULE 129.—(1) A transfer of a tangible movable which is valid and effective by the proper law of the transfer (*lex actus*) and by the law of the place where the movable is at the time of the transfer (*lex situs*) is valid and effective in England.

(2) A transfer of a tangible movable which is invalid or ineffective by the *lex actus* and by the *lex situs* of the movable at the time of the transfer is invalid or ineffective in England (p. 558).

RULE 130.—Subject to the Exception hereinafter mentioned, when the proper law of the transfer (*lex actus*) differs from the *lex situs* of the tangible movable at the time of the transfer, the *lex situs* governs the effect of the transfer on the proprietary rights of the parties thereto and of those claiming under them in respect thereof (p. 560).

Exception.—If goods are in transit and their *situs* is casual or not known, a transfer which is valid and effective by its proper law (*lex actus*) will (seem) be valid and effective in England (p. 564).

RULE 131.—A title to goods acquired or reserved in accordance with Rules 129 or 130 will be recognised as valid in England if the goods are removed out of the country where they were situated at the time when such title was acquired, until such title is displaced by a new title acquired in accordance with the law of the country to which they are removed (p. 565).

3. ASSIGNMENT OF INTANGIBLE THINGS

(1) Assignability.

RULE 132.—The question whether a debt or other intangible thing is capable of assignment, and if so under what conditions (so far as they affect the debtor) is governed by the proper law of the debt or the law governing the creation of the thing (p. 570).

(2) *Intrinsic Validity of Assignment.*

RULE 133.—*Subject to the Exception hereinafter mentioned, the intrinsic validity of an assignment of a debt or other intangible thing as between the assignor and the assignee is governed by the proper law (lex actus) of the assignment (p. 573).*

Exception.—*An assignment which is formally valid by the law of the place where it is made (lex loci actus) though not by its proper law (lex actus), is formally valid in England (p. 575).*

(3) *Priorities.*

RULE 134.—*The priority of competing assignments of a debt or other intangible thing is governed by the proper law of the debt or the law governing the creation of the thing (p. 576).*

(4) *Attachment and Garnishment.*

RULE 135.—*The validity and effect of an attachment or garnishment of a debt are governed by the lex situs of the debt (p. 577).*

 CHAPTER 24

CONTRACTS—GENERAL RULES

1. PRELIMINARY

RULE 136.—*In this Digest, the term ‘proper law of a contract’ means the law, or laws, by which the parties intended, or may fairly be presumed to have intended, the contract to be governed; or (in other words) the law, or laws, to which the parties intended, or may fairly be presumed to have intended, to submit themselves (p. 579).*

Sub-Rules for determining the Proper Law of a Contract in accordance with the Intention of the Parties.

SUB-RULE 1.—*When the intention of the parties to a contract, as to the law governing the contract, is expressed in words, this expressed intention determines the proper law of the contract, and, in general, overrides every presumption (p. 584).*

SUB-RULE 2.—*When the intention of the parties to a contract with regard to the law governing the contract is not expressed in words, their intention is to be inferred from the terms and nature of the contract, and from the general circumstances of the case, and such inferred intention determines the proper law of the contract (p. 589).*

SUB-RULE 3.—*In the absence of countervailing considerations, the following presumptions as to the proper law of a contract have effect:*

3. CONTRACTS OF AFFREIGHTMENT

RULE 146.—The term 'law of the flag' means the law of the country whereof the ship wears the flag

When the flag worn by a ship is that of a State including more than one country, the law of the flag means (semble) the law of the country where the ship is registered (p. 664).

RULE 147.—The *validity, interpretation and effect* of a contract of affreightment are governed by the *proper law of the contract*.

If, from the terms or objects of the contract, or from the circumstances under which it was made, *no inference can be drawn as to the law which the parties intended to apply, the law of the flag is the proper law of the contract* (p. 665).

SUB-RULE 1.—The mode of performing particular acts under a contract of affreightment (*e.g.*, the loading or unloading or delivery of goods) may be governed by the law of the country where such acts take place (p. 667).

SUB-RULE 2.—The authority of the master of a ship to deal with the cargo during the voyage, and the manner in which he should execute it, are governed by the law of the flag (p. 668).

4. CONTRACTS FOR THROUGH CARRIAGE OF PERSONS
OR GOODS

RULE 148.—A contract for the carriage of persons or goods from a place in one country to a place in another is presumably governed by the law of the place where it is made; but *this does not apply to contracts of affreightment*.

Provided that a contract for the international carriage by air of persons, luggage or goods is governed by the provisions of the Carriage of Goods by Air Act, 1932, and that the parties to such a contract cannot select as the proper law of the contract any system of law other than that of the Warsaw Convention (p. 669).

5. CONTRACTS OF MARINE INSURANCE

RULE 149.—A *marine insurance policy issued by an underwriter carrying on business in England is governed by English law, except in so far as the policy stipulates that it shall be construed or applied in whole or in part according to the law of a foreign country* (p. 674).

6. AVERAGE ADJUSTMENT

RULE 150.—As amongst the several owners of property saved by a sacrifice or benefited by an expenditure, the liability to general average contribution is governed by the law of the place (called hereinafter the place of adjustment) at which the common voyage terminates (that is to say),—

- (1) when the voyage is completed in due course, by the law of the port of *ultimate destination*; or,

- (2) when the voyage is not so completed, by the law of the place where the voyage is rightly broken up and the ship and cargo part company (p. 675).

RULE 151.—*The parties to a contract of marine insurance are bound by an average adjustment duly taken according to the law of the place of adjustment, in the absence of special agreement to the contrary (p. 677).*

7. BILLS OF EXCHANGE AND PROMISSORY NOTES

RULE 152.—*Any conflict of laws with regard to bills of exchange or promissory notes must be determined in accordance with the provisions of the Bills of Exchange Act, 1882, in so far as that statute applies (p. 678).*

RULE 153.—Where a bill drawn in one country is negotiated, accepted, or payable in another, the rights, duties, and liabilities of the parties thereto are determined as follows :—

- (1) The validity of a bill as regards requisites in form is determined by the law of the place of issue, and the validity, as regards requisites in form, of the supervening contracts, such as acceptance, or indorsement, or acceptance supra protest, is determined by the law of the place where such contract was made.

Provided that—

- (a) Where a bill is issued out of the United Kingdom, it is not invalid by reason only that it is not stamped in accordance with the law of the place of issue;
 - (b) Where a bill, issued out of the United Kingdom, conforms, as regards requisites in form, to the law of the United Kingdom, it may, for the purpose of enforcing payment thereof, be treated as valid as between all persons who negotiate, hold, or become parties to it in the United Kingdom (p. 684).
- (2) Subject to the provisions of this Act, the interpretation of the drawing, indorsement, acceptance, or acceptance supra protest of a bill is determined by the law of the place where such contract is made.

Provided that where an inland bill is indorsed in a foreign country, the indorsement shall, as regards the payer, be interpreted according to the law of the United Kingdom (p. 687).

- (3) The duties of the holder with respect to presentment for acceptance or payment, and the necessity for or sufficiency of a protest or notice of dishonour, or otherwise, are determined by the law of the place where the act is done or the bill is dishonoured (p. 697).

- (4) Where a bill is drawn out of, but payable in, the United Kingdom, and the sum payable is not expressed in the

currency of the United Kingdom, the amount shall, in the absence of some express stipulation, be calculated according to the rate of exchange for sight drafts at the place of payment on the day the bill is payable (p. 699).

- (5) Where a bill is drawn in one country and is payable in another, the due date thereof is determined according to the law of the place where it is payable (p. 700).

RULE 154.—Where a bill is dishonoured, the measure of damages, which shall be deemed to be liquidated damages, shall be as follows :—

- (1) The holder may recover from any party liable on the bill, and the drawer who has been compelled to pay the bill may recover from the acceptor, and an indorser who has been compelled to pay the bill may recover from the acceptor, or from the drawer, or from a prior indorser,—
 - (a) the amount of the bill :
 - (b) interest thereon from the time of presentment for payment if the bill is payable on demand, and from the maturity of the bill in any other case :
 - (c) the expenses of noting, or, when protest is necessary, and the protest has been extended, the expenses of protest.
- (2) In the case of a bill which has been dishonoured abroad, in lieu of the above damages, the holder may recover from the drawer or an indorser, and the drawer or an indorser who has been compelled to pay the bill may recover from any party liable to him, the amount of the re-exchange, with interest thereon until the time of payment.
- (3) Where by this Act interest may be recovered as damages, such interest may, if justice require it, be withheld wholly or in part; and where a bill is expressed to be payable with interest at a given rate, interest as damages may or may not be given at the same rate as interest proper (p. 701).

8. NEGOTIABLE INSTRUMENTS GENERALLY

RULE 155.—Any instrument for securing the payment of money, *e.g.*, a bill of exchange or a Government bond, whether *issued in England or elsewhere*, may *in England* be made a negotiable instrument either—

- (1) by custom of the mercantile world in England, which custom may, if well established, be of recent origin; or
- (2) by Act of Parliament.

A 'negotiable instrument' means an instrument for securing the payment of money which has the following characteristics :—

- (a) The property in the instrument and all rights under it pass to a bona fide holder for value by *indorsement and delivery or by mere delivery* to him.

- (b) In the hands of such holder the property in and the rights under such instrument are not affected by defects in the title of or defences available against the claims of any prior transferor or holder (p. 705).

RULE 156.—No instrument, whether issued in England or elsewhere, is a negotiable instrument in England unless it is made so by English law, i.e., either by the custom of the mercantile world in England, or by Act of Parliament (p. 705).

9. INTEREST

RULE 157.—The liability to pay interest, and the rate of interest payable in respect of a debt, e.g., in respect of a loan, is determined by the proper law of the contract under which the debt is incurred, e.g., by the proper law of the contract under which the loan is made (p. 708).

10. CONTRACTS THROUGH AGENTS

Contract of Agency.

RULE 158.—An agent's authority, as between himself and his principal, is governed by the law with reference to which the agency is constituted, which is in general the law of the country where the relation of principal and agent is created (p. 710).

Relation of Principal and Third Party.

RULE 159.—When a principal in one country contracts in another country through an agent, the rights and liabilities of the principal as regards third parties are, in general, governed by the law of such other country, i.e., by the proper law of the contract concluded between the agent and the third party (p. 712).

11. FOREIGN CURRENCY OBLIGATIONS

(1) *General: The Nominalistic Principle.*

RULE 160.—A debt expressed in the currency of any country involves an obligation to pay the nominal amount of the debt in whatever is legal tender at the time of payment according to the law of the country in the currency of which the debt is expressed (*lex monetæ*), irrespective of any fluctuations of the value of that currency in terms of sterling or any other currency, of gold, or of any commodities which may have occurred between the time when the debt was incurred and the time of payment (Principle of Nominalism).

If damages are to be assessed in terms of a given currency, any fluctuations in the value of that currency which may have occurred after the event giving rise to the claim for damages (breach of contract, tort) must be disregarded (p. 718).

(2) *Revalorisation of Debts.*

RULE 161.—*In whatever currency a debt be expressed, it is for the law governing the transaction, from which the debt arises, e.g., in the case of a contractual debt for the proper law of the contract, to determine whether and to what extent the debtor is liable, in the event of a depreciation of the currency, to make an additional payment to the creditor by way of revalorisation (p. 725).*

(3) *Gold and other Protective Clauses.*

RULE 162.—*The validity, the meaning and the effect of a gold clause in a contract are determined by the proper law of the contract.*

The same applies to any other contractual clauses by which the parties seek to negative the effect of the nominalistic principle, i.e., to safeguard the creditor against the risk of a depreciation of the currency in which the debt is expressed, or to safeguard the debtor against the risk of an appreciation of that currency.

Where English law is the proper law of a contract, any reference therein to gold is presumed to be a gold value clause, i.e., a definition of the means by which the amount of the indebtedness is to be measured and ascertained, not a definition of the means by which the debt is to be discharged, and to give rise to an obligation to pay in legal tender of the stipulated currency an amount which, on the day of payment, will be sufficient to buy gold coins corresponding to the nominal amount of the debt. It is not an obligation to pay gold coins (p. 727).

(4) *Determination of the Money of Account (Money of Contract).*

RULE 163.—*Where there is doubt as to the currency in which a debt is expressed (money of account, money of contract), and especially where the expression used for the denomination thereof connotes the currencies of two or more States (for example, United States and Canadian dollars, United Kingdom and Australian pounds, French and Swiss francs), the money of account must be ascertained by construing the contract in accordance with its proper law.*

Where English law is the proper law of a contract, the parties are presumed to have intended to measure the obligation in the currency of the country in which the debt is payable.

(Semble) The currency in which damages for breach of contract are to be assessed, must be ascertained in accordance with the proper law of the contract.

(Semble) Where English law is the proper law of a contract, damages for its breach must be assessed in the currency in which the loss was incurred, unless a contrary intention emerges from the contract itself (p. 784).

(5) *Discharge of Foreign Currency Obligations.*

RULE 164.—Irrespective of the currency in which a debt is expressed or damages are calculated (money of account), the currency in which the debt or liability can and must be discharged (money of payment) is determined by the law of the country in which such debt or liability is payable, but (semble) the rate of exchange at which the money of account must be converted into the money of payment is determined by the proper law of the contract or other law governing the liability.

If a sum of money expressed in a foreign currency is payable in England, it may be paid either in units of the money of account or in sterling at the rate of exchange at which units of the foreign legal tender can, on the day when the money is payable, be bought in London in a recognised and accessible market, irrespective of any official rate of exchange between that currency and sterling. *Quære*, whether this rate of exchange also applies if English law is not the proper law of the contract (p. 740).

(6) *Proceedings in an English Court.*

RULE 165.—(1) An English court cannot give judgment for the payment of an amount in foreign currency. A debt which is expressed and damages which are calculated in a foreign currency must therefore be converted into sterling for the purposes of litigation in England, irrespective of the place at which they are payable and irrespective of the law governing the substance of the obligation.

(2) For the purpose of litigation in England damages for breach of contract must be converted into sterling with reference to the rate of exchange prevailing on the day when the contract was broken and damages for tort with reference to the rate of exchange prevailing on the day when the loss was incurred for which compensation is claimed.

(3) Whether a debt expressed in a foreign currency must, for the purpose of litigation in England, be converted into sterling with reference to the rate of exchange prevailing on the day when the debt was payable or with reference to the day of the judgment is an open question (p. 744).

(7) *Exchange Control Legislation.*

RULE 166.—A contractual obligation may be invalidated or discharged by exchange control legislation if—

- (1) such legislation is part of the proper law of the contract; or
- (2) it is part of the law of the place of performance; or
- (3) it is part of English law and the relevant statute or statutory instrument is intended to apply to the transaction in question; or
- (4) (semble) its enforcement is required by British interests of State, especially if it was enacted in a foreign country by

virtue or in fulfilment of an obligation imposed by a Treaty to which the United Kingdom is a party.

(*Semble*) Foreign currency restrictions will not be enforced in England if their enforcement would be equivalent to a confiscation of property situated outside the territory in which the restrictions are enforced.

The mere fact that such currency restrictions form part of the law of the country in which the debtor resides or carries on business or of which he is a national does not invalidate or discharge his obligation (p. 750).

CHAPTER 26

QUASI-CONTRACT

RULE 167.—*The rights and obligations of the parties to a quasi-contractual relationship are determined in accordance with the proper law of the quasi-contractual relationship. Semble, the proper law of the quasi-contractual relationship is determined as follows :—*

- (1) *if the claim arises out of a contract, the proper law is the proper law of the contract;*
- (2) *if the claim arises in relation to an immovable (land), the proper law is the law of the country where the immovable is situate (lex situs);*
- (3) *if the claim arises in any other circumstances, the proper law is the law of the country where the enrichment giving rise to such a claim occurs (p. 754).*

CHAPTER 27

MARRIAGE

1. VALIDITY OF MARRIAGE

RULE 168.—Subject to the Exceptions hereinafter mentioned, a marriage is valid when

- (1) each of the parties has, according to the law of his or her respective domicile, the capacity to marry the other; and
- (2) any one of the following conditions as to the form of celebration is complied with (that is to say) :
 - (i) if the marriage is celebrated in accordance with the local form; or
 - (ii) if the parties enjoy the privilege of extritoriality, and the marriage is celebrated in accordance with any

form recognised as valid by the law of the State to which they belong; or

- (iii) if the marriage [being between British subjects?] is celebrated *as nearly as possible* in accordance with the requirements of the English common law in a country where the use of the local form is impossible; or
- (iv) if the marriage is celebrated in accordance with the provisions of the Foreign Marriage Act, 1892, s. 22, *between parties of whom at least one is a member of His Majesty's Forces serving in any foreign territory or employed in such territory in such other capacity as may be prescribed by Order in Council*; or
- (v) if the marriage, being between parties, one of whom at least is a British subject, is celebrated outside the United Kingdom in accordance with the provisions of, and the form required by, the Foreign Marriage Acts, 1892-1947 (p. 758).

Exception 1.—A marriage is not valid if either of the parties, being a descendant of George II, marries in contravention of the Royal Marriage Act, 1772 (p. 777).

Exception 2.—A marriage is, *probably*, not valid if either of the parties is, according to the law of the country where the marriage is celebrated, under an incapacity to marry the other (p. 778).

RULE 169.—Subject to the Exceptions hereinafter mentioned, no marriage is valid which does not comply, as to both (1) the capacity of the parties, and (2) the form of the marriage, with Rule 168 (p. 779).

Exception 1.—The validity of a marriage celebrated in England between persons of whom the one has an English, and the other a foreign, domicile is not affected by any incapacity which, though existing under the law of such foreign domicile, does not exist under the law of England (p. 784).

Exception 2.—A marriage celebrated in England is not invalid on account of any incapacity which, though imposed by the law of the domicile of both or of either of the parties, is *penal* (p. 786).

Exception 3.—Any marriage is valid which is made valid by Act of Parliament (p. 786).

2. ASSIGNMENT OF MOVABLES IN CONSEQUENCE OF MARRIAGE

RULE 170.—Where there is a marriage contract or settlement, the terms of the contract or settlement govern the rights of husband

and wife in respect of all movables within its terms which are then *possessed* or are afterwards acquired (p. 787).

SUB-RULE 1.—The marriage contract or settlement will be construed with reference to the proper law of the contract, *i.e.*, in the absence of reason to the contrary, with reference to the law of the matrimonial domicile (p. 789).

SUB-RULE 2.—The parties may *either explicitly or implicitly* make it part of the contract or settlement that their rights shall be subject to some other law than the law of the matrimonial domicile, in which case their rights will be determined with reference to such other law (p. 798).

SUB-RULE 3.—The proper law of the contract will, in general, decide whether any particular movable (e.g., any future acquisition) is included within the terms of the marriage contract or settlement (p. 794).

SUB-RULE 4.—The *interpretation* or effect of the marriage contract or settlement is not varied by a subsequent change of domicile (p. 794).

RULE 171.—Where there is no marriage contract or settlement, and where no subsequent change of domicile on the part of the parties to the marriage has taken place, the rights of husband and wife to each other's movables, whether possessed at the time of the marriage or acquired afterwards, are governed by the law of the matrimonial domicile, without reference to the law of the country where the marriage is celebrated, or where the wife is domiciled before marriage (p. 795).

RULE 172.—Where there is no marriage contract or settlement, and where there is a subsequent change of domicile, the rights of husband and wife to each other's movables, both *inter vivos* and in respect of succession, are governed by the law of the new domicile, *except in so far as vested rights have been acquired under the law of the former domicile* (p. 796).

CHAPTER 28

TORTS

RULE 173.—Whether an act done in a foreign country is or is not a tort (i.e., a wrong for which an action can be brought in England) depends upon the combined effect of the law of the country where the act is done (lex loci delicti commissi) and of the law of England (lex fori) (p. 799).

RULE 174.—An act done in a foreign country is a tort, and actionable as such in England, only if it is both—

(1) actionable as a tort, according to English law, or, in other

words, is an act which, if done in England, would be a tort; and

- (2) not justifiable, according to the law of the foreign country where it was done (p. 800).

SUB-RULE.—An act done in a foreign country which, though not justifiable under the law of that country at the moment when it was done, has since that time been the subject of an act of indemnity, passed by the legislature of such country *or of the United Kingdom*, is not a tort (p. 807).

CHAPTER 29

ADMINISTRATION IN BANKRUPTCY

RULE 175.—The administration in bankruptcy of the property of a bankrupt which has passed to the trustee is governed by the law of the country where the bankruptcy proceedings take place (*lex fori*) (p. 808).

CHAPTER 30

ADMINISTRATION AND DISTRIBUTION OF DECEASED'S MOVABLES

1. ADMINISTRATION

RULE 176.—The administration of a deceased person's movables is governed wholly by the law of the country *from which* the administrator derives his authority to collect them, *i.e.*, in effect, *normally* by the law of the country where the administration takes place (*lex fori*).

Such administration is not affected by the domicile of the deceased.

In this Rule, the term 'administration' does not include distribution (p. 811).

2. DISTRIBUTION

RULE 177.—The distribution of the distributable residue of the ~~movables~~ of the deceased is (in general) governed by the law of the deceased's domicile (*lex domicilii*) at the time of his death (p. 814).

CHAPTER 31

SUCCESSION TO MOVABLES

1. INTESTATE SUCCESSION

RULE 178.—The succession to the movables of an intestate is governed by the law of his domicile at the time of his death, without any reference to the law of the country where

- (1) he was born; or
- (2) he died; or
- (3) he had his domicile of origin; or
- (4) the movables are, in fact, situate at the time of his death (p. 817).

2. TESTAMENTARY SUCCESSION

(1) *Capacity.*

RULE 179.—*The law of the testator's domicile at the time of making his will determines whether or not he has personal testamentary capacity* (p. 818).

SUB-RULE.—*A legatee has capacity to receive a legacy of movables if he has capacity either by the law of his domicile or by the law of the testator's domicile* (p. 820).

(2) *Formal Validity.*

RULE 180.—Any will of movables which is *formally* valid according to the law of the testator's domicile at the time of his death is valid (p. 821).

RULE 181.—Any will of movables which is *formally* invalid according to the law of the testator's domicile at the time of his death is (subject to the Exceptions hereinafter mentioned, and to the effect of Rule 186) invalid (p. 822).

Exception 1.—Every will and other testamentary instrument made out of the United Kingdom by a British subject (whatever may be the domicile of such person at the time of making the same or at the time of his or her death) shall, as regards personal estate, be held to be well executed for the purpose of being admitted in England and Ireland to probate, and in Scotland to confirmation, if the same be made according to the forms required either

- [1] by the law of the place where the same was made; or
- [2] by the law of the place where such person was domiciled when the same was made; or

- [3] by the laws then in force in that part [if any] of His Majesty's dominions where he had his domicile of origin (p. 822).

Exception 2.—Every will and other testamentary instrument made within the United Kingdom by any British subject (whatever

may be the domicile of such person at the time of making the same or at the time of his or her death) shall, as regards personal estate, be held to be well executed, and shall be admitted in England and Ireland to probate, and in Scotland to confirmation, if the same be executed according to the forms required by the laws for the time being in force in that part of the United Kingdom where the same is made (p. 826).

(3) *Material or Essential Validity.*

RULE 182.—*The material or essential validity of a will of movables or of any particular gift of movables contained therein is governed by the law of the testator's domicile at the time of his death (p. 827).*

SUB-RULE.—The law of a deceased person's domicile at the time of his death, in general, determines whether, as to his movables, he does or does not die intestate, *whether wholly or partially* (p. 830).

(4) *Interpretation.*

RULE 183.—Subject to the Exception hereinafter mentioned, a will of movables is (in general) to be interpreted with reference to the law of the testator's domicile at the time when the will is made (p. 831).

Exception.—Where a will is expressed in the technical terms of the law of a country where the testator is not domiciled, the will should be *interpreted* with reference to the law of that country (p. 832).

(5) *Election.*

RULE 184.—*The question whether a legatee of movables under a will is put to his election between benefits under and outside the will is governed by the law of the testator's domicile at the date of his death (p. 833).*

(6) *Revocation.*

RULE 185.—Subject to the Exceptions hereinafter mentioned and to the effect of Rule 186, the question whether a will of movables has been revoked depends on the law of the testator's domicile at the date of the alleged act of revocation (p. 835).

Exception 1.—If the alleged act of revocation is the execution of a later will or codicil, the question whether the later instrument revokes the first depends entirely on whether the second instrument is valid in accordance with the foregoing Rules (p. 836).

Exception 2.—The question whether a will is revoked by the subsequent marriage of the testator depends on the law of the testator's domicile at the moment of the marriage (p. 837).

INTRODUCTION

THE purpose of this Introduction, which forms an integral part of this work, is to deal with three topics: first, the nature of the subject treated of in this Digest, and generally included under the title of the conflict of laws or of private international law; secondly, the proper method for the treatment of this subject; and thirdly, the general principles underlying the rules or maxims which collectively make up this branch of law.¹

1. NATURE OF THE SUBJECT

Most of the cases which occupy an English court are in every respect of a purely English character; the parties are Englishmen domiciled in England, and the cause of action arises wholly in England, as where A, a London tradesman, sues X, a citizen of London, for the price of goods sold and delivered in London. When this is so, every act done, or alleged to be done, by either of the parties clearly depends for its legal character on the ordinary rules of English law.

Cases, however, frequently come before our courts which contain some foreign element; the parties, one or both of them, may be of foreign nationality or domicile, as where an Italian sues a Frenchman for the price of goods sold and delivered at Liverpool; the cause of action, or ground of defence, may depend upon transactions taking place wholly or in part in a foreign country, as where A sues X for an assault at Paris, or on a contract made in France and broken in England, or where X pleads in his defence

¹ Cheshire, *Private International Law* (3rd ed. 1947) pp. 1-19; Westlake, *Private International Law* (7th ed. 1925) pp. 1-7; Wolff, *Private International Law* (1945) pp. 1-18; Harrison, *Jurisprudence and the Conflict of Laws* (ed. Lefroy 1919) pp. 98-148; Beale, *Conflict of Laws*, I (1935) pp. 1-86; W. W. Cook, *The Logical and Legal Bases of the Conflict of Laws* (1942) pp. 3-47, 48-70; (1943) 21 Can.Bar Rev. 249; Lorenzen, Chap. 1; Falconbridge, Chaps. 1 and 2; Yntema, (1927) 37 Yale L.J. 468; Heilman, (1934) 43 Yale L.J. 1082; De Sloovere, (1928) 41 Harv.L.R. 421; Willis, (1936) 14 Can.Bar Rev. 1-21; Neuner, (1942) 20 Can.Bar Rev. 479; Cheatham, (1945) 58 Harv.L.R. 361; Rabel, *Conflict of Laws*, I (1945) pp. 3-41; Nussbaum, *Principles of Private International Law* (1943) pp. 3-66; Beckett, *British Year Book of International Law*, 7 (1926) pp. 73-96; Llewellyn Davies, *Recueil de l'Académie Internationale de la Haye* 62 (1937, IV) 427-546; Foster, *ibid.* 65 (1938, III) 399-559; Maury, *ibid.*, 57 (1936, III) pp. 329-457; Ago, *ibid.*, 58 (1936 IV) pp. 247-311; Arminjon, *ibid.*, 21 (1928, I) pp. 431-509; Niboyet, *Traité de droit International Privé Français*, I (1938) pp. 5-83, ss. 1-66; Vol. 3 (1944) pp. 1-34, ss. 840-857; Bartin, *Principes de Droit International Privé*, I (1930) pp. 1-117; Raape, *Deutsches Internationales Privatrecht*, I (1938) pp. 1-106; Raape, in Staudinger, *Kommentar zum Bürgerlichen Gesetzbuch* (9th ed. 1931) vi, Part 2, pp. 1-62; Schnitzer, *Handbuch des Internationalen Privatrechts*, I (1944) pp. 1-80.

a discharge under the French bankruptcy law; lastly, the transactions in question, though taking place wholly in England, may, in some way, have reference to the law or customs of a foreign country; this is so, for instance, when A wishes to enforce the trusts of a marriage settlement executed in England but which on the face of it, or by implication, refers to French or Italian law.

Whenever a case containing any foreign element calls for decision, the judge before whom it is tried must, either expressly or tacitly, find an answer to, at least, two questions before he can decide the dispute.

FIRST QUESTION.—Is the case before him one which any English court has, according to the law of England, a right to determine? ²

The primary business of English tribunals is to decide English disputes. There clearly may be matters taking place in a foreign country, with which no English court has, according to the law of England, any concern whatever; thus no English tribunal will entertain an action for the recovery of land in any other country than England.³ When, therefore, a case coming before an English judge contains a foreign element, he must determine whether it is one on which he has a right to adjudicate. This first question is a question of jurisdiction (*forum*).

SECOND QUESTION.—What (assuming the question of jurisdiction to be answered affirmatively) is the body of law with reference to which the rights of the parties are, according to the principles of the law of England, to be determined? ⁴

Is the judge, that is to say, to apply to the matter in dispute (e.g., the right of A to obtain damages from X for an assault in Paris) the ordinary rules of English law applicable to like transactions taking place in England, or must he, because of the 'foreign element' in the case, apply to its decision the rules of some foreign law, e.g., the provisions of French law as to assaults?

This second question is an inquiry not as to jurisdiction, but as to the choice of law (*lex*).⁵

Each of these inquiries, be it noted, must be answered by any judge, English or foreign, in accordance with definite principles and, by an English judge, sitting in an English court, in accordance with principles or rules to be found in the law of England.

² See Chaps. 3 to 8, *post*.

³ *British South Africa Co. v Companhia de Moçambique* [1893] A.C. 602, *post*, Rule 20, p. 141.

⁴ See Chaps. 18 to 32, *post*.

⁵ It is possible that the judge may be called upon to answer a third question, if one of the parties bases his claim, or defence, upon the decision of a foreign court. The question which then arises and forms the third possible preliminary inquiry may be thus stated: Is the case one with which, according to the principles upheld by English courts, the foreign court delivering the judgment had a right to deal? This, again, is a question of jurisdiction. See Chaps. 11 to 17, *post*. For the sake of simplicity it will be well for the moment to leave this third and occasional inquiry as much as possible out of sight.

These rules make up that department of English law which deals with the conflict of laws. ✓

It makes no difference for our present purpose whether these principles are the result of direct legislation, or are created by judicial decisions. Thus the rule regarding the devolution of real and personal property, depending as it now does upon the Administration of Estates Act, 1925; the principle that a simple contract is not valid without a consideration; or the doctrine, created as it is by judicial legislation, that the validity of a marriage ceremony, wherever made, depends on the law of the country where the marriage is celebrated, are each of them, however different in character and origin, rules enforced by English courts, and therefore each of them both laws and part of the law of England.

The law of England, however, taken in its most extended and most proper sense, may, in common with the law of every civilised country, e.g., of Italy or of France, be divided into two branches.

The first branch of the law of England may be described, with sufficient accuracy for our present object, as the body of rules which regulate the rights of persons domiciled in England and determine the legal effect of transactions taking place between them within the limits of England. They may, therefore, for the sake of distinction from the other branch of English law, be called the 'domestic', 'internal' or 'local' law of England. This domestic law constitutes indeed so much the oldest and most important part of English law that it has been constantly taken to be, and treated as, the whole of the law of the land. Blackstone's Commentaries, for example, though written with the avowed object of describing the whole of the 'law of England', contain no mention of any rules which do not belong to the domestic or local law. Acts of Parliament, such as the Administration of Estates Act, 1925,⁶ similarly often ignore entirely such rules. With this branch of the law, important though it be, the writer on the conflict of laws has no direct concern.

The second branch of the law of England consists of rules which do not directly determine the rights or liabilities of particular persons, but which determine the limits of the jurisdiction to be exercised by the English courts taken as a whole, and also the choice of the body of law, whether the domestic law of England or the law of any foreign country, by reference to which English

⁶ Thus the words 'an intestate' in s. 46 of the Act do not mean any intestate but must be understood to signify any intestate whose property falls to be distributed under English law. Similarly, in s. 176 of the Supreme Court of Judicature (Consolidation) Act, 1925, the words 'a husband' and 'a wife' must not be taken literally, but as denoting only such persons as are held subject by reason of domicile or otherwise to the divorce jurisdiction of the English court. For choice of law clauses in English statutes, see below, p. 10, and see Morris (1946) 62 L.Q.R. 170.

courts are to determine the different matters brought before them for decision.

These rules about jurisdiction and about the choice of law, which make up the second branch of the law of England, are directions for the guidance of the judges.

As to purely English transactions no such guidance can be needed. The rules in question, therefore, must have reference to cases which contain, or may contain, some foreign element. If, for the sake of convenience, we dismiss for the moment from our attention all questions of jurisdiction, this second branch of the law of England may be described as that part of the law of England which provides directions for the judges when called upon to adjudicate upon any question in which the rights of persons not domiciled in England, or the effect of acts done, or to be done, in a foreign country, or with reference to a foreign law, require determination. These directions determine whether a given class of cases (e.g., cases as to contracts made in foreign countries) must be decided wholly by reference to the domestic law of England, or either wholly, or in part, by reference to the law of some foreign country, e.g., France. These directions for the choice of law may provide either that the domestic law of England shall, under certain circumstances, govern acts taking place abroad, e.g., the proper execution of a will made in France by a testator domiciled in England, or that foreign law shall, under certain circumstances, govern acts done in England, e.g., the proper execution of a will made in England by a testator domiciled in France.

The term 'law of England' may thus, on the one hand, mean every rule enforced or recognised by the English courts, including the rules followed by English judges as to the limits of jurisdiction and as to the choice of law. This is the sense in which the expression is used in the statement that 'every case which comes before an English court must be decided in accordance with the law of England'. The term 'law of England' may, on the other hand, mean the local or domestic law of England excluding the rules followed by English judges as to the limits of jurisdiction or as to the choice of law. This is the sense in which the expression is used in the statements that 'the validity of a will executed in England by a Frenchman domiciled in France is determined by English judges not in accordance with the law of England but in accordance with the law of France', or that 'a will of freehold lands in England, though executed by a foreigner abroad, will not be valid unless executed in conformity with the law of England', i.e., with the provisions of the Wills Act, 1837.

This ambiguity of phraseology is made plain to anyone who weighs the meaning of the well-known dictum of Lord Stowell with regard to the law regulating the validity of a marriage celebrated in a foreign country. The question, it is therein laid down,

'being entertained in an English court, it must be adjudicated according to the principles of English law, applicable to such a case. But the only principle applicable to such a case by the laws of England is, that the validity of Miss Gordon's marriage rights must be tried by reference to the law of the country where, if they exist at all, they had their origin. Having furnished this principle, the law of England withdraws altogether, and leaves the legal question to the exclusive judgment of the law of Scotland.'

The ambiguity affecting the term 'law of England' affects the term law of France, law of Italy, and the like, and where these terms are used, the reader should always carefully consider whether the expression is intended to include or to exclude the rules followed by the courts of the given country, e.g., France, as to the choice of law.⁷

The general character of our subject being then understood, there remain several subordinate points which deserve consideration.

(1) The branch of law containing rules for the selection of law is in England, as elsewhere, of later growth than the domestic law. The development of rules about the conflict of laws implies the existence of different countries governed by different laws or the existence within the same territory of different racial or religious communities governed by different laws. It was not until the eighteenth century, when the common law courts extended their jurisdiction to cases involving a foreign element, and when the law merchant, which had formerly been applied in these cases, became a part of English domestic law, that the need for rules of the conflict of laws arose in England, and the working out of the doctrines now prevalent is essentially the work of the nineteenth and twentieth centuries.⁸

(2) The growth of rules for the choice of law is the necessary result of the peaceful existence of independent nations combined with the prevalence of commercial intercourse. From the moment that these conditions are realised, the judges of every country are compelled by considerations of the most obvious convenience to exercise a choice of law, or, in other words, to apply foreign laws.

⁷ *Dalrymple v. Dalrymple* (1811) 2 Hagg.Cons. 54, 58, 59, per Lord Stowell, then Sir William Scott. And see *Holman v. Johnson* (1775) 1 Cowp 341, 343, per Lord Mansfield; *Collier v. Rivaz* (1841) 2 Curt. 855, 858, judgment of Sir H. Jenner.

⁸ See post, p. 47.

⁹ For the history of the conflict of laws, see Story, pp. 2-20, Westlake, pp. 7-22, Cheshire, pp. 22-57, Wolff, pp. 19-51; Llewelyn Davies (1937) 18 B.Y.B.I.L. pp. 49-78; *Recueil de l'Académie Internationale de la Haye* 62 (1937, IV) pp. 442-488; Beale III, pp. 1880-1975; Sack in *Law, A Century of Progress*, III (1935) pp. 342-454; Lorenzen Chap. 7; Gibb, *International Private Law in Scotland in the Sixteenth and Seventeenth Centuries*, in (1927) 39 Jur Rev. pp. 369-407; Meyers, *Hague Recueil* 49 (1934, III) pp. 547-586; Gutzwiller, *ibid.*, 29 (1929, IV) pp. 291-398; Laine, *Introduction au Droit International Privé*, 2 Vols., 1888, 1892; Niboyet, *Traité de Droit International Privé*, III (1944) pp. 40-196.

That this is so may be seen from an examination of the only courses which, when a case involving any foreign element calls for decision, are, even conceivably, open to the courts of any country forming part of the society of civilised nations.

The courts of any country, e.g., of England, might, on the one hand, decline to give any decision on cases involving any foreign element, i.e., cases either to which a foreigner was a party, or which were connected with any transaction taking place wholly, or in part, beyond the limits of England, and so obviate any choice of law.

This course of action would, however, exclude Englishmen no less than foreigners from recourse to English tribunals. For an Englishman who had entered into a contract with a Scotsman at Edinburgh, or with a Frenchman at Paris, would, if the principle suggested were rigidly carried out, be unable to bring an action in the English courts for a breach of the contract. Further, were the same principle adopted by the courts of other countries, neither party to such a contract would have any remedy anywhere for its breach.

The English courts might, on the other hand, determine to decide every matter brought before them, whatever the cause of action and wherever it arose, solely with reference to the domestic law of England, and hence determine the effect of things done in Scotland or in France exactly as they would do if the transactions had taken place between Englishmen in England.

Difficulties about the choice of law would, by the adoption of this principle, be undoubtedly removed, since the sole rule of selection would be, that the domestic law of England must in all cases be selected, or, in other words, that there must be no choice at all. Gross injustice would, however, result as well to Englishmen as to foreigners.

It follows, therefore, that the courts of every civilised country are constrained, not only by logical, but by practical necessity, to concern themselves with the choice of law, and must, from time to time, apply now their own domestic law to situations arising abroad, now the law of some foreign State to situations arising, at least in part, at home.

The above considerations afford a complete answer to the question, once much discussed¹⁰: Is, or is not the enforcement of foreign law a matter of 'comity'?

It is clear that the motive for giving effect to, e.g., French law as regards a contract made in France is not the desire to show

¹⁰ Compare Phillimore, s 9; Story, ss. 33, 38; Beale, I, pp. 53-55; and for judicial dicta, see *Geyer v. Aguilar* (1798) 7 T.R. 681, 695; *Castrique v. Imrie* (1870) L.R. 4 H.L. 414; *Dawkins v. Simonetti* (1880) 50 L.J.P. & M. 80. See also *The Johannes Christoph* (1854) 2 Ecc. & Ad., 93, 98, 100. For a qualified disapproval, see *Fenton v. Livingstone* (1859) 3 Macq. 497, 518, per Lord Wensleydale.

courtesy to the French Republic, but the impossibility of determining the rights of the parties to the contract justly if that law be ignored.

(3) The department of law, whereof we have been considering the nature, has been called by various names, none of which is free from objection.

(By many writers it has been designated as the 'conflict of laws'. The name is not altogether satisfactory. It covers only that part of the subject which deals with the choice of law to the exclusion of the issue of jurisdiction, which is in our view an essential part of the subject. The only 'conflict' possible is, moreover, that in the mind of the judge who has to decide which system of law to apply to the facts before him, and in many cases the proper choice must be so simple that the term is quite out of place as a description of his mental attitude. There is much to be said for preferring the simpler 'choice of law', the term 'choice' sufficiently indicating the existence of the possibility of applying one or other system of law to the facts of the case under consideration. Retention of the title 'conflict of laws' is justified merely by the obvious inconvenience of changing the name, which through the example of Story has won a certain degree of authority.

Some modern English authors have adopted the name Private International Law. Westlake's view¹¹ is that the subject falls under international law, denoting 'the department which treats of the selection to be made in each action between various national jurisdictions and laws'. The obvious objection to this use of the term 'international' is that it is a very different employment of the word from its normal meaning in the regular phrase 'international law', which denotes the species of law governing the relations between nations. Many attempts have been made to link up these two departments of law, either by establishing an international division of competences based upon territoriality, or upon the division of sovereignty over land at home and nationals at home or abroad, but all these attempts have failed.^{11a})

The English courts, with whose action we are alone concerned, do not adopt this mode of considering questions regarding the choice of law and the competence of tribunals. They consider laws not from the point of view of the sovereign authority whence they emanate, but rather in their relation to the people to whom and the matters to which they apply, and, so far as any definite theory can be said to guide their action, it is based on the desire to apply to any given set of circumstances that legal system which will afford results most in agreement with their views of convenience, equity, and public policy. For English courts, therefore, our

¹¹ Private International Law, p. 5.

^{11a} See Lapstein, *Transactions of the Grotius Society* 27 (1942) pp 142-175; 29 (1944) pp. 51-83.

subject is without any vital connection with international law as ordinarily understood, and accordingly it is better not to give it a name which inevitably suggests such connections.

Other names such as 'comity', the 'local limits of law', 'inter-municipal law',¹² and the like, have not received wide acceptance, while such phrases as 'the extra-territorial effect of law', or 'the extra-territorial recognition of rights', are rather descriptions than names.¹³ (There is, however, general agreement among English authorities that the vital questions to be considered are the choice of the system of law to be applied to cases which come before the courts for decision when they contain some foreign element, and the rules which should be maintained by the courts as to the limits of the jurisdiction to be exercised by English or foreign courts respectively.)

2. METHOD OF TREATMENT

The subject of the conflict of laws has been treated according to two different methods, which may, for the sake of distinction, be termed respectively the 'theoretical method' and the 'positive method'.

The theoretical method has been adopted by a body of Continental writers, by Beale in the United States, and by the American Restatement of the Conflict of Laws. It consists, broadly speaking, in an attempt to establish an ideal system either by a process of comparative study, or according to a territorial division of competences, or by reference to the nature of the rules of domestic law, which are supposed to contain their own limitations in space.

Authors who pursue this method necessarily combine the inquiry what are, with the different inquiry what ought to be, the principles of private international law.

(The advantages of the theoretical mode of treatment are in danger of being underrated by English lawyers. The two great merits of the method are, first, that it keeps before the minds of students the agreement between the different countries as to the principles to be adopted for the choice of law; and next, that it directs notice to the consideration which English lawyers are apt to forget: that the choice of one system of law rather than of another for the decision of a particular case is dictated by reasons of logic, of convenience, or of justice. Whether, for example, the legal effect of a given transaction ought to be tested by the *lex actus*, the *lex domicilii*, or the *lex fori*, is a matter to be discussed on intelligible grounds of principle.)

The defects of the theoretical method are obvious. It is not, indeed, open to the objection that it takes no account of laws as

¹² Harrison, *Jurisprudence and the Conflict of Laws*, pp. 180, 181.

¹³ See also Beale, I, pp. 12-16.

they actually exist, for it is normally¹⁴ based upon careful investigation into the rules as to the conflict of laws which in fact prevail in given countries, *e.g.*, France or the United States. But its results are essentially subjective, often diverge widely, and in no case represent faithfully the laws of any given country. No agreement has been achieved even as to fundamental principles, and efforts in Europe to adopt rules generally acceptable on special topics such as marriage have had little success.

The positive method is followed by a whole body of authors who treat the rules of the choice of law in the main as part of the municipal law of any given country, *e.g.*, England or France, where they are enforced.)

This school starts from the fact that the rules for determining the conflict of laws are themselves 'laws' in the strict sense of that term, and that they derive their authority from the support of the sovereign in whose territory they are enforced. A writer of this class may with perfect consistency either limit his inquiries to the law of one country only, as, for instance, of England, or may extend his investigations to the ascertainment of the laws (with reference, of course, to his special topic) of Italy, of France, or of all the countries making up the civilised world. But, whatever be the limits imposed on the scope of their inquiries by writers who follow the positive method, the object of their labours is always in character the same. (Their aim is to ascertain primarily what are the rules contained in the law of a given country with regard to a special topic, namely, the application of domestic and foreign law to cases involving a foreign element.) When they have done this, they may proceed to formulate the fundamental principles on which the rules in question avowedly or tacitly rest. But their task ends here; they do not seek to construct a common law for the world; their work is that of analysis and description, not of synthesis and philosophical speculation.

In this treatise, which is essentially an exposition of one section of English law, the positive method is necessarily adopted. The systematic attempt, however, to state what the law is, is in no way inconsistent with an exposition of the principles on which a rule rests. In the ascertainment of these rules, there will moreover be found opportunities for the comparison of other systems of law and for recourse to the speculations of masters of the theoretical method. Whenever, as often happens, neither the statute book nor the reports contain any authoritative direction for the decision of a particular class of cases, we must recur to the judgments of

¹⁴ For an objective view from the French standpoint, see E. Bartin, *Principes de droit international privé selon la loi et la jurisprudence françaises* (1930), and from the German with wide use of other systems, L. Raape, in Staudinger, *Kommentar zum Bürgerlichen Gesetzbuch* (9th ed. 1931) vi, Part 2; Lewald, *Deutsches Internationales Privatrecht* (1930); Schnitzer, *Handbuch des Internationalen Privatrechts*, 2 Vols. (2nd ed. 1944) for the Swiss practice.

foreign courts, and especially of Dominion and American tribunals, and to the doctrines of authors of repute.

The adoption of the positive method renders it desirable in dealing with issues of the conflict of laws to pursue, as far as possible, the course adopted by English judges when it is their duty to decide any question which may raise a so-called conflict of laws.

(1) (They first consider whether the case falls within the terms of any Act of Parliament.) If it does, there is no further room for discussion. Thus, the Foreign Marriage Acts, 1892-1947, validate marriages between parties, one of whom is a British subject, when celebrated abroad before a British Consul in the manner prescribed by those Acts, and the Wills Act, 1861, determines the circumstances under which a will of personalty is valid if executed in foreign parts by a British subject. Cases which fall within either of these statutes are, therefore, decided by our courts solely and simply by reference to these statutes. The possibility or certainty that French or other foreign tribunals might deny validity to a marriage celebrated in France in accordance with the Foreign Marriage Acts, 1892-1947, or that a French or other foreign court might treat as void a will which nevertheless satisfied the requirements of the Wills Act, 1861, is, as far as our courts are concerned, an irrelevant consideration.¹⁵

(2) If a given case does not fall within the terms of an Act of Parliament, the next inquiry for a judge is whether it is covered by (any principle to which precedent has given the authority of law.) Show the existence of such a principle, and discussion is again closed.

It is now, for example, settled by a series of decisions that the question whether an action on a contract is barred by a statute of limitation must, in an English court, be determined wholly by reference to the *lex fori*, i.e., the ordinary or domestic law of England. When, therefore, the question is discussed whether the remedy on a foreign contract is barred by lapse of time, our courts look wholly to the provisions of English statutes of limitation. On the matter referred to, the authority of text-writers and jurists is opposed to the rule established by English decisions. But the rule is now firmly established. It is part of the law of England, and no argument from the authority of eminent jurists would induce an English judge to violate a rule which, were the matter *res integra*, our courts might hesitate to adopt.

(3) If, lastly, it happen that a case fall neither within the terms of any Act of Parliament, nor under any principle established by

¹⁵ See also the Bills of Exchange Act, 1882, s. 72; the Carriage of Goods by Sea Act, 1924, s. 1; the Legitimacy Act, 1926, ss. 1, 8; the Inheritance (Family Provision) Act, 1938, s. 1 (1); the Law Reform (Frustrated Contracts) Act, 1943, s. 1 (1); and see Morris (1946) 62 L.Q.R. 170-185; Falconbridge, pp. 356-367.

authority, English judges (who, under these circumstances, in effect legislate) look (for guidance to foreign decisions)⁶ to the opinions of jurists, or to arguments drawn from general principles.

These are the sources to which the judges refer when called upon to ascertain or fix the law. To follow judicial example and look exclusively to the sources of information recognised by the courts, is the method pursued throughout the present treatise.

3. GENERAL PRINCIPLES

Jurisdiction and Choice of Law.

GENERAL PRINCIPLE NO. 1.—Any right¹⁷ which has been acquired under the law of any civilised country which is applicable according to the English rules of the conflict of laws is recognised and, in general, enforced by English courts, and no right which has not been acquired in virtue of an English rule of the conflict of laws is enforced or, in general, recognised¹⁸ by English courts.

This proposition is the enunciation of a maxim or the statement of a fact—for it may be considered in either light—which lies at the foundation of many rules of the conflict of laws. Their object and result is to render effective in one country, *e.g.*, England, rights acquired in every other civilised country, *e.g.*, France or

¹⁶ Irish decisions, in view of the common law being English, are of special value, as also are decisions of the Privy Council on appeal from Dominion courts, and of the Superior Courts in Canada, Australia, and New Zealand, when based on English common law; strictly speaking, they are not binding on English courts. They are freely cited in this treatise. Scottish decisions are only adduced in cases where there is identity of statutory law or the legal principles involved are substantially the same, and a similar practice is followed as regards decisions on the law of Quebec and of the Union of South Africa. American decisions are often of special value, owing to their elaboration of discussion and their exposition of the common law, to which they not rarely adhere with much rigidity. See *e.g.*, *Lloyd v. Gubert* (1865) L.R. 1 Q.B. 115, 123; *The Halley* (1868) L.R. 2 P.C. 193, 204; *Phillips v. Eyre* (1870) L.R. 6 Q.B. 1, 26; *The Gaetano and Maria* (1882) 7 P.D. 1, 4; *Re Missouri Steamship Company* (1889) 42 Ch.D. 321, 324; *Bank of Africa, Ltd. v. Cohen* [1909] 2 Ch. 129, 146; *Huntington v. Attrill* [1893] A.C. 150, 157; *Luther v. Sagor* [1921] 3 K.B. 532, 541, 542, 548, 550, 557; *Lorentzen v. Lydden* [1942] 2 K.B. 202, 212, 214, 215; *Frankman v. Anglo-Prague Credit Bank* [1948] 1 K.B. 730.

¹⁷ The term 'right' includes legal relationships, capacities, disabilities and powers which are granted or imposed by any system of law.

¹⁸ This principle must, of course, be understood as limited by the exceptions or limitations contained in Principle No. 2. For a criticism of the principle originally laid down by Dicey (5th ed. p. 17) that English courts enforce rights acquired abroad, see Arminjon, *Précis* (3rd ed. 1947) i, pp. 127-139; *Hague Recueil* 44 (1933, II) pp. 5-110; Cheshire, pp. 46-50; Wolff, pp. 2-3; Falconbridge, Chaps. 1 and 2; Cook, Ch. 1. Accordingly it has been thought desirable to modify this principle by adding the requirement that the right must arise under the law of a country which is applicable according to the English rules of conflict of laws.

Italy, the law of which is applicable according to the English rules of the conflict of laws. A, a Frenchman, marries a Frenchwoman at Paris, and has children by her. If French law applies, and he possesses the status and the position of a husband and a father, he possesses the same status in England. If again, by sale, gift, descent, or otherwise, he becomes in France the owner of goods which he then brings to England, his rights of ownership obtain acknowledgment here, and he can in an English court sue any wrongdoer who takes his property away from him. If further, A is assaulted by a German in Paris, and, under French law, has a claim to damages for the assault, he can, if he finds the aggressor in England, in general bring an action for the tort¹⁹ in our courts in virtue of the English rules of the conflict of laws; and if A, instead of suing in England for the wrong, has obtained in a French court a judgment²⁰ against the wrongdoer, he can, speaking generally, enforce his claim to be paid the money due under the judgment against the debtor in England. If, lastly, A and X have entered into a contract in France, and X breaks it, A can, if he finds X in England, bring an action against him for the breach of contract, and for the damage resulting to A therefrom no matter what law governs the contract.

(1) *Right.* English judges never in strictness enforce the law of any country but their own, and when they are popularly said to enforce a foreign law, what they enforce is not a foreign law, but a right acquired under the law of a foreign country which is applicable according to English rules of the conflict of laws.)

(2) *Acquired under the law of a country which is applicable according to English rules of the conflict of laws.* (The object for which courts exist is to give redress for the infringement of rights. The basis of a plaintiff's claim is that, at the moment of his coming into court, he possesses some right, e.g., a right to the payment of £20, which has been violated; the bringing of an action implies, in short, the existence of a right of action. When, therefore, A applies to an English court to enforce a right which he alleges to have been acquired according to French law, he must in general show that, at the moment of bringing his action, he possesses a right which is actually acquired under French law, and which he could enforce against the defendant if he sued the defendant in a French court, and that French law applies in virtue of English rules of the conflict of laws.) A complains, for example, of the non-payment of a debt contracted by X in Paris, or seeks damages for an assault committed on him by X in Paris. To bring himself within the principle we are considering, he must show that his right to payment or to damages is actually acquired, i.e., that the debt is

¹⁹ See Chap. 26, *post*.

²⁰ See Chap. 16, *post*.

due under French law, or that the assault is an offence punishable by French tribunals and that French law applies in virtue of English rules of the conflict of laws.²¹

Whether such a right actually exists, *i.e.*, whether A has an 'acquired right', is a matter of fact depending upon the law of France and upon the circumstances of the case. But whether the law under which such right exists in fact is the law applicable is a question not of fact but of law, and not of foreign law but of English law.

For example, under Italian law which applies according to the English rules of the conflict of laws, A has the status and the position of a husband with regard to M, or has acquired the right to be paid £20 by X. The existence of these rights on A's part in Italy is indisputable, and this for the best of all reasons, namely, that if A is in Italy the courts will in fact recognise and enforce his rights and liabilities as M's husband, and if X also is in Italy and in possession of property, will enable A to obtain payment of the £20 due from X. But if M wishes to bring a petition for the restitution of conjugal rights in England, or if A wishes to sue X in an English court, the question whether Italian law applies to these claims must be determined once more by the English rules of the conflict of laws. What, then, are the circumstances either in the conduct of the Italian State, or in the conduct of A himself, which will lead English courts to treat the rights acquired by A as defective in due acquisition?

First, as to the conduct of the Italian State.²²

The right conferred by the Italian State and acquired by A may lack acquisition according to English rules of the conflict of laws because the right is one which, in the opinion of the English courts, is governed by a system of laws other than the Italian. The Italian State has in the supposed case acted, in the opinion of English courts, *ultra vires*. A State's authority, in the eyes of other States and the courts that represent them, is, speaking very generally, coincident with, and limited by, its power. It is territorial.²³ It may legislate for, and give judgments affecting,

²¹ This is quite consistent with the rule that the *remedy* for a right acquired under French law may, *e.g.*, under a statute of limitation, be lost in France and exist in England, or *vice versa*. Questions as to procedure do not really depend upon the rights of the parties. No person has a vested interest in the course of procedure.

²² It is assumed that the Government of the State is recognised *de facto* or *de jure* by the British Crown; rights resting on the authority of a revolutionary authority are not regarded as acquired according to law for the reason that before recognition of the revolutionary authority the law of the legitimate authority is alone applicable in English courts: *Luther v. Sagor & Co.* [1921] 1 K.B. 456. On recognition its acts are validated *ab initio*: *ibid.* [1921] 3 K.B. (C.A.) 532.

²³ *Ex p. Blain* (1879) 12 Ch.D. 522; *Re Pearson* [1892] 2 Q.B. (C.A.) 263; *Macleod v. Att.-Gen. for New South Wales* [1891] A.C. 455; *R. v. Cork*

things and persons within its territory. From the point of view of English courts it has no authority to legislate for, or adjudicate upon, things or persons not within its territory, except in virtue of some English rule of the conflict of laws.

The Italian, or any other, State may exceed its acknowledged legislative authority. This kind of excess is rare, but there is no reason to doubt that English courts would be very slow to admit the validity in England of foreign legislation resembling the Foreign Marriage Acts, 1892-1947, or of a foreign law framed on the lines of the Royal Marriage Act, 1772, at any rate, if the parties affected by it were domiciled in England. The reason is that according to English rules of the conflict of laws both the formalities of a marriage concluded in England and the capacity to marry of a person domiciled in England are governed by English law.

Again legislative measures during war against private rights may be refused recognition in English courts.²⁴ But the legislative confiscation in the U.S.S.R. of private property there situate and the dissolution of all companies incorporated there have been recognised in England.²⁵

The Italian State, again, or any other, may exceed its judicial authority as acknowledged by English rules of the conflict of laws. This kind of excess is common. Few things are more disputable than the limits within which the courts of one country have a right to exercise jurisdiction in the opinion of the courts of other countries. The plain truth is—and this holds good of England no less than of other States—that every country claims for its own courts wider jurisdiction than it willingly concedes to foreign tribunals.²⁶ Hence it constantly happens that rights acquired

Circuit Court Judge [1925] 2 Ir.R. 165 English and other courts, when considering their jurisdiction in bankruptcy and in criminal matters, have given forcible expression to this view. See General Principle, No. 8, p. 22.

²⁴ *Wolff v. Oeholm* (1817) 6 M. & S. 92; *Re Francke and Rasch* [1918] 1 Ch. 470, 486

²⁵ *Luther v. Sagor & Co.* [1921] 3 K.B. (C.A.) 532; but only in so far as it is confined to territorial limits: *Sedgwick Collins & Co. v. Russia Insurance Co. of Petrograd* [1926] 1 K.B. 1, 15; *Employers' Liability Assurance Corporation v. Sedgwick Collins & Co.* [1927] A.C. 95; *The Jupiter* (No. 3) [1927] P. 122, 144-145 (C.A.) 260; *First Russian Insurance Co. v. London and Lancashire Insurance Co., Ltd.* [1928] Ch. 922; *Princess Paley Olga v. Weiss* [1929] 1 K.B. 718; *Kolbin & Sons v. Kinnear & Co.* [1930] S.C. 724; *Russian Commercial & Industrial Bank v. Comptoir d'Escompte de Mulhouse* [1925] A.C. 112; *Banque Internationale de Pétrograd v. Goukassow* [1925] A.C. 160; *Lazard Brothers v. Midland Bank* [1933] A.C. 289; *Russian and English Bank v. Baring Bros.* [1936] A.C. 405; *Re Russian and English Bank* [1932] 1 Ch. 663; *Re Russian Bank for Foreign Trade* [1938] Ch. 745; *Re Russo-Asiatic Bank* [1934] Ch. 720. See Wortley (1938) 14 B.Y.B.I.L., pp. 1-17.

²⁶ *Schibbsby v. Westenholz* (1870) L.R. 6 Q.B. 155, 160. This case affords an example of legislative and judicial excess of authority. The English courts under an Act of the English Legislature were authorised, and, indeed, bound to exercise a jurisdiction which English judges did not believe that foreign courts would admit to be within the proper authority of the British sovereign power. See also *Phillips v. Batho* [1918] 3 K.B. 28.

For an analogous excess of authority by the French Legislature, see Article 14 of the Civil Code, which ascribes jurisdiction to the French courts in regard to

under foreign judgments are refused enforcement on the ground that they are not 'duly' acquired.

X, a Swiss subject, enters into an agreement with A, a Dutch citizen resident in Amsterdam. X, at the time when the contract is made, is staying in Amsterdam for a week's visit. He generally lives in England; his domicile is Swiss. A sues X before a Dutch court for breach of contract. X receives no notice of the action, and is absent during its continuance. A recovers judgment against X for, say, £1,000. He brings an action on the judgment in England; he fails in his action. The ground of the failure is, that the English court denies the jurisdiction of the Dutch court, or in effect holds that a right certainly acquired under Dutch law has not been acquired in virtue of English rules of the conflict of laws.

A is a domiciled Englishman, married to M; he goes to South Dakota, stays there a year, obtains a divorce from M, and during her lifetime marries N. In South Dakota he is N's lawful husband, but his right to marry her and all rights depending thereupon are in the view of English courts not acquired, and therefore cannot be recognised or enforced in England.²⁷

Secondly, as to A's own conduct. A has acquired a right to the payment of £20 to him by X under Italian law, e.g., under an Italian judgment. That his right exists in Italy is indisputable. The right, moreover, is one which the Italian State has full authority to confer. A, however, has obtained the judgment by fraud. In this case his right is not acquired according to English rules of the conflict of laws, and, on proof of the fraud, will not be enforced by the English courts.²⁸

(3) *Civilised country.* This term is of necessity a vague one; it may for our present purpose be treated as including any of the Christian States of Europe, as well as any country colonised or governed by such European State, and any non-Christian State, at least in so far as it is governed on the principles recognised by the Christian States of Europe.

England, France, Mexico, the United States, Turkey, Russia,²⁹

obligations entered into by foreigners with French subjects out of France. See Gutteridge, *Hague Recueil* 44 (1933, II) pp. 115-194; 19 B.Y.B.I.L. (1936) pp. 19-48.

²⁷ See *Lolley's Case* (1812) 2 Cl. & F. 567 (n.); *Shaw v. Gould* (1868) L.R. 3 H.L. 55; *Green v. Green* [1893] P. 89. See further on this subject, General Principle, No. 3, p. 22, *post*, as to the test of jurisdiction.

²⁸ See *Abouloff v. Oppenheimer* (1882) 10 Q.B.D. (C.A.) 295; *Vadala v. Lawes* (1890) 25 Q.B.D. (C.A.) 310; *Ellerman Lines v. Read* [1928] 2 K.B. 144. There are few (if any) cases in which A's conduct militates against the acquisition of a right conferred by a State which has authority to confer it according to English rules of conflict of laws, except the case of a judgment obtained by fraud. For the modern doctrine of evasion of laws, see Wolf, pp. 140-145; Foster in *Hague Recueil* 65 (1938, III) 399, at pp. 512-514; *Pottinger v. Wightman* (1817) 3 Mer. 67; *Vita Food Products Inc. v. Unus Shipping Co* [1939] A.C. 277, at p. 290.

²⁹ This was recognised by English courts; see *ante*, p. 14, e.g., *Princess Paley Olga v. Weiss* [1929] 1 K.B. 718. Russian marriages have also been held valid. *Nachimson v. Nachimson* [1930] P. (C.A.) 217.

and India, are civilised countries. The proposition is simply an affirmative and limited statement; it neither affirms nor denies anything as to the recognition of rights acquired under the laws of countries which are not in this sense civilised; but it is believed that the question is of little practical importance today. If an individual rule of foreign law is repugnant to English courts, the courts can refuse to enforce any right acquired under this rule on the ground that it is against public policy, whether the rule forms part of the law of a civilised country or not.

The reason why the rule as to the recognition of rights acquired under foreign law is limited, so as to apply to laws of civilised countries only, is that the willingness of one State to give effect to rights gained under the laws of other States depends upon the existence of a similarity in principle between the legal and moral notions prevailing among different communities. Rules of the choice of law can exist only among nations which have reached a similar stage of civilisation. That English courts will usually recognise rights acquired under the law of Italy or of France is certain. To what extent English courts will recognise rights acquired under the law of China,³⁰ under the peculiar legislation or customs of the State of Utah,³¹ or under the customary law of Bechuanaland³² is, to say the least, uncertain. The treatment of these rules is freed from unnecessary perplexity by excluding from it all reference to the question how far English courts may, or may not, give effect to the laws of non-civilised communities.

(4) *Recognised and enforced.*³³ The distinction between the recognition and the enforcement of a right deserves notice.

A court recognises a right or status governed by foreign law when for any purpose the court treats it as existing according to foreign law in virtue of the rules of the conflict of laws of some legal system. Thus, if A, a Frenchman, marries M, a Frenchwoman, in Paris, and they then come to England, our courts treat acts done by A, in regard to M, as lawful because he is her husband which would be unlawful if done by a man not married to M. Our courts therefore recognise A's rights under French law as M's husband. So, whenever an English judge considers A's appointment as guardian of M by an Italian court as a reason for appointing him M's guardian in England, the judge recognises A's rights or status as guardian under Italian law. So again, a court recognises A's rights as owner of land in France when treating an

³⁰ *Cf. Att.-Gen. v. Kwok-A-Sing* (1873) L.R. 5 P.C. 179; *Dairen Kisen Kabushiki Kaisha v. Shiang Kee* [1941] A.C. 373; *Re Tootal's Trusts* (1888) 23 Ch.D. 532; *Mong Kuen Wong v. May Wong* [1948] N.Z.L.R. 348.

³¹ *Hyde v. Hyde* (1866) L.R. 1 P. & D. 130.

³² *Re Bethell* (1888) 38 Ch.D. 220, with which contrast *Brinkley v. Att.-Gen.* (1890) 15 P.D. 76 (Japanese marriage); *Abd-ul-Messih v. Farra* (1889) 13 App.Cas. 491, 445, not followed in *Casdagli v. Casdagli* [1919] A.C. 145.

³³ Compare, for this distinction, Figgott, *Foreign Judgments* (3rd ed.) Book 1, Chap. 2, s. 3, pp. 36-37.

agreement made by him in England in reference to such land as a good consideration for a promise made to him by X.

A court enforces a right when giving the person who claims it either the means of carrying it into effect, or compensation for interference with it.

It is plain that, while a court must recognise every right which it enforces, it need not enforce every right which it recognises.

Now, English courts generally recognise rights acquired in a foreign country, and often enforce them. But our courts constantly recognise rights, capacities, disabilities and status which they do not enforce. Thus they will treat A, a Frenchman, married to M in France, as her husband, but they will not enforce against M all the rights which A as her husband may possess against M under French law since these rights may according to the English rules of the conflict of laws be governed by another system of laws. So again, A's ownership of land in France receives for many purposes legal recognition in England. But no English court will determine A's title to French land, or attempt to put him into possession of a house in Paris, or give him damages for a trespass on his land at Boulogne.

(5) *English Courts.* These words are inserted in the proposition under consideration, though it might easily be stated in a more general form, for the sake of emphasising the fact that the principles of the choice of law are dealt with in this treatise as part of the law of England.

It may be well to note that English courts expect foreign tribunals to recognise rights acquired under English law,³⁴ and occasionally attempt by indirect means to enforce such recognition.

The negative side of Principle No. 1 is all but self-evident. If the effect of the English rules of the conflict of laws be the recognition of rights acquired according to foreign law in virtue of these rules of the conflict of laws, it almost necessarily follows that English courts will not recognise any right which they do not consider acquired.

In the application further of Principle No. 1 we must bear in mind that, though the principle is for the sake of clearness stated in an absolute form, it is subject to important exceptions or limitations, the definition whereof is a matter of extreme nicety and difficulty. They are embodied in Principle No. 2.

GENERAL PRINCIPLE No. 2.—English courts will not enforce a right otherwise acquired under the law of a foreign country which is ordinarily applicable in virtue of English rules of the conflict of laws :

³⁴ *Employers' Liability Assurance Corporation v. Sedgwick, Collins & Co.* [1927] A.C. 95, 104, 112, 116.

(A) Where the enforcement of such right involves the enforcement of foreign penal³⁵ or confiscatory³⁶ legislation or a foreign revenue law³⁷;

(B) Where the enforcement of such right is inconsistent with the policy of English law,³⁸ or with the moral rules upheld by English law,³⁹ or with the maintenance of English political and judicial institutions⁴⁰;

(C) Where the enforcement of such right involves interference with the authority of a foreign State within the limits of its territory.⁴¹

Principle No. 2 contains the exceptions⁴² to Principle No. 1; and enumerates in very general terms the rights which, though acquired under the law of a foreign country which is applicable according to the English rules of the conflict of laws, English courts will not enforce, or allow to operate, in England.

(A) *Foreign penal or confiscatory Legislation.* If in virtue of English rules of the conflict of laws it is sought to enforce a right

³⁵ *Folliott v. Ogden* (1789) 1 H.Bl. 123; (1790) 3 T.R. 726; *Wolff v. Oxholm* (1817) 6 M. & S. 92; *Huntington v. Attrill* [1893] A.C. 150, 156-158; *Lecoururier v. Rey* [1910] A.C. 262, 265; *Banco de Vizcaya v. Don Alfonso de Borbon y Austria* [1935] 1 K.B. 140; *Scott v. Att.-Gen.* (1886) 11 P.D. 128, but distinguish *Warter v. Warter* (1890) 15 P.D. 152.

³⁶ See above, note 35. A foreign requisitioning decree is not disregarded as being against public policy if it is not confiscatory: *Lorentzen v. Lydden* [1942] 2 K.B. 202. Again foreign confiscatory legislation is recognised if it only affects property situate abroad and is not to be enforced in England. See *ante*, p. 13, note 22, p. 14, note 25.

³⁷ *Holman v. Johnson* (1775) Cowp. 341; *Re Visser* [1928] Ch. 877; *Municipal Council of Sydney v. Bull* [1909] 1 K.B. 7.

³⁸ This head is illustrated by every case affected by the rules against trading with the enemy or involving a contract with an enemy concluded before the outbreak of war and to be performed after the end of hostilities. Instances are rare, since most contracts of this kind which came before English courts were governed by English law as their proper law. See *Dynamit A.-G. v. Rid Tinto Co.* [1918] A.C. 260, 293, 302; *Naylor, Benson & Co. v. Krainsche Industrie Gesellschaft* [1918] 2 K.B. 486; *Friederich Krupp v. Orconera Iron Ore Co.* (1919) 88 L.J.Ch. 304.

³⁹ *Cranstown v. Johnston* (1796) 3 Ves. 170, 183; *Grell v. Levy* (1864) 16 C.B. (N.S.) 73; *Rousillon v. Rousillon* (1880) 14 Ch.D. 351; *Kaufman v. Gerson* [1904] 1 K.B. (C.A.) 591; *Société des Hôtels Réunis v. Hawker* (1913) 29 T.L.R. 578; affirmed on different grounds (1914) 30 T.L.R. (C.A.) 423.

⁴⁰ *Sommersett's Case* (1772) 20 St.Tr. 1, but see *Santos v. Illidge* (1860) 8 C.B. (N.S.) 861, 868, 876; *Phillips v. Eyre* (1870) L.R. 6 Q.B. 1; *The Halley* (1868) L.R. 2 P.C. 193; *Hope v. Hope* (1857) 8 D.M. & G. 731; *Worms v. De Valdor* (1880) 49 L.J.Ch. 261; *Re Selot's Trusts* [1902] 1 Ch. 488.

⁴¹ See *Foster v. Driscoll* [1929] 1 K.B. 470, and *Companhia de Moçambique v. British South Africa Co.* [1892] 2 Q.B. (C.A.) 353; [1893] A.C. 602; this part of the Rule is approved by Lord Merrivale, F., in *Tallack v. Tallack* [1927] P. 211.

⁴² See Cheshire, pp. 174-196; Wolff, pp. 163-186; Lorenzen, Chap. 1; Nussbaum (1940) 49 Yale L.J. 1027.

under foreign law which is penal or confiscatory⁴³ in character, English courts will refuse to lend their assistance. The same principle applies to foreign tax and revenue legislation which benefits foreign States or foreign municipalities. On the other hand, foreign penal or confiscatory legislation which has operated in respect of objects situate abroad will be recognised in England if the objects are subsequently brought to England. In the latter case English courts are not called upon to enforce foreign law which is repugnant to English public policy, but to protect property which has been lawfully acquired abroad, where it could only be governed by foreign law. Foreign disabilities imposed for the purpose of punishment or of social, religious or racial discrimination are also unenforceable, but it is believed that the effects of such legislation which has operated abroad and spent itself, will be recognised by English courts.

(B) *Inconsistency with Policy of English Law, etc.* Under this very general head come a variety of cases in which English courts refuse to enforce in England rights which conflict with the fundamental ideas on which English law is grounded, or which are inconsistent with the maintenance of English institutions. The chief instances which the general and inevitably rather vague head is intended to include may be enumerated under five classes. It will be found that, in general, the right which English courts refuse to enforce on account of its inconsistency with the policy of English law, conflicts either with the *interests* or *prerogatives* of the Crown, with the *morality* supported by English courts, the *status* of persons in England, English rules of *procedure*, or, lastly, English law as to what constitutes a *tort*.

(1) *Political or Economic Interests.* This head includes principally contracts governed by foreign law which infringe the rules against trading with the enemy.

(2) *Morality.* English courts refuse to give legal effect to transactions, even when governed by foreign law, which our tribunals hold to be immoral. Thus a promise made in consideration of future illicit cohabitation, or an agreement which, though innocent in itself, is intended by the parties to promote an immoral purpose,⁴⁴ or a promise obtained through what our courts consider duress or coercion,⁴⁵ champertous contracts⁴⁶ and contracts in

⁴³ Foreign requisitioning decrees are not confiscatory and are therefore not excluded in English courts on grounds of public policy if the law of the requisitioning State is applicable in virtue of English rules of the conflict of laws: *Lorentzen v. Lydden* [1942] 2 K.B. 202. However, the reason given in that case to the effect that public policy and not English rules of the conflict of laws required the application of the foreign decree is not entirely convincing. See Wolff, pp. 537-538, and Mann (1942) 5 *Modern Law Review* 262.

⁴⁴ See *Robinson v. Bland* (1760) 2 Burr. 1077, 1084.

⁴⁵ *Kaufman v. Gerson* [1904] 1 K.B. (C.A.) 591

⁴⁶ *Grell v. Levy* (1864) 16 C.B. (N.S.) 73.

restraint of trade⁴⁷ are according to English law based on an immoral consideration. Such a promise or agreement, therefore, even were it valid under the law of the country which governs the contract, will not be enforced by English judges. The similarity, however, between the moral principles prevailing in all civilised countries is now so great that the instances are of necessity rare in which English tribunals can be asked to treat as immoral transactions which in a foreign country give rise to legal rights.

Note, nevertheless, that English law may forbid the carrying out in England of transactions which our courts do not hold to be immoral when taking place abroad. When, for example, the usury laws made the taking of interest above 5 per cent. illegal, it was still possible to recover in England interest above that amount on loans made in India⁴⁸; and during the formative period of the English rules of the conflict of laws a contract made in Brazil for the sale of slaves, and there legal, was held to give rise to rights enforceable by English courts.⁴⁹

(3) *Status*.⁵⁰ As stated above (A) English courts do not recognise in England any penal (or privative) status, or the disabilities of such a status, arising under a foreign law, as, for example, the status of civil death, or the civil disabilities or incapacities which may be imposed on priests, nuns, Jews, Protestants, slaves, untouchables, or others, by the law of the country to which they may belong.

Dicey's view was that our courts 'do not recognise in England or give effect to any status unknown to English law, as for example the status existing in India under caste rules'.⁵¹ But this view is, it is submitted, far too sweeping, and has been described by Cheshire⁵² as 'obviously unacceptable'. Long before legitimisation by subsequent marriage was recognised in English domestic law, our courts recognised the status of persons legitimated by subsequent marriage under a foreign law and gave effect to that status in England.⁵³ Moreover, it is now clear that our courts do for many purposes recognise the status created by a polygamous marriage.⁵⁴ It may be taken for granted that our courts would not recognise in England disabilities imposed by Hindu rules of caste; but the reason, it is submitted, is that the status is a

⁴⁷ *Rousillon v. Rousillon* (1880) 14 Ch.D. 351. It may be questioned whether this decision did not carry the notion of public policy too far if the contract was governed by French law and was to operate abroad. See Cheshire, p. 186, and note 4, who believes that the contract was governed by English law and that the rules against contracts in restraint of trade applied as part of domestic law.

⁴⁸ *Bodily v. Bellamy* (1760) 2 Burr. 1094. Thus it was held that the Money-lenders Act, 1900, s. 1, did not apply to an Indian loan transaction, *Shrichand & Co. v. Lacon* (1906) 22 T.L.R. 245.

⁴⁹ *Santos v. Illidge* (1860) 8 G.B. (N.S.) (Ex.Ch.) 861. See also *Forbes v. Cochran* (1824) 2 B. & C. 448.

⁵⁰ See Chap. 18, Rule 111, *post*, p. 465.

⁵¹ 5th ed., p. 28; cf. pp. 531-535.

⁵² P. 193.

⁵³ *Post*, Rule 121, p. 496.

⁵⁴ *Post*, pp. 224-228.

penal one, not that the status is unknown to English law; and the same is true of most if not all of Dicey's other examples.⁵⁵

This non-recognition of a penal status must be confined to its effect in England. Civil death is a penal status. But if, under the law of a foreign country where civil death is recognised, the effect of a person's civil death were to transfer his property there situate to his heir, English law would, it is submitted, recognise the legal effect of such transfer, at any rate in the case of a person domiciled in the foreign country, and would in England treat the heir as lawful owner of the property.

(4) *Matters of Procedure*.⁵⁶ The rights as respects procedure of the parties to a suit are utterly unaffected by any foreign law. If A, a Frenchman, sues X, a German, on a contract made in Italy, in the High Court of Justice, he stands, as regards procedure, exactly in the same position as that occupied by Jones, a citizen of London, when he sues Brown, also a Londoner, for the price of goods sold and delivered. To the idea of 'procedure', moreover, our courts give the widest extension. It includes parties, process, evidence, rules of limitation, remedies, damages, methods of execution, and the like. The reason for this is that the practice of a court is determined by the views entertained in the country to which the court belongs of the right method of compelling the attendance of the parties, of obtaining evidence, and so forth, and the fact that the claim brought before the court contains a foreign element is no reason why the court should adopt methods of enforcing the plaintiff's right differing from the methods which the courts, or rather the sovereign under whose authority the court acts, holds to be best adapted for the purposes in mind. It must, however, be admitted that the application of English rules of evidence and limitation may result in failure to give effect to rights which were fully acquired under a contract governed by foreign law according to English rules of the conflict of laws.⁵⁷

(5) *Torts*.⁵⁸ No act done in a foreign country, e.g., Italy, can be sued upon as a tort in England unless it both is a wrongful, that is, an unjustifiable, act under the law of Italy, and would also have been actionable if it had been done in England. A, for example, sues X in England for a libel published by X of A in Italy. He must, in order to maintain his action, establish that the defamatory statement is one which is wrongful, or more strictly unjustifiable, by the law of Italy,⁵⁹ for it would be unreasonable to penalise an

⁵⁵ For further discussion, see *post*, pp. 467-469.

⁵⁶ See Chap. 32, *post*.

⁵⁷ See *Leroux v. Brown* (1852) 12 C.B. 801; *British Linen Co. v. Drummond* (1880) 10 B. & C. 908; *Huber v. Steiner* (1835) 2 Bing. N.C. 208; *Don v. Lippmann* (1837) 5 Cl. & F. 1. Compare *Re Lorillard* [1922] 2 Ch. (C.A.) 638; and see Beckett in (1934) 15 B.Y.B.I.L. 46, at pp. 66-71.

⁵⁸ See Chap. 28, *post*.

⁵⁹ The act in Italy need not be strictly actionable; see *Machado v. Fontes* [1897] 2 Q.B. (C.A.) 281.

action which in Italy is innocent; he must also make out that the statement is one which, if published in England, would render X liable to proceedings for libel,⁶⁰ for it would be contrary to the moral principles upheld by English law to give damages for an action innocent under that law. Taking a very broad view, it may therefore be said that the English rule of conflict of laws relating to torts is part of English public policy.⁶¹

(C) *Interference with Authority of Foreign State.* An English court will not give effect to rights which cannot be enforced without the doing of acts in another country inconsistent with the supremacy of the sovereign power thereof. Thus a contract involving the smuggling of goods into the territory of a friendly State in violation of its laws will not be enforced in England.⁶²

*Jurisdiction.*⁶³

GENERAL PRINCIPLE No. 3.—The courts of any country are considered by English law⁶⁴ to have jurisdiction over (*i.e.*, to be able to adjudicate upon) any matter with regard to which they can give an effective judgment, and are considered by English law not to have jurisdiction over (*i.e.*, not to be able to adjudicate upon) any matter with regard to which they cannot give an effective judgment.⁶⁵

⁶⁰ See *The Halley* (1868) L.R. 2 P.C. 193; *Phillips v. Eyre* (1870) L.R. 6 Q.B. 1.

⁶¹ The view set out above is that of Dicey, but it is open to criticism. First, rules of public policy are flexible. The rule set out above is not. Second, rules of public policy usually have a negative effect. The rule set out above has both a negative and a positive effect, inasmuch as compliance with it renders the tort actionable in England. There is some ground for holding that it is not a general principle but part of the individual rule of English conflict of laws relating to torts.

⁶² Cf. *Foster v. Driscoll* [1929] 1 K.B. 470, discussed *post*, p. 607. According to Dicey, the rule that English courts will not entertain actions which concern foreign land directly or indirectly is an instance of the operation of English rules of public policy. It is believed, however, that the principle arises out of the absence of effective jurisdiction. See *British South Africa Co. v. Companhia de Moçambique* [1893] A.C. 602, and see *The Tolten* [1946] P. 135, 161; Rule 20, *post*, p. 141.

⁶³ See Chaps. 3-17, *post*.

⁶⁴ *Companhia de Moçambique v. British South Africa Co.* [1892] 2 Q.B. (C.A.) 358, 394 (*per* Lord Esher, M.R.); [1893] A.C. 602, 624-629 (*per* Lord Herschell, L.C.), 684 (*per* Lord Halsbury).

⁶⁵ Compare *Companhia de Moçambique v. British South Africa Co.* [1892] 2 Q.B. (C.A.) 358, judgment of Lord Esher, M.R., p. 405, of Fry, L.J., pp. 407-409, and Lopes, L.J., at p. 418; Chesire, pp. 139-150, 776-791; Wolff, pp. 64-73, 262-263. The Rule is approved by Lord Merrivale, P., in *Tallack v. Tallack* [1927] P. 211. For a similar theory of jurisdiction, though somewhat differently expressed, see Bishop, *Marriage, Divorces and Separation*, II, ss. 14-24. But see Gutteridge, *Hague Recueil* 44 (1932, II) 113, 136.

Subject to the following observations, this Principle may be regarded as self-evident, a fact which no doubt explains why it has seldom been judicially asserted.

An 'effective judgment' means a decree which the State, under whose authority it is delivered, has in fact the power to enforce against the person bound by it, and which therefore its courts can enforce against such person. A judgment which is not 'effective' or is 'ineffective' means a decree which the State under whose authority it is delivered has not in fact the power to enforce against the person bound by it. Thus if an Italian court gives a judgment entitling A to the possession of land at Rome which is occupied by X, the judgment is effective, since it can clearly, by means of Italian officials, be enforced against X, in favour of A. If, on the other hand, an Italian court should give a judgment entitling A to the possession of land in London occupied by X, the judgment is clearly ineffective, for it cannot by the mere power of the State be enforced against X or in favour of A.

SUB-RULE.—When with regard to any matter (*e.g.*, divorce) the courts of no one country can give a completely effective judgment, but the courts of several countries can give a more or less effective judgment, the courts of that country where the most effective judgment can be given are considered to have a preferential jurisdiction.

This is a corollary to Principle No. 3. It has seldom been distinctly formulated, but it accounts for more than one instance of what may seem an anomalous exercise of jurisdiction.

To understand the bearing of this corollary, let us contrast the effect of a judgment given by an English court as regards the possession of land in England with a judgment by an English court divorcing a husband and wife.

The judgment giving possession to A of land in London is as effective as the judgment of any court can by possibility be made. But if an English court declares A divorced from M, and regulates their property relations, the most that such judgment effects is that in England the parties have the rights of unmarried persons, and that their property situate in England is regulated by any decree of the court. The judgment cannot, of itself, secure that A or M shall be treated as unmarried in France or Italy, or affect their property there, and conversely no sentence of divorce delivered in France can, of itself, secure that the divorced parties shall be treated as unmarried in England, or regulate their property in England. Now the value of a sentence of divorce, given, *e.g.*, in England, depends upon the connection of the parties with England. If they belong to that country, if they habitually reside there, if it is essentially their home or, in technical language, their domicile,

then the English sentence of divorce is considered as effective as the sentence of the courts of any one country can be. It gives A and M the status of unmarried people and regulates their property in the country to which they belong, that is to say, in the country where it is, both to them and to the country itself, of most importance that their status as married or unmarried persons and property relations should be fixed. If, on the other hand, A and M are domiciled, say, in New York, an English sentence of divorce would be, comparatively speaking, ineffective. Hence the rule that the courts of a person's domicile have at any rate jurisdiction, if not exclusive jurisdiction, in matters of divorce⁶⁶; and the same principle is, we shall find, applicable not only to all judgments affecting status, but also to jurisdiction in matters of succession to movable property.⁶⁷

GENERAL PRINCIPLE No. 4.—The courts of any country are considered by English law to be able to exercise jurisdiction, *i.e.*, are courts of competent jurisdiction, over any person who voluntarily submits to their jurisdiction.⁶⁸

This principle may be called the 'principle of submission'. It applies to most kinds of civil jurisdiction, though not, *e.g.*, to jurisdiction in divorce. It amounts to this, that a person who voluntarily agrees either by act or word, to be bound by the judgment of a given court or courts, has no right to deny the obligation of the judgment as against himself.

To a certain extent Principle No. 4, may be treated as an application of Principle No. 3. A person who agrees to be bound by the judgment of a court does often give the court the means of making its judgment effective against him. Still, the principle of submission is often based upon grounds different from the principle of effectiveness. It is rather a portion of the rule that a person is bound by his contracts. Submission, it should be noticed, may take place in various ways, *e.g.*, by a party suing as plaintiff, by his voluntarily appearing as defendant, or by his having made it a part of an express or implied contract that he will, if certain questions arise, allow them to be referred for decision to the courts of a given country.⁶⁹

⁶⁶ See Chaps. 6 and 14, *post*.

⁶⁷ See Chap. 15, *post*.

⁶⁸ See Chap. 3, Rule 24, and Chap. 12, Rule 68, *post*.

⁶⁹ See, *e.g.*, *Schibsy v. Westenholz* (1870) L.R. 6 Q.B. 155, 161; *Copin v. Adamson* (1875) 1 Ex.D. (C.A.) 17; *Cheshire*, pp. 140-142, 779-787; *Wolff*, pp. 72-73, 262; *Graupner*, (1943) 59 L.Q.R. 227. Compare, for Scotland, *Gibson v. Munro* (1894) 21 R. 840, 847.

With the principle of submission, which applies more or less to all actions, we need concern ourselves but slightly. The main point to which attention should be directed is the extent to which the principle of effectiveness applies to different kinds of jurisdiction.

Let us then first examine the application of the principles of jurisdiction to different kinds of actions.

(1) *Actions in rem*.⁷⁰ In such actions jurisdiction admittedly depends primarily upon the *res*, e.g., the ship, being within the control of the court adjudicating upon the title thereto, i.e., within the control of the State under whose authority the court acts.⁷¹ The rule therefore is a direct and obvious application of the principle of effectiveness, and the same remark applies to jurisdiction in respect of immovables, or land or movables situate in a given territory,⁷² though in England such jurisdiction does not now take the technical form of an action *in rem*.

(2) *Actions with regard to divorce and status*.⁷³ Jurisdiction in regard to divorce in general depends, according to English law, upon the domicile of the married persons, one of whom seeks a dissolution of the marriage, i.e., upon the domicile of the husband. The courts of the domicile do possess, and the courts of any other country, do not normally possess, jurisdiction to grant divorce. No doubt the rules for determining a person's domicile are often artificial.⁷⁴ A man, and still more often a woman, may be legally held to have his or her home in a country where he or she does not live, and never has lived. Hence there is an apparent unreality about the rule which bases a court's authority to dissolve a marriage upon the domicile of the parties. Still, in the vast majority of cases, a person's domicile is his actual home. Hence, far more often than not, a divorce granted by a court of a person's domicile is the most effective sentence of divorce which can be attained. Moreover, in questions concerning divorce and status generally, it is of practical importance that the courts of some one country should have exclusive jurisdiction. Hence English courts hold that the courts of the domicile at the time when the proceedings for divorce are taken not only have jurisdiction, but, subject to very limited exceptions chiefly introduced by statute, have exclusive jurisdiction in the matter. Similarly, the jurisdiction of the courts of the domicile occupies first place in all actions concerning status, but it is not exclusive.

⁷⁰ See Chaps 5 and 13, *post*; Cheshire, pp. 145-146, 791-798; Wolff, pp. 73, 89-90, 263-265.

⁷¹ See Story, s. 592; and *Castrique v. Imrie* (1870) L.R. 4 H.L. 414, 428, 429, *per* Blackburn, J.; Cheshire, pp. 145-146, 791-796; Wolff, pp. 89-90, 263. Compare also Chap. 13, Rule 70, and comment thereon, *post*, p. 365.

⁷² See Story, ss. 589-591; *British South Africa Co. v. Companhia de Moçambique* [1893] A.C. 602. But see *The Tolten* [1946] P. 135. And see the Foreign Judgments (Reciprocal Enforcement) Act, 1933, s. 4 (2) (b). See Chap. 3, Rules 20, 25; Chap. 11, Rule 66; and Chap. 13, *post*.

⁷³ See Chaps. 6 and 14, *post*; Cheshire, pp. 146-149, 796-797; Wolff, pp. 74-87, 263-264; Gutteridge (1938) 19 B.Y.B.I.L. 19, 25; Cheshire (1945) 61 L.Q.R. 352.

⁷⁴ See Chap. 2, *post*.

(3) *Actions with reference to succession.*⁷⁵ The courts of a deceased person's domicile are regarded as courts of competent jurisdiction to determine the devolution, whether by will or otherwise, of the movable property left by the deceased. A person normally lives and has his movables in the place of his domicile, and even when this is not the case, it is desirable that succession should depend on one law, which, according to English rules of the conflict of laws, can only be that of the country to which he belongs, *i.e.*, where he dies domiciled. Hence the courts of a deceased's domicile should certainly be held courts of competent jurisdiction in regard to succession to movables. Whether they ought to be held to be courts of exclusive jurisdiction is a somewhat different matter, with which it will be convenient to deal in considering the objections to the doctrine that jurisdiction is based in the main on our two principles.⁷⁶

(4) *Actions in personam.*⁷⁷ This is the class of action which presents most difficulty to a student bent on ascertaining the theory of jurisdiction upheld by the High Court. One reason for this is that the court always claims for itself a jurisdiction more extensive than it would concede to foreign tribunals.⁷⁸ Again, the extent of exercise of jurisdiction is largely now regulated by statutory rules and has varied from time to time.⁷⁹ Much uncertainty also exists as to the extent of jurisdiction conceded by the High Court to foreign courts.⁸⁰ The only course, therefore, open is to take the instances in which the High Court apparently exercises, or concedes, jurisdiction, and show that many of them hold good in principle when tested by our criteria.

Jurisdiction of the High Court. The High Court exercises jurisdiction *in personam* both where the defendant is, and often where the defendant is not, in England at the time of the commencement of an action.

(1) *Where the Defendant is in England.* In this case the principle of effectiveness applies with full force. When a writ can be served on a defendant, it is normally possible to make effective against him a judgment of the court which adjudicates on the cause of action.

(2) *Where the Defendant is not in England.* The courts

⁷⁵ See Chaps. 8 and 15, *post*; Cheshire, p. 149; Wolff, p. 68; R.S.C. Order XI, r. 1 (d).

⁷⁶ See pp. 29-31, *post*.

⁷⁷ See Chaps. 4 and 12, *post*; Cheshire, pp. 142-145; 779-791; Wolff, pp. 64-71, 262-263.

⁷⁸ See *Schibsby v. Westernholz* (1870) L.R. 6 Q.B. 155, 159; *Phillips v. Batho* [1913] 3 K.B. 25, 29, 30.

⁷⁹ Ord. XI, r. 1. These Rules as made in 1883 considerably restricted the effect of the earlier Rules of 1875. They have since been widened considerably in scope, though no corresponding concessions have been made in favour of the jurisdiction of foreign courts.

⁸⁰ *Schibsby v. Westernholz* (1870), L.R. 6 Q.B. 155, 159-161; *Roussillon v. Roussillon* (1880) 14 Ch.D. 351, 370-371.

formerly neither claimed nor exercised, at any rate directly, jurisdiction over a defendant who was not in England at the time of service of the writ. The test, therefore, of effectiveness held good in its negative, no less than in its positive, aspect. The courts, however, always exercised jurisdiction over a defendant who appeared to, or a plaintiff who brought, an action or suit. This again is in strict conformity with the principle or test of submission.

But the High Court now, under statutory powers,⁸¹ exercises jurisdiction in several cases in which the defendant is not in England, and cannot therefore be served with a writ in England. In dealing with this matter we may dismiss from consideration all actions which directly or indirectly concern land or movables in England⁸²; they are in reality, though not in form, actions *in rem*, and the jurisdiction of the court clearly stands on the principle of effectiveness. So also this principle justifies the exercise of jurisdiction, wherever any injunction is sought as to anything to be done in England, or any nuisance in England is sought to be prevented or removed.⁸³

Nor, again, is there substantial difficulty in applying the principle of effectiveness to the exercise of jurisdiction where relief is sought against a person *domiciled* or *ordinarily resident* in England.⁸⁴ A person who is domiciled, or is ordinarily resident, in a country is a person against whom a judgment can, if not always yet more often than not, be rendered effective. Something indeed may be said against the admission of domicile as a ground of jurisdiction *in personam*, and this point will be considered in due course.⁸⁵

No doubt the High Court does exercise jurisdiction in cases which do not obviously come within either the principle of effectiveness or the principle of submission, and the existence of these cases⁸⁶ is an objection to the soundness of the doctrine propounded in this Introduction, which will receive consideration below. But it certainly is true that the jurisdiction *in personam* of the High Court, in so far as it is original and independent of statute, rests almost entirely upon one or other of our two principles of jurisdiction, and, in so far as it is statutory, is to a very great extent based on the principle of effectiveness.

⁸¹ See Ord. XI, r. 1.

⁸² *Ibid.*, r. 1 (a), (b), (d), (h).

⁸³ *Ibid.*, r. 1 (f).

⁸⁴ *Ibid.*, r. 1 (c).

⁸⁵ See p. 29, *post*.

⁸⁶ Ord. XI, r. 1 (e), (ee), (g); see also r. 1 (i), which was introduced as a result of the Carriage by Air Act, 1932. This Act was passed in order to give effect to the Warsaw Convention for the Unification of certain Rules regarding International Air Transport, of October 12, 1929. R.S.C., Ord. XI, r. 1 (i) reproduces article 28 of the Convention. Compare Ord. XVI A.

Jurisdiction of foreign courts. The High Court concedes jurisdiction to the courts of a foreign country in the following cases⁸⁷:

- (i) Where the defendant is at the time of the action being brought resident or present in the foreign country.
- (ii) Where the party who objects to the jurisdiction has by his conduct precluded himself from objecting to the jurisdiction of the foreign court.⁸⁸

Doubt, however, may be entertained whether jurisdiction would be conceded solely on account of the defendant's allegiance.⁸⁹

Now, of these instances, case (i) clearly comes within the principle of effectiveness, whilst case (ii) is nothing but the application or rather the expression, of the principle of submission.

Let us next consider the objections which may fairly be brought against the validity of the proposed criteria of jurisdiction. Our theory of jurisdiction is open to objections of two different kinds.

First objection. English judges, it may be urged, have maintained a different doctrine, for they have based the jurisdiction of a court, not on its power to enforce its judgment, but on the 'duty' of the person affected thereby (speaking generally, the defendant) to obey them.⁹⁰

The answer to this objection is that the doctrine judicially laid down does not in any way contradict the principle here contended for. The duty of the defendant is correlative to the right which the court is considered to have to give judgment against him, and to determine the right of the court recourse must be had to independent criteria, as is in effect admitted in the same judgment.⁹¹ An English court does not in fact really rely upon the vague principle that the validity of a foreign judgment depends

⁸⁷ *Schibsby v Westenholz* (1870) L.R. 6 Q.B. 155; *Rousillon v. Rousillon* (1880) 14 Ch.D. 351. See Chap. 12, *post*.

⁸⁸ See Chap. 12, *post*; Cheshire, pp. 779-788; Wolff, pp. 262-263. And see Administration of Justice Act, 1920, s. 9 (2) (b); Foreign Judgments (Reciprocal Enforcement) Act, 1933, s. 4 (2) (a).

⁸⁹ *Douglas v. Forrest* (1828) 4 Bing. 686, is the only case known to us which comes near to a decision that allegiance is a basis of jurisdiction. There are, of course, dicta in *Schibsby v. Westenholz*, *Rousillon v. Rousillon*, *Emanuel v. Symon* [1908] 1 K.B. (C.A.) 302, 309, and elsewhere, *Phillips v. Batho* [1913] 3 K.B. (C.A.) 25, 29; *Harris v. Taylor* [1915] 2 K.B. (C.A.) 580, 591; *Carrick v. Hancock* (1895) 12 T.L.R. 59; *Forsyth v. Forsyth* [1948] P. 125, 132, to the effect that the courts of a country have jurisdiction over a defendant who at the time when the judgment is given is subject to the sovereign thereof. Compare, however, *Gibson & Co. v. Gibson* [1913] 3 K.B. 379, 385, which shows that the principle was (at least before the development of Dominion citizenship) not applicable as between the different parts of British territory, allegiance being but one and indivisible; see Cheshire, pp. 788-789; Wolff, pp. 126, 262, and see below, Rule 68.

⁹⁰ *Schibsby v. Westenholz* (1870) L.R. 6 Q.B. 155, 159, *per curiam*. See *Russell v. Smyth* (1842) 9 M. & W. 810, 817; *Williams v. Jones* (1845) 13 M. & W. 628, 633.

⁹¹ *Schibsby v. Westenholz* (1870) L.R. 6 Q.B. 155, 160, 161.

on the duty of a defendant to obey it. What the judges really do is to enumerate the circumstances under which this duty arises, and to show that, in the particular case, none of the conditions which create a duty on the part of a defendant to obey, or the right on the part of a court to issue, a judgment against him, exist. The important thing, therefore, to ascertain is whether the principle of effectiveness and the principle of submission do, or do not, include all the conditions under which, according to the judgment in *Schibsby v. Westenholz*, a person is bound, or is under a duty to obey, the commands of a court.

Here we come across another and much more serious objection to the positions which we are concerned to defend.

Second objection. The High Court, it may be urged, claims or concedes jurisdiction under circumstances which cannot be covered by either of our principles of jurisdiction. The validity of this criticism can be determined only by examining the cases of the exercise of jurisdiction, which, apparently at least, fall within neither the principle of effectiveness nor the principle of submission.

(1) *Jurisdiction founded upon domicile or ordinary residence.*⁹² That a person should be bound by a judgment because he is domiciled in the country where the court delivering judgment has authority is, it must be admitted, to a certain degree an anomaly. In matters of *status*, for reasons given above,⁹³ it is in accordance with the principle of effectiveness and its corollary that jurisdiction should depend on domicile. That domicile should be the test of jurisdiction in matters of *succession* to movable property admits also of explanation. It is true that, if each piece of property be looked at separately, jurisdiction ought to belong, not to the courts of the deceased's domicile, but to the courts of the country where each piece of property is situate at the time of his death, for it is clear that it is the courts of the *situs* which can give the most effective judgment with regard to the possession of property situate within a given territory. But, if it be convenient, as it certainly is, that the courts and the law of some one country should determine the succession to the whole of a deceased's movable property, then it is in accordance with the principle of effectiveness that jurisdiction, although not exclusive jurisdiction, should belong to the courts of the deceased's domicile.⁹⁴

From the fact, however, that in matters of succession the power of giving an effective judgment belongs rather to the courts of the *situs* than to the courts of the domicile, flow some noteworthy results—

⁹² See Chap. 4, Rule 28, Exception 3, p. 186, *post*; Cheshire, pp. 152–153; Wolff, p. 69.

⁹³ See p. 25, *ante*.

⁹⁴ See p. 26, *ante*. For a possible transmission of jurisdiction to another country see *Re Trufort* (1887) 86 Ch.D. 600; Wolff, pp. 67–68, 263.

(1) According to the English principles of jurisdiction succession to land is determined by the courts of the country where the land is situate.⁹⁵

(2) In countries such as England, where a distinct difference is drawn between the administration of and the beneficial succession to movables, every matter connected with administration is within the jurisdiction of the courts of the country where any articles of a deceased's movable property are locally situate.⁹⁶ T, an intestate, for example, dies domiciled in Portugal, leaving goods, money, etc., in England. The Portuguese courts indeed are courts of competent jurisdiction to determine whether A, T's natural son, is or is not entitled to succeed to such part of T's money and goods as may remain after the due administration of T's property in England, e.g., the payment of his debts there, and the decision of the Portuguese courts in the matter of A's claim to succeed will be taken as conclusive by English courts.⁹⁷ But it is to the English courts that belongs the right and duty of administration. They are in this matter the courts of competent⁹⁸ and exclusive jurisdiction.

(3) Though, as regards beneficial succession to movables, the courts of the deceased's domicile are courts of *competent* jurisdiction, they are not courts of *exclusively competent* jurisdiction. Thus, to follow out our supposed case of a Portuguese dying domiciled in Portugal, and leaving movables in England, though the Portuguese courts are competent to determine whether A has a right to succeed beneficially to T, yet the right and duty of the English court in 'administering the property, supposing a suit to be instituted for its administration, is to ascertain, who, by the law of the domicile, are entitled [to succeed to T's property] and, that being ascertained, to distribute the property accordingly. The duty of administration is to be discharged by the courts of this country, though in the performance of that duty they will be guided by the law of the domicile',⁹⁹ and will follow any decision given in the matter, e.g., as to the right of an illegitimate or adopted son to succeed, by the courts of the domicile.¹ The admitted rules, in short, as to jurisdiction in matters of succession, arise not from any opposition to the principle of effectiveness, but from a question how

⁹⁵ Story, s. 591; Cheshire, pp. 145, 793; Wolff, pp. 89-90, 264-265. Rules 25, 70, *post*.

⁹⁶ See Chap. 8, Rule 49, *post*; Cheshire, pp. 668-678; Wolff, pp. 614-617.

⁹⁷ *Dogliani v. Crispin* (1866) L.R. 1 H.L. 301, 314; compare *Re Trufort* (1887) 36 Ch.D. 600, 611.

⁹⁸ Compare *Enohin v. Wylie* (1862) 10 H.L.C. 1, with *Ewing v. Orr-Ewing* (1883) 9 App.Cas. 34, 39, 45; (1885) 10 App.Cas. 453, 502, 523, 527, 542-544, 551; *Re Lorillard* [1922] 2 Ch. 688; *Re Achilopoulos* [1928] Ch. 483; cf. Administration of Justice Act, 1932, s. 2 (1).

⁹⁹ *Enohin v. Wylie* (1862) 10 H.L.C. 19, *per* Lord Cranworth; cited with approval in *Ewing v. Orr-Ewing* (1885), 10 App.Cas. 453, 508, *per* Lord Selborne, and see *ante*, p. 29, note 94.

¹ *Dogliani v. Crispin* (1866) L.R. 1 H.L. 301.

best to apply it to the matter in hand. Look at the property of a deceased as a whole, and the courts of the country to which he belongs (*i.e.*, according to English law, of his domicile) will appear to be in general the tribunals most capable of giving an effective judgment with regard to it. Look, however, at his movable property, not as a whole, but as consisting of separate movables, and then it will appear that the courts of a country where each movable is situate are the tribunals capable of giving the most effective judgment with regard to such movable.

Why, however, should domicile be a foundation of jurisdiction in *personal actions*? Until recently, it never has been, according to English law, a ground for jurisdiction. That it has recently been treated as such must be attributed either (1) to the habit of resting jurisdiction on domicile in matters of status and of succession; or (2) to the fact that, when a man is 'domiciled' or 'ordinarily resident' in a country, the courts of that country can often make a judgment against him effective; or (3) to the consideration that a man who has his domicile or ordinary residence, *e.g.*, in England, may be taken to submit to the jurisdiction of the English courts. It is, we must admit, something of an anomaly that domicile should be made a ground of jurisdiction, and it would have been better in any case to restrict the rule to cases of ordinary residence, thus excluding claims where a merely technical domicile of origin exists, without any residence. It is noteworthy that this fact has been recognised in the Administration of Justice Act, 1920,² and the Foreign Judgments (Reciprocal Enforcement) Act, 1933,³ when deciding the conditions on which judgments of foreign courts may properly be enforced. Ordinary residence is assumed as a proper basis of jurisdiction but not domicile.

(2) *Jurisdiction founded on place of obligation.*⁴ It is sometimes asserted that the High Court recognises the jurisdiction of the *forum obligationis*, that is, of the courts of the country where an obligation is incurred, or, in the terms of English law, a cause of action has arisen.⁵ For this assertion, no decisive authority can be cited. Neither at Common Law nor in Equity did the *mere fact* of a tort having been committed, or of a contract having been made or broken, in England, give the courts jurisdiction over a defendant not present in England, and there is no reason to suppose that the English courts have ever conceded to foreign tribunals authority more extensive than that which the English courts claimed for themselves. At present, not only is there nothing to show that the

² Section 9 (2) (b).

³ Section 4 (2) (a) (iv).

⁴ See Cheshire, pp. 789-790; Wolff, pp. 69-70, but see pp. 262-263; see below, Chap. 4, Rule 28, Exceptions 5 and 6: and compare Chap. 12, Rules 68, 69, *post*.

⁵ See *Schibsky v. Westenholz* (1870) L.R. 6 Q.B. 155, 161; compared with *Westlake*, s. 322, and Ord. XI, r. 1 (e), (*see*); Rule 28, Exception 5.

commission of a tort⁶ in a foreign country is held by our judges to give jurisdiction in respect of the wrong to the courts of the country where the wrong is committed; but there is some, though not decisive, authority for the assertion that they do not recognise such a ground of jurisdiction.⁷

The Common Law Procedure Act, 1852, sections 18, 19, indeed gave the Common Law Courts jurisdiction (which the judges themselves thought in principle hardly defensible⁸) over a defendant not present in England, when either the cause of action arose in England or depended upon the breach of a contract made in England,⁹ and, though the extent of jurisdiction has been more carefully defined by Orders of Court of 1875 and of 1883, with later, decidedly important, amendments, the High Court now claims jurisdiction *in personam* over an absent defendant when the action is founded on a contract which is made in England, or which by its terms or by implication is to be governed by English law, or on a breach committed in England of part of a contract, wherever made, which ought to have been performed in England.¹⁰ Whether the High Court would concede an analogous jurisdiction to foreign tribunals is uncertain, for authority can be¹¹ cited for the proposition that the mere circumstance of a contract having been made in a foreign country does not give jurisdiction to the courts thereof. Even this amount of respect for the *forum obligationis* cannot be explained by the principle of effectiveness. But the jurisdiction of the courts of a country where a contract is intended to be performed, and is in fact broken, admits of explanation as an extension of the principle of submission, on the assumption that the parties may be assumed to agree that any controversy arising from the breach should be submitted to the courts of that country. More anomalous but explicable on the doctrine of submission is the exercise of jurisdiction by English courts merely because a contract has been made in England; in deference to Scottish protests the exercise of jurisdiction was in 1921 abandoned in cases of persons domiciled or ordinarily resident in Scotland.¹²

⁶ See *Companhia de Moçambique v. British South Africa Co.* [1892] 2 Q.B. (C.A.) 358, 413, judgment of Fry, L.J. Since 1920 the commission of a tort in England has been a ground for the exercise of jurisdiction over a person not present in England; R.S.C., Ord. XI, r. 1 (*ee*); see Rule 28, Exception 6, *post*.

⁷ *Sirdar Gurdial Singh v. Rajah of Faridkote* [1894] A.C. 670, but see in respect of trespass to foreign land, *British South Africa Co. v. Companhia de Moçambique* [1893] A.C. 602; compare Chap. 12, Rule 69, *post*.

⁸ *Schibsby v. Westernholz* (1870) L.R. 6 Q.B. 155, 159.

⁹ C.L.P. Act, 1852, s. 18. And see *Jackson v. Spittal* (1870) L.R. 5 C.P. 542; *Durham v. Spence* (1870), L.R. 6 Ex. 46; *Allhusen v. Malgarejo* (1868), L.R. 3 Q.B. 340; *Vaughan v. Weldon* (1874) L.R. 10 C.P. 49.

¹⁰ Ord. XI, r. 1 (*e*), as amended in 1920 (R.S.C., July 14) and 1921 (R.S.C., June 23); see *post*, Rule 28, Exception 5.

¹¹ *Rousillon v. Rousillon* (1880) 14 Ch.D. 351, 371; compare especially, *Sirdar Gurdial Singh v. Rajah of Faridkote* [1894] A.C. 670, 684; and see Chap. 12, Rule 69, *post*.

¹² Ord. XI, r. 1 (*e*) (i), (ii), (iii).

(3) *Jurisdiction founded on possession of property.*¹³ Ought the possession of immovable or movable property in a particular country to give the courts thereof jurisdiction over the possessor?

Two points must be carefully distinguished. The possession of property, whether land or goods, undoubtedly gives the courts of the country where the property is situate jurisdiction over that property, and, therefore, over the owner or possessor thereof, in regard thereto. If a man claims land or goods in Italy, the Italian courts have a right to determine who is the person entitled to the ownership, or possession, of such land or goods. Such a determination is in substance, though not necessarily in form, a judgment *in rem*, and its effect is fully recognised by English courts.¹⁴ One may perhaps go further and say that the possession of property, immovable or movable, in a country gives the courts jurisdiction over the possessor in regard to obligations connected with this property.¹⁵ This concession of jurisdiction is not only consistent with, but confirmatory of, both the principle of effectiveness and the principle of submission.

The possession of property, whether land or movables, is however, in Scotland and South Africa, as in some other countries, held to give the courts of the country jurisdiction over the possessor, not only in respect of the property or of duties connected therewith, but generally, and in short, to have the same effect as is given to the presence of the owner, *e.g.*, in Scotland. Usually the mere fact that immovables or movables are situate within the jurisdiction of the court, confers jurisdiction over the possessor. In Scotland, in order to establish jurisdiction over a possessor abroad of movables in Scotland, the movables must first be arrested. No such arrestment is required where immovables are situated in Scotland.¹⁶ If, for example, X has broken a contract with A, or done a wrong to A, and goods of X's are lying in Scotland, the arrest of the goods gives the Scottish courts, according to Scottish law, jurisdiction to entertain an action against X

¹³ Compare Chap. 4, Rule 28, Exceptions 4 and 9, and Chap. 12, Rule 69, *post*. Cheshire, pp. 145-146, 790-791; Wolff, p. 72, 262; Westlake, s. 323; *Emanuel v. Symon* [1908] 1 K.B. 302, 306.

¹⁴ See *Castrique v. Imrie* (1870) L.R. 4 H.L. 414, 429; *Schubbsby v. Westenholz* (1870) L.R. 6 Q.B. 155, 163; *Alcock v. Smith* [1892] 1 Ch. (C.A.) 238, 263, 265, 268; *Cammell v. Sewell* (1860) 5 H. & N. 728, 744, 751; *Rousillon v. Rousillon* (1880) 14 Ch.D. 351, 371; *Sirdar Gurdial Singh v. Rajah of Faridkote* [1894] A.C. 670, 683. So as regards garnishment of property: *Employers' Liability Assurance Corporation v. Sedgwick, Collins & Co.* [1927] A.C. 95, 104, 112, 115; *Duncan & Dykes, Principles of Civil Jurisdiction*, pp. 135-148.

¹⁵ *Ibid.*, and *Becquet v. McCarthy* (1831) 2 B. & Ad. 951; and compare Ord. XI, r. 1 (a), (b), but note the more restricted wording of r. 1 (h); *post*, Rule 28, Exceptions 1, 2 and 9.

¹⁶ *Duncan & Dykes, Principles of Civil Jurisdiction*, pp. 58-103; *Maclaren, Court of Session Practice*, pp. 40-53; *Bar, Gillespie's transl.* (2nd ed.) pp. 936, 937; *Gloag & Henderson, Introduction to the Law of Scotland* (4th ed. 1946) pp. 20-21. For a similar practice in Quebec, see *Johnson, Conflict of Laws with special reference to the law of the Province of Quebec*, III (1937) pp. 636, 664-667.

for the breach of contract or the wrong.¹⁷ The High Court, however, does not claim such jurisdiction for itself on account of the presence in England of a defendant's property, and English judges clearly hold that the possession of property locally situate in a country and protected by its laws does not afford a general ground of jurisdiction.¹⁸

Now the noticeable thing is the existence of this doubt and the reason thereof. The argument for basing jurisdiction on the possession of property is that the possession by X of property, *e.g.*, in Scotland, especially when seized by the Scottish courts, does, as far as it goes, give the courts the means of rendering a judgment against X effective. The argument against making the possession of property a ground of jurisdiction is that 'the existence of such property, *which may be very small*, affords no sufficient ground for imposing on the foreign owner of that property a duty or obligation to fulfil the judgment'¹⁹ given against him by the foreign court in an action *e.g.*, for libel, which has no reference to his rights over such property. In other words, the objection to jurisdiction founded on the possession of some property, say in Scotland, is that the fact of X's possessing any property in Scotland does not of itself give the Scottish courts power to deliver an effective judgment against X.²⁰

(4) *Jurisdiction founded on considerations of convenience.* The High Court assumes jurisdiction in certain instances on the ground of convenience, and especially upon the ground of the advantage of pronouncing judgment once for all against every person interested in a particular action. Thus a person Y, living out of England, may be joined as defendant in an action against X, because he is a proper party to the action,²¹ and on similar grounds a defendant may join in the action a third party,²² against whom he is entitled to indemnity, even though such third party be out of England; in the latter case jurisdiction is only permitted if it can be justified under one or other of the grounds already enumerated. The exercise of jurisdiction in some of these instances cannot fairly be brought under the principle either of effectiveness or of submission; it is anomalous and justifiable, if at all, only by considerations of immediate convenience. Our courts would scarcely admit the validity of foreign judgments against

¹⁷ See especially, Duncan & Dykes, pp. 74, 75. The arrestment is really a mere step in procedure, and to arrest the property in the sense of attachment a further arrestment on the dependence is necessary; see, for its operation, *Re Queensland Mercantile & Agency Co.* [1891] 1 Ch. 536.

¹⁸ *The Beldis* [1936] P. 51.

¹⁹ *Schibsby v. Westenholz* (1870) L.R. 6 Q.B. 155, 163. But see Johnson, *loc. cit.*, III, p. 637.

²⁰ Compare the Report of the Committee on British and Foreign Legal Procedure, 1919, Parliamentary Paper, Cmd. 251, pp. 3, 4.

²¹ Compare Chap. 4, Rule 28, Exception 8, *post*, based on Ord. XI, r. 1 (g).
See Ord. XVII.

persons made parties to an action simply under rules similar to Rules of Court, Ord. XI, r. 1 (g), or Ord. XVIIA.

It appears, therefore, that the greater number of the instances in which the High Court itself claims jurisdiction, or allows jurisdiction to foreign courts, fall under one or other of our two principles. Other instances are in reality applications of one or other of these principles, modified more or less by the desirability (e.g., in the case of divorce) of enabling the court of some one country to give a final decision on matters as to which the court of no country can give an absolutely effective judgment. In yet other instances the rule as to jurisdiction is doubtful, but the doubt arises not from the validity of our tests, but from a difference of opinion on the result to which the application of these tests leads. Further, occasionally our courts, for purposes of convenience, exercise a jurisdiction which they would not concede to foreign tribunals. If, however, the instances in which our tests obviously hold good be fairly compared with the few instances in which their validity is disputable, the conclusion to which we are led is that the principle of effectiveness and the principle of submission are the true, though not perhaps the sole criteria of jurisdiction.²³

Character of the General Principles. What, it may be asked, is the true nature and the real value of the General Principles propounded in this Introduction?

They are not axioms whence may be deduced the Rules to be found in the body of this treatise, nor again propositions covering the whole field of the choice of law and possessing such accuracy and precision as to be applicable with confidence to the solution of novel questions. With regard to the rules of the choice of law recognised by English courts it is impossible to lay down principles to cover the ground. These rules are of recent growth, subject to constant change and expansion. Whilst many single maxims may be treated as well established, many of the fundamental ideas on which the system rests are far from being well defined or beyond dispute, and rules which are repeated in text books, and even in judgments, will often be found on examination to rest on a very narrow basis of precedent; whilst the actual practice of the courts in some instances hardly coincides with doctrines nominally laid down in judgments of received authority.

The Principles are essentially generalisations suggested by the decisions and dicta of the courts and by writers of acknowledged weight and authority. These generalisations, though not laid down,

²³ Dicey's General Principles, Nos. 5 and 6 (3rd ed., pp. 59-64) have been omitted from this edition. The former dealt very shortly with the problem of characterisation which is fully discussed *post*, pp. 62-73. The latter dealt with the incorporation of foreign law in wills and contracts; these matters are fully discussed *post*, Chap. 24, p. 579, Chap. 31, p. 817.

in so many words, by English judges express the grounds on which reported decisions may logically be made to rest; they are far less the premises from which our judges start, when called upon to determine any question of private international law, than the principles towards the establishment of which the decisions of our courts gradually tend. They mark not so much the *terminus a quo* as the *terminus ad quem* of judicial legislation. The doctrine, for example, which is embodied in Principle No. 1, is rarely, if ever, enunciated in its full breadth by an English court. But the tendency, prevalent throughout the civilised world, to give full effect to rights acquired under, or in some way measured by, foreign law is constantly followed by English courts in accordance with the English notions of the conflict of laws. The principle again, that the jurisdiction of a country's courts is, or ought to be, governed by the criterion of effectiveness, may be seldom authoritatively laid down as a maxim recognised by the law of England. But our courts do to a very great extent regulate the exercise of their own jurisdiction, and still more often determine what recognition is to be given to foreign judgments, by reference to the test of effectiveness. The same consideration has influenced English legislation concerning the recognition of foreign judgments.

When the nature of these Principles is appreciated, their true value becomes apparent. They suggest a general view of the whole subject of the conflict of laws as administered by English courts. They indicate the direction in which these rules tend, and thus give a rational meaning to maxims which, when taken by themselves, appear arbitrary or conventional; and, if they do not directly solve new problems of the conflict of laws, they help us in perceiving what are the problems which need solution.

PART ONE

PRELIMINARY MATTERS

PART 1 treats of matters which are in strictness preliminary to the Rules contained in Parts 2 and 3.

Chapter 1 contains the interpretation of certain terms, such, for example, as 'country', 'foreign country', 'law of a country', and the like, which often occur in the subsequent Rules, and the accurate apprehension whereof facilitates the understanding of the whole Digest. It also deals with the problems of Renvoi, Characterisation, and the so-called Incidental or Preliminary Question.

Chapter 2 contains Rules for determining a given person's domicile. The application of many of our Rules, and notably of those relating to marriage, divorce and succession to movables, frequently depends upon the ascertainment of a person's domicile. It is therefore in accordance with usage to set out the principles which regulate the acquisition, loss, and resumption of domicile.

CHAPTER 1

INTERPRETATION OF TERMS¹

1. GENERAL DEFINITIONS

IN the following Rules and Exceptions, unless the context² or subject-matter otherwise requires, the following terms have the following meanings.

1. 'This Digest' means the Rules and Exceptions contained in Parts 1 to 3 of this treatise.

2. 'Court' means His Majesty's High Court of Justice in England.³

3. 'Person' includes a corporation or body corporate.⁴

4. 'Country' means the whole of a territory subject under one sovereign to one system of law.⁵

5. 'State' means the whole of the territory (the limits whereof may or may not coincide with those of a country) subject to one sovereign.⁶

6. 'Foreign' means not English.⁷

7. 'Foreign country' means any country which is not England.⁸

8. 'England' means the territory of England, including the Principality of Wales and the town of Berwick-

¹ The terms defined are intended to bear in the Rules and Exceptions which make up the Digest the meaning here given them. It is not meant that they should necessarily have the same sense in the comment which accompanies the Digest. To restrict in the comment the use of every term used in the Digest to the special meaning there given it, would involve the employment of strained or unnatural language without conducing to the intelligibility or precision of the comment.

² The sense given to a term in this clause is occasionally varied in express words in some of the subsequent Rules. See, e.g., definition of 'Court', Rule 40, *post*.

³ And, if and so far as the Court of Appeal has original jurisdiction, includes the Court of Appeal. Strictly speaking, the Court of Appeal is part of the Supreme Court of Judicature, but not of the High Court: *Re Carroll* (No. 2) [1931] 1 K.B. 104.

⁴ See p. 41, *post*.

⁵ See p. 42, *post*, for certain qualifications of this definition.

⁶ See p. 42, *post*.

⁷ See p. 42, *post*, as to 'British' and 'English': 49 L.Q.R. 463, note by F.P.

⁸ See p. 42, *post*.

on-Tweed, and the territorial waters adjacent thereto, and includes any ship of the Royal Navy wherever situate.⁹

9. 'United Kingdom' means the United Kingdom of Great Britain (England and Scotland) and Northern Ireland, the islands and the territorial waters adjacent thereto, but does not include Eire, the Isle of Man or the Channel Islands.¹⁰—

10. 'British territory' means all countries subject to the Crown, including the United Kingdom, and the territorial waters adjacent thereto, but does not include any protectorate, protected State, mandated territory or trust territory.—

11. 'Domicile' means the country which in accordance with the Rules¹¹ in this Digest is considered by English law to be a person's permanent home.¹²

12. 'Independent person'¹³ means a person who as regards his domicile is not legally dependent, or liable to be legally dependent, upon the will of another person.

13. 'Dependent person' means any person who is not an independent person as hereinbefore defined, and includes:

- (i) an infant;
- (ii) a married woman.

14. 'An immovable' means a thing which can be touched but which cannot be moved, and includes, unless the contrary is expressly stated, a chattel real.¹⁴

15. 'A movable' means a thing which is not an immovable, and includes:

⁹ See p. 43, *post*.

¹⁰ Certain islands, though not physically forming part of the United Kingdom, are by law held to be part of the United Kingdom; such, *e.g.*, are Shetland, which despite its great distance from Scotland is part of Scotland, and the Isle of Wight, which is part of England. Certain other islands, the Isle of Man and the Channel Islands, are held by law not to be part of the United Kingdom. The difference of treatment depends not on physical but on historical causes. The new definition of United Kingdom to exclude Eire was laid down by the Royal and Parliamentary Titles Act, 1927, s. 2 (1), and see *Re Barlow* [1933] P. 184.

¹¹ See Rules 1 to 17, and, as to domicile of corporations, Rule 18, *post*.

¹² Compare p. 43, *post*.

¹³ See p. 44, *post*.

¹⁴ See p. 45, *post*.

(i) a thing which can be touched and can be moved, and

(ii) a thing which is the object of a claim,¹⁵ and cannot be touched, or, in other words, a chose in action (thing in action)

16. 'Lex domicilii', or 'law of the domicile', means the law of the country where a person is domiciled.¹⁶

17. 'Lex loci contractus' means the law of the country where a contract is made.¹⁷

18. 'Lex loci solutionis' means the law of the country where a contract is to be performed.¹⁸

19. 'Lex loci actus' means the law of the country where a legal act takes place.

20. 'Lex situs' means the law of the country where a thing is situate.¹⁹

21. 'Lex fori' means the local or domestic law of the country to which a court, wherein an action is brought, or other legal proceeding is taken, belongs.²⁰

Comment

(3) *Person*.²¹—The word 'person' includes not only a natural person or human being, but also an artificial person or, speaking broadly, a corporation. This wide sense is the meaning given to the word in this Digest, but every definition is to be taken subject to the reservation 'unless the context or subject-matter otherwise requires'. There are many Rules which can obviously apply only to natural persons.²²

(4) *Country*.—The word 'country' has among its numerous significations the two following meanings, which require to be carefully distinguished from one another.

(i) A country, in the political sense of the word, means 'the whole of the territory, subject to one sovereign power', such as Italy or the United States. To a country in this sense the term 'realm' or 'state' is often applied.

(ii) A country, in the legal sense of the word, which is that employed throughout the Digest and normally in the body of this work, means 'a territory, which (whether it constitutes the whole

¹⁵ See p. 45, *post*.

¹⁶ See p. 46, *post*.

¹⁷ See p. 46, *post*.

¹⁸ See p. 47, *post*.

¹⁹ See p. 47, *post*.

²⁰ See p. 47, *post*.

²¹ Only those terms are commented upon which need some explanation.

²² *E.g.*, Rule 8, *post*.

or a part only of the territory subject to one sovereign) is the whole of a territory subject to one system of law'; such, for example, as England, Scotland, or Northern Ireland, or as each of the States which collectively make up the United States. For the term 'country', in this sense of the word, there is no satisfactory English substitute. It might (on the analogy of the Latin *territorium legis* and the German *Rechtsgebiet*), be called a 'law district'.²³

Territories ruled by different sovereigns never constitute one country in either sense of the term, but a territory ruled by one and the same sovereign, *i.e.*, a realm, though it may as a fact constitute one country or law district, may also comprise several such countries or law districts.

Thus Italy and Belgium each constitute one separate country in both senses of the term. On the other hand, the British Commonwealth and Empire, while originally constituting one country or realm in the political sense of the term country, has always consisted of a large number of countries in the legal sense of the word, since England, Scotland, Northern Ireland, the Isle of Man, the different Dominions, provinces, states, colonies, protectorates, etc., are in this sense separate countries or law districts.²⁴

(5) *State*.—The word 'State' has various senses. It is often used as meaning a political society, governed by one and the same sovereign power. Here it is used in contrast with country as the whole of the territory subject to one sovereign power.

(6) *Foreign*, and (7) *Foreign Country*.—The word 'foreign' means, as used throughout this Digest, simply 'not English'. Thus, a Scottish parent is as much within the term foreign parent as an Italian or a French parent. The expression 'foreign country' means any country except England, and applies as much to Scotland, Northern Ireland, New Zealand, etc., as to France or Italy.²⁵

²³ See Arminjon, 3rd ed., i., pp. 157-160; Read, pp. 7-51. The sense here given to 'country' is exemplified by the Legitimacy Act, 1926, s. 8, where it is recognised that for purposes of the conflict of laws Scotland and any other part of British territory is in the same position as a 'foreign country'. The usual meaning of 'country' may of course be modified in a particular case by the express words of a statute, *e.g.*, Matrimonial Causes (War Marriages) Act, 1944, s. 1 (2), (U.S.A. and India): cf. Indian Independence Act, 1947.

²⁴ Although, *e.g.*, Canada is a single Dominion, nevertheless each province, as well as the Yukon and the North-West Territories, is a country in the legal sense of that term, and a man is domiciled not in Canada but in, *e.g.*, Alberta; see *Att.-Gen. for Alberta v. Cook* [1926] A.C. 444. Australia also consists of several countries, the States, the Federal Capital Territory, etc. Delicate questions might arise as to which areas are law districts. Jersey and Guernsey doubtless are, but perhaps not Alderney or Sark. Tobago presumably now is part of the law district of Trinidad.

²⁵ See, however, *Re Orr-Ewing* (1882) 22 Ch.D. (C.A.) 456, 464, 465, for an objection by Jessel, M.R., to the use of the word 'foreign' as applied to Scotland which though admittedly not a 'foreign' country in the sense in which the word 'foreign' is used in ordinary discourse, certainly is a 'foreign' country in the sense in which these words are defined in this treatise.

(8) *England*.—The word 'England' is used in its ordinary sense of England and Wales, including any adjacent islands, such as the Isle of Wight or Anglesea or Lundy Island,²⁶ which form part of, or are, English or Welsh counties. The word, however, is by our definition extended so as to include a ship of the Royal Navy wherever situate, *e.g.*, when lying in an Italian port; such a ship is, it is said,²⁷ regarded by a fiction of law as part of the parish of Stepney. In any case, a person on board thereof is within the territorial jurisdiction of the High Court, *i.e.*, is considered as being in England, and Ord. XI, r. 1, as to service of a writ out of the jurisdiction,²⁸ is inapplicable to him.²⁹ A British merchant ship, when on the high seas, is normally subject to English law,³⁰ but under what circumstances, and to what extent, she is to be considered as part of England is open to some question. The territorial waters adjacent are normally included in the term.³¹

✓(11) *Domicile*.—A person's domicile is the country which is considered by English law to be his permanent home. The words 'considered by English law' are important and point to the fact that a person's domicile is not a mere question of fact, but an inference of law drawn from the facts. For further information as to the nature and meaning of domicile, the reader is referred to

²⁶ *Harman v. Bolt* (1931) 47 T.L.R. 219.

²⁷ See *Annual Practice*, note to Ord. XI, r. 1; *Fraser v. Akers* (1891) 35 S.J. 477.

²⁸ Compare Rule 28, and Exceptions thereto, *post*.

²⁹ *Seagrove v. Parks* [1891] 1 Q.B. 551, and see Memorandum on Service of Legal Process, in Civil Proceedings, on Members of H.M. Forces, by the Lord Chancellor's Department, April, 1944, in the *Annual Practice*.

³⁰ The Commonwealth of Australia Constitution Act, 1900, s. 5, provides for the application of the laws of the Commonwealth to all British ships (other than the King's ships of war) whose first port of clearance and whose port of destination is in the Commonwealth. As to the limitations of the doctrine that a ship is part of the territory of the country whose flag it carries, see *R. v. Keyn* (1876) 2 Ex.D. 63, 93, 94, *per* Lindley, L.J.; *Chartered Bank of India v. Netherlands Co.* (1883) 10 Q.B.D. 521, 544; *Chung Chi Cheung v. R.* [1939] A.C. 160; *R. v. Gordon Finlayson* [1941] 1 K.B. 171.

³¹ See the Territorial Waters Jurisdiction Act, 1878. The Merchant Shipping Acts repeatedly recognise that ships may be arrested not merely in ports but within three miles of the coast; see the Merchant Shipping Act, 1894, s. 688; Shipowners' Negligence (Remedies) Act, 1905, s. 1; Workmen's Compensation Act, 1925, s. 39; R. S. C., Ord. LIIIc; Maritime Conventions Act, 1911, s. 8; Merchant Shipping (Stevedores and Trimmers) Act, 1911, s. 1; note also the wide terms of s. 685 of the Act of 1894 extending the jurisdiction of every court to ships passing on the coast. The Patents and Designs Acts, 1907 and 1938, show that the jurisdiction of the English courts extends to foreign ships violating patent rights in territorial waters; compare *Caldwell v. Van Vliessen* (1851) 31 L.J.Ch. 97; contrast *Brown v. Duchesne* (1857) 19 How. 188, and a British ship on the high seas is not part of the United Kingdom within s. 41 of the Army Act, 1881, *R. v. Gordon Finlayson* [1941] 1 K.B. 171. Aircraft covered by s. 3 of the Air Navigation Act, 1947, cannot be seized on patent claims. The extent of British jurisdiction is a matter to be determined by the Crown, represented by the Secretary of State for Home Affairs, and is properly presented to the court by the Attorney-General: *The Fagernes* [1927] P. (C.A.) 211.

the Rules explaining its meaning or nature, with reference, first, to natural persons³³; secondly, to corporations.³⁴

(12) *Independent Person*, and (13) *Dependent Person*.—An independent person means a person who, as regards the legal effect of his acts, is not dependent on the will of any other person. Since the term is used in this Digest with reference to a person's legal capacity for acquiring or changing his domicile it means a person legally capable of effecting a change of domicile, and who is not liable to have it changed by the act of any other person.³⁵

Under English law a man of full age, or an unmarried woman of full age, is such an independent person.

A dependent person means a person who, as regards the legal effects of his acts, is dependent, or liable to be dependent, on the will of another person. Used with reference to a person's legal capacity for acquiring or changing his domicile it means a person who is not legally capable of effecting a change of domicile for himself, but whose domicile is liable to be changed (if at all) by the act of another.³⁶

Under different legal systems, different classes of persons are dependent persons. Under English law the two classes which indubitably fall within the term as already explained are—first, infants; and, secondly, married women.³⁷ Neither of these classes has the legal capacity to make a change of domicile, and both of these classes are liable to have it changed by the act of another person, who in the case of infants³⁸ is generally the father, and in the case of married women³⁹ is always the husband.

The term 'liable' in the definition should be noticed. It covers the case of a person (such as an infant without living parents or guardians) of whom it cannot be said that there is at the moment any person on whom he is dependent, or who can change his domicile. The infant is, however, even then not an independent person in the sense in which the word is here used. He is legally incapable of changing his own domicile,⁴⁰ and liable to have it changed (if at all) by the act of a person appointed guardian.⁴¹

³³ See Rules 1 to 17, *post*.

³⁴ See Rule 18, *post*.

³⁵ Such a person as is here described by the term independent person is often called, both by judges and text-writers, a person *sui juris*. This expression is borrowed from Roman law. It is a convenient one, but is purposely avoided on account of the difficulty of transferring without some inaccuracy the technical terms of one legal system to another.

³⁶ Such a dependent person is often termed a person not *sui juris*.

³⁷ Lunatics are purposely not added. Their position in respect of capacity to effect a change of domicile is not free from doubt, but the better view seems to be that a lunatic's domicile cannot be changed by his committee. See comment on Rule 17, *post*.

³⁸ Rule 9, Sub-Rule 1, *post*.

³⁹ Rule 9, Sub-Rule 2, *post*.

⁴⁰ Rule 10, and Sub-Rule, *post*.

⁴¹ *Pottinger v. Wightman* (1817) 3 Mer. 67; *Re Beaumont* [1893] 3 Ch. 490.

(14) *An Immovable* and (15) *A Movable*.

(i) The subjects of property are in general⁴² throughout this treatise divided into immovables and movables, and under the latter head are included all things which do not fall within the description of immovables.

Immovables are tangible things which cannot be moved, such as are lands and houses, whatever be the interest or estate which a person has in them. Hence the term includes 'chattels real', that is to say, land, etc., in which a person has less than a freehold interest, as, for instance, leaseholds.

Movables are, in the first place, such tangible things as can be moved, e.g., animals, money, stock in trade, and in general terms goods; and, in the second place, 'things' (using that word in a very wide sense indeed) which are the objects of a claim (e.g., payment of money due from X to A), called by English lawyers 'choses in action', in one of the senses of that ambiguous term.⁴³

It is convenient to group under the one head of movables goods and choses in action (the objects of a legal claim), for neither class falls under the head of immovables, and each class is in many respects, as regards the conflict of laws, subject to the same rules. There is, however, this essential distinction between goods and choses in action, that goods have in fact a physical local situation, and choses in action (e.g., debts) have not, though English law ascribes to them a situs on various grounds. Hence, those Rules as to movables which depend upon an article having a real local situation, i.e., occupying a definite space, do not, except by analogy, apply to choses in action.

(ii) The division of the subjects of property into immovables and movables does not square with the distinction known to English lawyers between *things real*, or real property, and *things personal*, or personal property.

For though all things real are, with certain exceptions, included under immovables, yet some immovables are not included under things real; since 'chattels real', including estates for years, at will, and by sufferance, or, speaking generally, leaseholds, are included under immovables, whilst they do not, for most purposes, come within the class of realty, or things real.

On the other hand, while all movables are, with certain exceptions, included under things personal, or personalty, there

⁴² In some Rules, as, for example, those referring to administration, and in Rules which are intended to follow verbatim the words of an Act of Parliament, it is sometimes necessary to use to a limited extent the ordinary English division into realty and personalty, or real property and personal property.

⁴³ *Choses in action* or, as now used in the terminology of Acts of Parliament, thing in action, is used for—

- (i) the claim or right to a performance or service legally due from one man to another;
- (ii) the thing claimed, e.g., the debt due;
- (iii) the evidence of the claim, e.g., the bond on which a debt is due.

are things personal, viz., chattels real, or, speaking generally, leaseholds, which are immovables, and are in no way affected by the Rules hereinafter laid down as to movables.⁴⁵

To put the same thing in other words, 'immovables' are equivalent to realty, with the addition of chattels real or leaseholds; 'movables' are equivalent to personalty, with the omission of chattels real.

It is of consequence to notice the difference between movables and personal property, because judges have occasionally used language which identifies movables with personal property,⁴⁶ and suggests the conclusion that all kinds of personalty, including leaseholds, are, as regards the conflict of laws (i.e., in the case of intestate succession), governed by the rules which apply to movables properly so called. This doctrine has now been pronounced erroneous, and leaseholds (it has been decided) are, as regards the conflict of laws, to be considered of course as personalty, but also as immovables.⁴⁷

(16) *Lex domicilii*.—What is the country in which a person is domiciled must be determined in accordance with the Rules hereinafter stated.⁴⁸ It may here be remarked that domicile is a totally different thing from residence.

A French citizen is permanently settled in England, but is residing for a time at Paris. The law of his domicile is the law of England.

(17) *Lex loci contractus*.—The expression *lex loci contractus*, at any rate as used by English courts, is ambiguous.—

(i) It means the law of the country where a contract is made or entered into. This is the sense in which it is always employed in this Digest, and in which it is generally employed in the earlier English cases on the conflict of laws.

(ii) It sometimes denotes the law of the place where the contract is to be performed, which is more accurately styled the *lex loci solutionis*.

(iii) It sometimes means the law by which the parties who make a contract intend it to be governed, or as it is often called, the proper law of the contract.⁴⁹

These laws constantly do in fact coincide, that is, are one and the same law, as where X in London sells goods to A, to be

⁴⁵ For full discussion, see *post*, Chap. 21, p. 521.

⁴⁶ See, e.g., *Sill v. Worswick* (1791) 1 H.Bl. 665, 690; *Birtwhistle v. Vardill* (1826) 5 B. & C. 438, 451, 452; *Forbes v. Steven* (1870) L.R. 10 Eq. 178; *Re O'Keefe* [1940] Ch. 124, 128; *Duke of Marlborough v. Att.-Gen.* [1945] Ch. 78, 86; *Re Allen's Estate* (1945) 114 L.J.Ch. 298; *Baindail v. Baindail* [1946] P. 122, 127; *Re Bischoffsheim* [1948] Ch. 79, 92.

⁴⁷ *Freke v. Lord Carbery* (1873) L.R. 16 Eq. 461; *In Goods of Gentili* (1875) L.R. 9 Eq. 541; *De Fogassieras v. Duport* (1881) 11 L.R.Lr. 128; *Re Moses* [1908] 2 Ch. 235. Compare *Duncan v. Lawson* (1889) 41 Ch.D. 894; *Pepin v. Bruguère* [1902] 1 Ch. (C.A.) 24. Cf. Westlake, ss. 164-169.

⁴⁸ See Rules 1-18, *post*.

⁴⁹ See Rule 138, *post*.

delivered and paid for in London, and to be governed by English law. But they need not coincide. A marriage contract, or settlement, is made in England between X and A, who are a Scots man and woman domiciled in Scotland. It appears, either from the express terms or indirectly from the language of the instrument, that the contract is intended to be carried out in accordance with the law of Scotland. In such a case the *lex loci contractus*, in the first sense of that term is clearly the law of England; the *lex loci contractus*, in the third sense of that term, is as clearly the law of Scotland.

(18) *Lex loci solutionis*.—X contracts in London to deliver goods to A in Italy. The *lex loci solutionis* is the law of Italy.

(19) *Lex loci actus*.—X, domiciled in England, a British subject, makes a will in Scotland. The *lex actus* is the law of Scotland.

(20) *Lex situs*.—X leaves by will to A lands in England, money in France, and furniture in Italy.

The *lex situs*, as regards the land, is the law of England; as regards the money, the law of France; as regards the furniture, the law of Italy.⁵⁰

(21) *Lex fori*.—This expression always means the *local or domestic* law of the country to which a court wherein the action is brought, or other legal proceedings are taken, belongs. Hence the term excludes the application of any law other than the local law; and this is so whether the country referred to be England or a foreign country. If, for instance, the assertion be made in reference to England that the courts, as to certain matters (*e.g.*, procedure), always follow the *lex fori*, what is meant is that, when an action, etc., is brought in an English court, every matter of procedure is determined in accordance with the ordinary local or domestic law of England, and that this is so, even though the case have in it a foreign element, as where an Italian brings in England an action against a Frenchman for the breach of a contract made in Germany.

2. MEANING OF 'LAW OF A COUNTRY'

(THE PROBLEM OF RENVOI)⁵¹

'In this Digest the law of a given country (*e.g.*, the law of the country where a person is domiciled):'

⁵⁰ The object of these examples is to illustrate the meaning of the *lex situs*; they are not intended to show what is the law applicable to the things in question. As a matter of fact, succession to these things will be determined by an English court, as regards the land, in accordance with the *lex situs*, but as regards the money and furniture, in accordance with the *lex domicilii* of the testator.

⁵¹ The literature on this subject is immense. See Westlake, Chap. 2; Dicey, 5th ed. Appendix, Note I; Cheshire, pp. 85-129; Wolff, ss. 120-133, 178-195;

- (i) means, when applied to England, the local or domestic law of England;
- (ii) means, when applied to any foreign country, usually the local or domestic law of that country, sometimes any domestic law which the courts of that country apply to the decision of the case to which the Rule refers.

Comment

The term 'law of a country', e.g., the law of England or the law of Italy, is, as already explained,^{51a} ambiguous. It means in its narrower and most usual sense the domestic or local law of any country, i.e., the law which is applied by the courts thereof to the decision of cases which have in them no foreign element. It means in its wider sense all the principles or maxims, including the rules of the conflict of laws, which the courts of a country apply to the decision of cases coming before them.

The Rules contained in this Digest state the principles according to which English courts will determine what is the system of law to be applied to the decision of a given case having in it any foreign element. When these considerations are borne in mind, the varying meaning of the expression law of a country becomes intelligible.

(1) When country is England.—When any Rule, applied to circumstances of a given case, directs that the case be determined in accordance with the law of England, then the term 'law of England' must mean the local or domestic law of England. If the term were used in a more general sense and meant whatever law or principle an English court would apply to the case, the Rule

Falconbridge, Chaps. 7, 8, 9, 10; Restatement, ss. 7, 8; Goodrich, s. 7; Cook, Chap. 9; Lorenzen, Chaps. 2, 3, 5; J. Pawley Bate, *Notes on the Doctrine of Renvoi* (1904) (the best account of the cases down to 1903); Bentwich, *The Law of Domicile in its Relation to Succession and the Doctrine of Renvoi* (1911); Baty, *Polarized Law* (1912), pp. 116 ff.; Mendelssohn-Bartholdy, *Renvoi in Modern English Law* (1937); *Collier v. Rivoaz* (1841) 2 Curt. 855; *Frere v. Frere* (1847) N. of C. 598; *Bremer v. Freeman* (1857) 10 Moo. P.C. 306 (the only English case of appellate authority); *Hamilton v. Dallas* (1876) 1 Ch.D. 257; *In bonis Lacroix* (1877) 2 P.D. 94; *Re Trufort* (1887) 36 Ch.D. 600; *Ross v. Ross* (1894) 25 Can.S.C.R. 307; *Re Johnson* [1908] 1 Ch. 821 (the first English case in which the word *renvoi* appears); *Armistage v. Att.-Gen.* [1906] P. 135; *Casdagli v. Casdagli* [1918] P. 89; 110-111; *Re Annesley* [1926] Ch. 692; *Re Ross* [1930] 1 Ch. 377; *Re Askew* [1930] 2 Ch. 259, followed in *Collins v. Att.-Gen.* (1931) 47 T.L.R. 484; *Re O'Keefe* [1940] Ch. 124; *Kotia v. Nahas* [1941] A.C. 403; *Re Duke of Wellington* [1947] Ch. 506. For periodical literature, see Abbott, 24 L.Q.R. 137 (1908); Jethro Brown, 25 L.Q.R. 149 (1909); Schreiber, 31 H.L.R. 523 (1918); Morris, 18 R.Y.B.I.L. 32 (1937); Griswold, 51 H.L.R. 1165 (1938); Cowan, 37 U. of Penn.L.Rev. 34 (1938); Griswold, 37 U. of Penn.L.Rev. 267 (1939); Cormack, 34 Cornell L.Rev. 221 (1941). The fullest discussion in English is to be found in Falconbridge, loc. cit. For continental literature, see *Rebel*, pp. 70-82.

would constitute an unmeaning truism; for we are dealing with cases decided by an English court, and any case so decided must be determined in accordance with some law or principle which the English court applies to it. If by the law of England were meant any principle which the English courts would apply to the case, the Rule would afford no guidance whatever.

(2) *When country is a foreign country.*—When any Rule applied to the circumstances of a given case directs that the case be determined in accordance with the law, e.g., of Italy, then the term 'law of Italy' means usually the local or domestic law of Italy, but sometimes means any principle or body of law which the Italian courts hold applicable to the particular case. This ambiguity in the expression 'law of Italy' gives rise to the difficult problem of renvoi.

Nature of the Problem. The problem of renvoi arises whenever a rule of the conflict of laws refers to the 'law' of a foreign country, but the conflict rule of the foreign country would have referred the question to the 'law' of the first country or to the 'law' of some third country. The classic illustration is that of the British subject who dies intestate domiciled in Italy, leaving movables in England. The English conflict rule refers to the law of the domicile (Italian law), but the Italian conflict rule refers to the national law, which may for the moment be assumed to be English law. Here we have a patent conflict of conflict rules⁵² involving a reference back to the forum (*remission*, *Rückverweisung*, *rinvio*). Had the intestate been a German instead of a British national we should have had a patent conflict of conflict rules involving a reference on to German law (*transmission*, *Weiterverweisung*). Had the intestate been domiciled in New York in the English sense and in England in the New York sense, and both the English and the New York conflict rules agreed that intestate succession to movables was governed by the law of the domicile, we should have had a latent conflict of conflict rules,⁵³ arising from the fact that though the English and New York conflict rules were in apparent agreement, they differed in what constitutes domicile.^{52a}

The following statement of the problem raised by these cases has been widely accepted: 'When the conflict of laws rule of the forum refers a jural matter to a foreign law for decision, is the reference to the corresponding rule of the conflict of laws of that foreign law, or is the reference to the purely internal rules of law

⁵² For the difference between patent and latent conflicts of conflict rules, see *post*, pp. 64-66.

^{52a} At least two important differences between English and New York rules as to domicile suggest themselves: (1) in New York law the abandonment of a domicile of choice does not involve the revival of the domicile of origin (contrast Rule 8 (2) (ii), *post*); (2) in New York law a married woman can have a different domicile from that of her husband (contrast *Supra* Rule 2 to Rule 9, *post*).

of the foreign system, *i.e.*, to the totality of the foreign law, minus its conflict of laws rules? In this situation, a court might conceivably adopt any one of three solutions.⁵⁴

(1) The court might apply the domestic rule of the foreign country, that is, the law of the foreign country applicable to a purely domestic situation arising therein, without regard to the elements which render the situation a conflict of laws situation for the foreign law.⁵⁵ Thus, in the case of a British subject dying intestate domiciled in Italy, and leaving movables in England, the English court might (if it adopted this solution) apply the purely domestic rule of Italian law applicable to Italians, disregarding the fact that the intestate was a British subject. This solution, which is hereinafter called the 'internal law theory', requires proof of the internal law of the foreign country, and does not require proof of its conflict rules. It has been recommended (*obiter*) by two English judges on the ground that it is 'simple and rational'.⁵⁶

(2) If the conflict rule of the foreign country refers back to the law of the forum or on to the law of a third country, the court might accept the reference and apply the internal law of the forum or the internal law of the third country. The former process is technically known as 'accepting the renvoi'. Thus, in the case of a British subject dying intestate domiciled in Italy, leaving movables in England, the English court might (if it adopted this solution) apply the domestic rule of English law, that is the rule laid down in the Administration of Estates Act, 1925, disregarding the fact that the intestate was domiciled in Italy. This solution, which is hereinafter called the 'partial renvoi theory', requires proof of the conflict rule of the foreign country, but does not require proof of the foreign rules about renvoi. It has been adopted by continental courts in a number of celebrated cases.⁵⁷

(3) The court might decide the case in exactly the same way as it would be decided by the foreign court. Thus, in the case of a British subject dying intestate domiciled in Italy, leaving movables in England, the English court (if it adopted this solution) would decide the case as it would be decided by the Italian court. If the Italian court would refer to English 'law' and would

⁵³ Schreiber, 31 H.L.R. 523, 525, adopted by Beale, Treatise, s. 7, (3); Goodrich, p. 13; Griswold, 51 H.L.R. 1165, 1170.

⁵⁴ Cheshire, p. 87; Morris, 18 B.Y.B.I.L., pp. 32, 33; Falconbridge, p. 188.

⁵⁵ This appears to be the solution generally adopted in the United States; Restatement, s. 7, *Re Tallmadge* (1919) 181 N.Y. Supp. 336; though there is dissent: Griswold, 51 H.L.R. 1165, citing *Gray v. Gray* (1934) 87 N.H. 82, 174 Atl. 508, and *University of Chicago v. Dater* (1936) 277 Mich. 658, 270 N.W. 175, on which see Cook, pp. 246-250.

⁵⁶ *Re Annesley* [1926] Ch. 692, 708-709, per Russell, J.; *Re Askew* [1930] 2 Ch. 269, 278, per Maugham, J.; cf. *Barcelo v. Electrolytic Zinc Company of Australasia* (1932) 43 O.L.R. 391, 437, per Evatt, J.; *Bremer v. Freeman* (1857) 10 Moo.P.C. 306; *Hamilton v. Dallas* (1876) 1 Ch.D. 257.

⁵⁷ See e.g., *L'Affaire Forgo* (Clunet, 1883, p. 64); *L'Affaire Soulié* (Clunet, 1910, p. 883); Falconbridge 136-139.

interpret that reference to mean English domestic law, then the English court would apply English domestic law. If on the other hand the Italian court would refer to English 'law' and interpret that reference to mean English conflict of laws, and would 'accept the renvoi' from English law and apply Italian domestic law, then the English court would apply Italian domestic law. This solution, which is hereinafter called the 'total renvoi theory', requires proof not only of the conflict rule of the foreign country but also of the foreign rules about renvoi.)

The English Cases. There is no doubt that English courts of first instance have, in matters of succession both testate and intestate, and in matters of status, adopted the total renvoi theory: *Re Annesley*,⁵⁸ *Re Ross*,⁵⁹ *Re Askew*,⁶⁰ *Re O'Keefe*,⁶¹ *Re Duke of Wellington*.⁶² There is therefore some justification for the statement in the 5th edition of this work that there is 'an unbroken catena of authority' in its favour.⁶³ But these decisions were arrived at without, it is submitted, adequate discussion of the theoretical and practical difficulties involved, and it does not follow that they lay down a rule of universal application, capable of being generalised and applied to situations other than those of succession or status.⁶⁴

In *Re Annesley*,⁶⁵ a testatrix, a British subject, died domiciled in France in the English sense, but domiciled in England in the French sense because she had not obtained authority from the French Government to set up a legal domicile in France, as required by Article 18 of the Code Napoleon (since repealed). She left a will which was valid by English domestic law, but partially invalid by French domestic law because she failed to leave the requisite proportion of her movables to her children. Russell, J., held (1) that the testatrix died domiciled in France, her English domicile in the French sense being irrelevant in an English court⁶⁷; (2) that French domestic law applied, because a French court would refer to English law as the national law of the testatrix and would accept the renvoi back to French law. The decision would have been the same if the learned judge had, in accordance with his own inclination, adopted the internal law solution and applied French domestic law in the first instance.⁶⁸

⁵⁸ [1926] Ch. 692 (essential validity of will of movables).

⁵⁹ [1930] 1 Ch. 377 (essential validity of will of movables and immovables).

⁶⁰ [1930] 2 Ch. 259 (legitimation by subsequent marriage).

⁶¹ [1940] Ch. 124 (intestate succession to movables).

⁶² [1947] Ch. 506 (testator's disposing power in will of immovables).

⁶³ Preface, p. iv.

⁶⁴ *Post*, pp. 55-61.

⁶⁵ [1926] Ch. 692.

⁶⁷ Following *Re Martin* [1900] P. 211 and not following *Re Johnson* [1903] 1 Ch. 821. The law is now well settled in the sense laid down by Russell, J.: *post*, p. 96.

⁶⁸ The decision on the second point is open to the comment that French law referred to English law, not because the testatrix was a British subject, but because she was domiciled in England in the French sense, a factor which had

In *Re Ross*,⁶⁹ the testatrix, a British subject, died domiciled in Italy leaving movables in England and Italy and immovables in Italy. Her will was valid by English domestic law, but partially invalid by Italian domestic law because it failed to leave a *legittima portio* to her only son. Luxmoore, J. referred to Italian 'law' so far as the movables were concerned, because the testatrix was domiciled in Italy, and to Italian 'law' so far as the immovables were concerned, because they were situated in Italy. Finding that the Italian court would have referred to English 'law' as regards both the movables and immovables, because the testatrix was a British subject, and would not have accepted the renvoi back to Italian law, he finally applied English domestic law, with the result that the will was held valid.⁷⁰

In *Re Askew*,⁷¹ an English marriage settlement made on the occasion of A's first marriage gave him a special power of appointment among the children of a second marriage if he married again. A was a British subject. He acquired a domicile of choice in Germany, obtained a divorce there from his first wife, and married again. After he had acquired his German domicile, but before the divorce, A had a daughter by the lady who eventually became his second wife. A purported to exercise his power of appointment in favour of this daughter. The question was therefore whether she was an object of the power. In the view of Maugham, J., this depended on whether she had been legitimated by German law,⁷² her father having been domiciled in Germany at the date of her birth and at the date of his subsequent marriage.⁷³ He considered that a German court would have referred to English law as the national law of A, and would have accepted the renvoi back to German law. He therefore applied German domestic law and held that the daughter was legitimate. The decision would have been the same if the learned judge had referred to German domestic law in the first instance.⁷⁴

already been held irrelevant. See Niboyet, *Manual de Droit International Privé*, s. 733; Pillet, *Traité Pratique de Droit International Privé*, Vol. 2, s. 581; Falconbridge, pp. 139-142, 170; Cheshire, pp. 117-118; Morris, 18 B.Y.B.I.L., p. 40.

⁶⁹ [1930] 1 Ch. 377.

⁷⁰ The decision is open to the objection that the court assumed that English law was the national law of a British subject without noticing the hiatus in the reasoning of the Italian expert witnesses: see *post*, pp. 57, 58, Falconbridge, pp. 146, 154, 203-4.

⁷¹ [1930] 2 Ch. 259, followed in *Collins v. Att.-Gen.* (1931) 47 T.L.R. 484.

⁷² But it seems arguable that even if the daughter was legitimated, she was not a child 'of' the subsequent marriage: *Re Wicks' Marriage Settlement* [1940] Ch. 475; contrast *Colquitt v. Colquitt* [1948] P. 19; cf. Cheshire, p. 121; Falconbridge, p. 191, note (i).

⁷³ The Legitimacy Act, 1926, s. 8, was not available because A was still married to his first wife when the daughter was born; see s. 1 (2) and *post*, p. 509.

⁷⁴ The decision is open to the objection that the court assumed that English law was the national law of a British subject without noticing the hiatus in the reasoning of the German expert witness: see *post*, pp. 57, 58; Falconbridge, pp. 152, 199-194. The German expert stated: 'I am informed and

In *Re O'Keefe*,⁷⁵ a British subject died intestate domiciled in Italy and leaving movables in England. Her domicile of origin was in that part of Ireland which is now Eire. Crossman, J., held that an Italian court would distribute her movables in accordance with her national law (which he interpreted to mean the domestic law of Eire), and would not accept any reference back to Italian law. He therefore decided that the domestic law of Eire was to be applied. It is submitted that this decision is no authority against the conclusion that Italian domestic law should have been applied, because the originating summons did not even suggest that this was a possibility. From the practical point of view the decision seems surprising, because the connection between the intestate and the law of Eire was of the most tenuous character.⁷⁶

In *Re Duke of Wellington*⁷⁷ the testator, a British subject domiciled in England, by his Spanish will gave land in Spain to the person who on his death would become Duke of Wellington and Ciudad Rodrigo. There was, however, no such person because the two dukedoms had become separated for the first time since 1814. By his English will the testator gave all the rest of his property on trusts for the benefit of the person who on his death would become Duke of Wellington. By Spanish domestic law the testator could in the circumstances only dispose of half his property and the other half passed to his mother as heiress.⁷⁸ The question was who was entitled to the Spanish land. Wynn-Parry, J., first referred to Spanish law as the law governing the succession to the testator's immovables in Spain (*lex situs*), and then, finding that it would refer to English law as the national law of the testator and would not accept the renvoi back to Spanish law, decided that English domestic law governed the question of the testator's disposing power. By English domestic law the

believe that John Bertram Askew was an Englishman. Therefore English law would be applied by the German court'. Even the most superficial student of German conflict of laws must wonder how the German expert persuaded himself (and the English court) that English law was the national law of a British subject.

⁷⁵ [1940] Ch. 124.

⁷⁶ She had never been in Eire in her life except for a 'short tour' with her father sixty years before her death; and her 'national law' was held to be the law of a State which only came into existence during her long sojourn in Italy, and of which she was not a citizen. See Falconbridge, 204-206; 56 L.Q.R. 144; Cheshire, 111-113. The case recalls the much-criticised decision of Farwell, J., in *Re Johnson* [1903] 1 Ch. 821, criticised by Dicey, 19 L.Q.R. 244; Pollock, 36 L.Q.R. 92; Bate, pp. 19, 115; Abbott, 24 L.Q.R. 144-145; Jethro Brown, 25 L.Q.R. 145; Lorenzen, pp. 44-47; Schreiber 31 H.L.R. 554-557; Falconbridge, 133-136; Scrutton, L.J., in *Casdagli v. Casdagli* [1918] P. 89, 109; Russell, J., in *Re Annesley* [1926] Ch. 692, 705; Maugham, J., in *Re Askew* [1980] 2 Ch. 259, 272.

⁷⁷ [1947] Ch. 506; affirmed on other grounds [1948] Ch. 118; discussed 64 L.Q.R. 265, 321; 11 M.L.R. 232; 26 Can.Bar Rev. 467 (1948).

⁷⁸ This important fact has been supplied by one of the counsel engaged in the case. It is omitted from the reports, which fail to indicate clearly in what respect Spanish domestic law differed from English domestic law.

testator had, of course, full disposing power; and English domestic law governed the construction of his will, since he was domiciled in England. The result was that the gift in the Spanish will failed for uncertainty and the Spanish land fell into the residue disposed of by the English will.⁷⁹

Wynn-Parry, J.'s, principal authority for holding that Spanish 'law' meant Spanish rules of the conflict of laws and not Spanish domestic law was a dictum of the Privy Council in *Kotia v. Nahas*.⁸⁰ The Privy Council said: 'In the English courts, phrases which refer to the national law of a *propositus* are to be construed, not as referring to the law which the courts of that country would apply in the case of its own national domiciled in its own country with regard (where the situation of the property is relevant) to property in its own country, but to the law which the courts of that country would apply to the particular case of the *propositus*, having regard to what in their view is his domicile (if they consider that to be relevant) and having regard to the situation of the property in question (if they consider that to be relevant).' This statement was, it is submitted, no more than a dictum, because the Privy Council was considering a clause in the Palestine Succession Ordinance which expressly provided for partial renvoi in the following terms: 'Mulk land shall be distributed in accordance with the national law of the deceased . . . where the national law imports the law of . . . the situation of an immovable, the law so imported shall be applied.' The Privy Council was sitting on appeal from a Palestine court and was considering the Palestine conflict of laws, and therefore anything said about the English conflict of laws was necessarily obiter.⁸¹ But even as a dictum, the statement cannot, it is submitted, be considered accurate for the following reasons. In the first place, in the English conflict of laws there are no 'phrases which refer to the national law of a *propositus*', because the English conflict of laws adopts domicile, not nationality, as the personal law.⁸² Secondly, the statement confuses two different theories, the partial renvoi theory and the total renvoi theory, which differ not only in their starting point but also in their result.⁸³ Thirdly, the suggestion that the English court should defer to the foreign court's view of where the *propositus* was domiciled is contrary to well-established principle.⁸⁴

⁷⁹ The decision is open to the comment that none of the parties was concerned to argue that the reference to Spanish 'law' meant Spanish domestic law; and to the objection that the court assumed that English law was the national law of a British subject without noticing the hiatus in the reasoning of the Spanish expert witnesses: see *post*, pp. 57, 58.

⁸⁰ [1941] A.C. 408, 413.

⁸¹ Cf. Falconbridge, 217.

⁸² *Post*, p. 94.

⁸³ *Ante*, pp. 50, 51. It is plain that the Palestine Ordinance involved 'accepting the renvoi' and not 'deciding the case as the national law would decide it'.

⁸⁴ *Ante*, p. 50, *post*, p. 96. Cf. the convincing criticisms of Falconbridge, pp. 217-220. Gesshine, pp. 124-125.

Scope of the doctrine. The total renvoi theory obtained a foothold in the English conflict of laws through the medium of cases on the formal validity of wills.⁸⁵ Thus in *Collier v. Rivaz*,⁸⁶ one of the earliest cases, the court had to consider the formal validity of a will and codicils made by a British subject who died domiciled in Belgium in the English sense. Some of the codicils were not executed in the form required by Belgian domestic law, though they were valid by English domestic law. Upon proof that a Belgian court would consider these codicils to have been well executed, Sir H. Jenner admitted them to probate, remarking that 'the court sitting here to determine it, must consider itself sitting in Belgium under the particular circumstances of the case'. This case was disapproved by the Privy Council in *Bremer v. Freeman*,⁸⁷ on appeal from the Prerogative Court of Canterbury. Since *Bremer v. Freeman* is the only English decision on the renvoi doctrine of appellate authority, it would be a very important case if the judgment were unequivocal, but unfortunately the reasoning is so intricate and so ambiguous that it has been claimed as an authority both for⁸⁸ and against⁸⁹ the renvoi doctrine.

➤ The total renvoi theory has been applied to cases of intrinsic validity of wills⁹⁰ and to cases of intestacy⁹¹ as well as to cases of formal validity of wills.⁹² It has been applied when the reference has been to the law of the domicile,⁹³ the law of the place where a will was made (*lex actus*),⁹⁴ and the law of the place where an immovable was situated (*lex situs*).⁹⁵ It has never⁹⁶ been applied outside the field of succession and personal

⁸⁵ Falconbridge, 177-178, 211-212.

⁸⁶ (1841) 2 Curt. 855, discussed by Cheshire, 113-115; Mendelssohn-Bartholdy, 58-64; Morris, 18 B.Y.B.I.L. 43-44; Abbott, 24 L.Q.R. 143; Schreiber, 31 H.L.R. 539-541; Falconbridge, 120-123, who calls this case the 'fons et origo mali'; 53 L.Q.R. 552. The decision is open to the same objection as *Re Annesley* [1926] Ch. 692, ante, p. 51, note 68. For other cases of renvoi on the formalities of wills, see *Frere v. Frere* (1847) N.C. 593; *Bremer v. Freeman* (1857) 10 Moo. P.C. 306; *In bonis Lacrow* (1877) 2 P.D. 94; *Ross v. Ross* (1894) 25 Can. S.C.R. 307.

⁸⁷ (1857) 10 Moo. P.C. 306, 374.

⁸⁸ Jethro Brown, 25 L.Q.R. 149-150, Luxmoore, J., in *Re Ross* [1930] 1 Ch. 377, 393-395.

⁸⁹ Abbott, 24 L.Q.R. 144; Bate, 11-13, 110-111; Mendelssohn-Bartholdy, 69. Cf. Falconbridge, 123-126, 176, note (g).

⁹⁰ *Re Trufort* (1887) 36 Ch.D. 600; *Re Annesley* [1926] Ch. 692; *Re Ross* [1930] 1 Ch. 377; *Re Duke of Wellington* [1947] Ch. 506.

⁹¹ *Re Johnson* [1903] 1 Ch. 821; *Re O'Keefe* [1940] Ch. 124.

⁹² See cases cited in note 86, ante.

⁹³ *Collier v. Rivaz* (1841) 2 Curt. 855; *Re Trufort* (1887) 36 Ch.D. 600; *Re Johnson* [1903] 1 Ch. 821; *Re Annesley* [1926] Ch. 692; *Re Ross* [1930] 1 Ch. 377; *Re Askew* [1930] 2 Ch. 259; *Re O'Keefe* [1940] Ch. 124.

⁹⁴ *In bonis Lacrow* (1877) 2 P.D. 94; *Ross v. Ross* (1894) 25 Can.S.C.R. 307.

⁹⁵ *Re Ross* [1930] 1 Ch. 377; *Re Duke of Wellington* [1947] Ch. 506. Cheshire's statement (p. 126) that in all the cases except one (*Kotia v. Nahas* [1941] A.C. 408) 'the problem has been to determine the meaning of the expression "law of the domicile"', seems to require modification.

⁹⁶ There is a faint suggestion by the Privy Council in *Vita Foods Inc. v. Unus Shipping Co.* [1939] A.C. 277, that the doctrine might be applied to the proper

status.⁹⁷ In countless situations when the court has applied foreign law in cases of contracts, torts, bankruptcy, companies, negotiable instruments, transfer of movables, infants, lunatics and so forth, the court has applied the domestic law of the foreign country without regard to its rules of the conflict of laws.⁹⁸ There is therefore as yet no justification for generalising the few English cases on renvoi into a general rule that a reference to foreign 'law' always means the conflicts rule of the foreign country, and (it is submitted) no justification for the statement in previous editions of this book that 'what is decisive is that not a single case to the contrary has yet been adduced.'¹ Much of the discussion of the renvoi doctrine has proceeded on the basis that the choice lies in all cases between its absolute acceptance and its absolute rejection. The truth would appear to be that in some situations the doctrine is convenient and promotes justice, and that in other situations the doctrine is inconvenient and ought to be rejected. Although the doctrine was favoured by Dicey,² the great majority of writers are opposed to it,³ and it is submitted that before the doctrine is generalised into a rule of universal application for all situations in the conflict of laws, the warning involved in the following criticisms ought to be carefully considered.

Criticisms of the doctrine. The criticisms of writers may be summarised as follows.

(1) If the foreign country also adopts the total renvoi theory, then logically no solution is possible at all for a perpetual *circulus inextricabilis* would be constituted. The English court would inquire how the foreign court would decide the question; the foreign expert witness would reply, exactly as the English court would.⁴ It is often claimed by advocates of the total renvoi theory that it avoids all possibility of the *circulus inextricabilis*⁵; but it only does so because, as yet, English courts have not been called upon to apply the theory to the law of a country which also adopts it.⁶

(2) The total renvoi theory makes everything depend on 'the

law of a contract; but the suggestion was obiter and was, it is submitted, made *per incuriam*: see Morris and Cheshire, 56 L.Q.R. 333-335 (1940); Falconbridge, 213, 342-343; *post*, p. 581.

⁹⁷ *Armitage v. Att.-Gen.* [1906] P. 135 (recognition of foreign divorce); *Re Askew* [1930] 2 Ch. 259 (legitimation by subsequent marriage).

⁹⁸ Mendelssohn-Bartholdy, pp. 45-57

¹ 5th ed., p. 866.

² 5th ed., Appendix, Note 1; cf. Westlake, Chap. 2; Jethro Brown, 25 L.Q.R. 145; Bentwich, *Law of Domicile in its Relation to Succession* (1911); cf. 14 Can.Bar Rev. 379 (1936); Griswold, 51 H.L.R. 1165; Wolff, ss. 178-195.

³ Cheshire, pp. 85-129; Falconbridge, Chaps. 7, 8, 9, 10; Beale, s. 7; Goodrich, s. 7; Cook, Chap. 9; Lorenzen, Chaps. 2, 3, 5; Schreiber, 81 H.L.R. 528; Abbott, 24 L.Q.R. 137; Bate, *Notes on the Doctrine of Renvoi*; Morris, 18 B.Y.B.I.L. 32; Mendelssohn-Bartholdy, *Renvoi in Modern English Law*.

⁴ Morris, 18 B.Y.B.I.L. 37; cf. 12 B.Y.B.I.L. 175.

⁵ *Re Askew* [1930] 2 Ch. 259, 267; *Kotia v. Nahas* [1941] A.C. 403, 414.

⁶ Cf. Lorenzen, pp. 126-127: 'Personally, I cannot approve a doctrine which is workable only if the other country rejects it'.

doubtful and conflicting evidence of foreign experts'.⁸ Moreover, it is peculiar to this theory that it requires proof, not only of the foreign conflicts rules, but of the foreign rules about renvoi—often the most controversial and doubtful part of its conflict of laws. In Continental countries, decided cases, at least of courts of first instance, are not binding as authorities to be followed, and doctrine changes from decade to decade. As Wynn-Parry, J., said in *Re Duke of Wellington*,⁹ 'it would be difficult to imagine a harder task than that which faces us, namely, of expounding for the first time either in this country or in Spain the relevant law of Spain as it would be expounded by the Supreme Court of Spain, which up to the present time has made no pronouncement on the subject, and having to base that exposition on evidence which satisfies me that on this subject there exists a profound cleavage of legal opinion in Spain and two conflicting decisions of courts of inferior jurisdiction'. The difficulty would have been avoided had the learned judge referred to the domestic law of Spain.¹⁰

(3) In the field of succession the most striking conflict of conflict rules is that by English law succession is governed by the law of the domicile, and by many Continental laws succession is governed by the law of the nationality. Whenever the *propositus* is a British subject or an American citizen, the foreign court's reference to the national law is meaningless, for there is no such thing as 'British' law or 'American' law.¹¹ Under the total renvoi doctrine, whenever a British subject dies domiciled in a foreign country the law of which refers to the national law, English judges are forced either to adopt the outdated conclusion that the national law of every British subject is English law,¹² or else to attribute to the *propositus* as his national law the law of his domicile of origin, which he may have discarded many years before his death.¹³ So far, the courts have not been driven to the absurdity of applying some non-British law as the national law of a British subject; but if his domicile of origin was outside the British Commonwealth, they might be forced to do so.¹⁴ If the foreign court refers to the citizenship of the *propositus* in accordance with the British Nationality Act, 1948, the reference is still likely to be ambiguous, for the United Kingdom and some of the Dominions

⁸ *Per* Maughan, J., in *Re Askeu* [1930] 2 Ch. 259, 278; cf. Lorenzen, p. 127.

⁹ [1947] Ch. 506, 515.

¹⁰ For convincing criticism of the evidence of foreign law given in the English cases, see Falconbridge, 141-142, 193-194, 203-207; cf. 56 L.Q.R. 145.

¹¹ This difficulty, it is submitted, vitiates the reasoning in *Re Johnson* [1903] 1 Ch. 821; *Re Ross* [1930] 1 Ch. 377; *Re Askeu* [1930] 2 Ch. 259; *Re O'Keefe* [1940] Ch. 124; and *Re Duke of Wellington* [1947] Ch. 506. Cf. Falconbridge, 194-208.

¹² *Re Ross* [1930] 1 Ch. 377; *Re Askeu* [1930] 2 Ch. 259; *Re Duke of Wellington* [1947] Ch. 506.

¹³ *Re Johnson* [1903] 1 Ch. 821; *Re O'Keefe* [1940] Ch. 124.

¹⁴ See comments on *Re Johnson* [1903] 1 Ch. 821, by Morris, 18 B.Y.B.I.L. 47; Falconbridge, 184.

each contain several law districts: there is no United Kingdom or Canadian or Australian law any more than there is 'British' law.

(4) The total renvoi theory is often difficult to apply except at the expense of the well-settled rule that in an English court domicile means domicile in the English sense and that the foreign court's view of where the *propositus* was domiciled is irrelevant.¹⁵ For if a man dies intestate domiciled in France in the English sense, and in England in the French sense, and the French court would refer to English law because "by French conflict of laws intestate succession to movables is governed by the law of the domicile,"¹⁶ the English court cannot distribute the movables in the same way as they would be distributed by the French court without first abandoning its rule that the intestate was domiciled in France. It is logically inconsistent for the English court first to hold that the intestate was domiciled in France notwithstanding the fact that by French law he was domiciled in England, and then to accept a reference to English law from the French conflict of laws which can only be predicated on an English domicile in the French sense.¹⁷

(5) It is often said that the total renvoi theory promotes uniformity of distribution.¹⁸ If, in a case of intestacy, the English court applies Italian domestic law and the Italian court applies English domestic law, then the movables in England and in Italy may be distributed in different directions; but if the English court gives whatever decision the Italian court would give, uniformity of distribution is secured. But there are several answers to this argument. (a) Uniformity of decision in the English courts might be thought to be at least as important as uniformity of distribution in a particular case. At present the effect of acquiring a domicile in a foreign country may sometimes be to make the foreign domestic law applicable,¹⁹ sometimes English domestic law,²⁰ and sometimes the domestic law of some third country,²¹ in accordance with whatever theory of renvoi happens to be in vogue in the foreign country.²² (b) Uniformity of distribution would only be possible if the English court applied the whole law of the foreign country, including not only its rules of the conflict of laws but also its rules of public policy and procedure. In practice all courts stop

¹⁵ *Re Martin* [1900] P. 211; *Re Annesley* [1926] Ch. 692.

¹⁶ See note 68, p. 51, *ante*.

¹⁷ This difficulty, it is submitted, vitiates the reasoning in *Collier v. Rivaz* (1841) 2 Curt. 855, and *Re Annesley* [1926] Ch. 692.

¹⁸ Dicey, 5th ed. pp. 869-870; Griswold, 51 H.L.B. 1180-1181.

¹⁹ *Re Annesley* [1926] Ch. 692; *Re Askew* [1930] 2 Ch. 259.

²⁰ *Re Ross* [1930] 1 Ch. 377; *Re Duke of Wellington* [1947] Ch. 506.

²¹ *Re Johnson* [1903] 1 Ch. 821; *Re O'Keefe* [1940] Ch. 124.

²² Cf. Maughan, J., in *Re Askew* [1930] 2 Ch. 259, 277-278.

short of that. We may be sure that no English court would allow a murderer to benefit from his victim's death, no matter what the relevant foreign law had to say about the matter.²³ (c) Uniformity of distribution would be impossible on any theory if an Italian national died intestate domiciled in England, for the English court would distribute the movables in England in accordance with English domestic law and the Italian court would distribute the movables in Italy in accordance with Italian domestic law. Yet uniformity of distribution in such a case is no more and no less desirable than in the case of a British subject dying intestate domiciled in Italy. (d) If the foreign court also adopts the total renvoi theory, then not only is uniformity of distribution unattainable, but logically no solution is possible at all.²⁴

These difficulties, and others which have been suggested by academic writers, have, it is submitted, not been adequately considered by English courts of first instance when they have adopted the total renvoi theory, for widely differing reasons and with widely differing results. It is respectfully submitted that the renvoi doctrine is overdue for consideration by a higher court, or perhaps for a reference to the Law Revision Committee.²⁵ It is submitted that the balance of convenience lies, generally speaking, in the adoption of the internal law theory as a general rule.

Exceptional situations. It remains to consider whether there are any exceptional situations in which the total renvoi theory may be the more convenient or produce more just results. It is suggested that in the following situations a relatively strong case is presented for adopting the total renvoi theory.

(1) *Title to land situated abroad.*²⁶ This is one of the only two exceptions which the American Restatement makes to its general principle that renvoi ought to be rejected.²⁸ If the question before the English court is whether X has acquired a proprietary interest in land situated abroad, the court (so far as it has jurisdiction to deal with the matter at all) will apply the *lex situs*, the law of the place where the land is situated. The reason for applying the *lex situs* is that any adjudication which ignored the *lex situs* would be a *brutum fulmen*, since in the last resort the land can only be dealt with in a manner permitted by

²³ Cf. *Cleaver v. Mutual Reserve Fund Life Association* [1892] 1 Q.B. 147; *Re Crippen* [1911] P. 108; *Re Hall* [1914] P. 1, *Re Sigsworth* [1935] Ch. 89. The principle has been applied in the teeth of an English statute, and so would presumably be applied in the teeth of foreign law. Cf. Maughan, J., in *Re Askew* [1930] 2 Ch. 259, 275-276.

²⁴ *Ante*, p. 56.

²⁵ Cf. the suggestion of Maughan, J., in *Re Askew* [1930] 2 Ch. 259, 278, that the matter should be made clear by 'a very short statute', and Falconbridge's comment, pp. 152-153.

²⁶ Falconbridge, 180; Cheshire, 127-128.

²⁸ Sections 7, 8.

the *lex situs*. Such questions rarely arise, because English courts do not normally try questions of title to foreign land.²⁹ But when they do the reason for applying the *lex situs* requires that the *lex situs* should be interpreted to mean the law which the *lex situs* would apply, for only in this way can the reason for applying the *lex situs* be implemented. Suppose that a British subject dies intestate leaving land in Italy, and that by Italian domestic law X is entitled to the land, but that the Italian courts would apply the national law of the intestate and would hold that Y is entitled. The argument is that it would be futile for the English courts to decide that X is entitled to the land, because Italian officials would not help him to recover it from Y.³⁰

(2) *Title to movables situated abroad.*³¹ A similar argument suggests that when the English court applies the *lex situs* to determine the title to movables situated abroad, it should interpret the *lex situs* broadly so as to include whatever the courts of the *situs* have decided or would decide. The argument is not so strong as in the case of land, because the movables may be taken out of the jurisdiction of the foreign court.

(8) *Recognition of foreign divorces.*³² In view of the paramount importance that questions of status should be decided the same way in every country, it has been suggested that if the status of the parties is changed by some act done outside the country of their domicile, which is recognised as changing their status by the law of their domicile, English courts should recognise the change of status. Thus, English courts have recognised a decree of divorce granted outside the country of the domicile of the parties, if it would be recognised by the law of their domicile.³³ It is not clear whether this exception should be limited to the recognition of divorce decrees, or whether it should be extended to questions of status generally. The American Restatement³⁴ says the former, the case of *Re Askew*³⁵ suggests the latter.

(4) *Formalities of wills.*³⁶ Some writers think that a will ought to be admitted to probate if it complies with the formalities prescribed by either the domestic law of the relevant foreign

²⁹ Rule 20, *post*, p. 141.

³⁰ For this reason it is submitted that the decisions in *Re Ross* [1930] 1 Ch. 377 (so far as the immovables were concerned) and *Re Duke of Wellington* [1947] Ch. 506, were correct, subject to what has been said *ante*, pp. 57-58, about the difficulty arising from the reference to the national law of a British subject.

³¹ Falconbridge, 180-181; Cheshire, 128; Morris, 22 B.Y.B.I.L. 237 (1945).

³² Falconbridge, 181-183; Cheshire, 127; Restatement, s. 8.

³³ *Armitage v. Att.-Gen.* [1906] P. 135; attacked by Morris in 24 Can. Bar Rev. 73 (1946); defended by Tuck in 25 Can. Bar Rev. 226 (1947); see *post*, pp. 376-8.

³⁴ Section 8. Cf. Cheshire, 127.

³⁵ [1930] 2 Ch. 259. Cf. *Re Luck* [1940] Ch. 864, 873; Falconbridge, 181-183; Cheshire, 128.

³⁶ Falconbridge, 177-179, 209-212; Cheshire, 127.

country, or by any system of domestic law referred to by the conflict rule of the foreign country.³⁷ It may be doubted, however, whether the extreme indulgence allowed to testators by the Wills Act, 1861, has not been carried far enough. For under that Act, testators may in certain circumstances choose between no less than four systems of law³⁸; and it seems likely that Parliament intended to refer only to the domestic rules of the alternative systems of law which it authorised.³⁹ Moreover, there is no English case in which a will complying with the formalities prescribed by the domestic law of the testator's domicile has been held formally invalid for failure to comply with the formalities prescribed by whatever system of law would have been referred to by the conflicts rules of the testator's domicile.⁴⁰ These considerations, it is submitted, throw doubt on the expediency of extending the principle in *favorem testamenti* further than the choice of systems of domestic law allowed by the Wills Act, 1861.

(5) *Certain cases of transmission.*⁴¹ Where the foreign law referred to by the English court would refer to a second foreign law, and the second foreign law would agree that it was applicable, the case for applying the second foreign law is strong. Thus, if a German national domiciled in France died leaving movables in England, and French and German law both agreed that German domestic law was applicable because the *propositus* was a German national, it seems that the English court should accept the situation and apply German domestic law. For the practical advantages of deciding the case the way the French and German courts would decide it seem to outweigh the theoretical disadvantages of this mild form of transmission. If, on the other hand, the conflict between the English and French conflict rules was not patent but latent, the decision should, it is submitted, be otherwise. Thus, if the French conflict rule would have referred to German law, not because the *propositus* was a German national, but because he was domiciled in Germany in the French sense, the English court should (it is submitted) disregard the reference from French to German law and should apply French domestic law, because the only kind of domicile which is relevant in an English court is a domicile in the English sense.^{42, 43}

³⁷ Cf. *Collier v. Rivaaz* (1841) 2 Curt. 855; *Frere v. Frere* (1847) N.C. 598; *In bonis Lacroix* (1877) 2 P.D. 94; *Ross v. Ross* (1894) 25 Can.S.C.R. 307.

³⁸ *Post*, pp. 822-827.

³⁹ Falconbridge, 126-127.

⁴⁰ Falconbridge, 155, 178.

⁴¹ *Griswold*, 51 H.L.R. 1190; cf. *Re Trufort* (1887) 36 Ch.D. 600; *Bate*, 112-114.

⁴² *Re Martin* [1900] P. 211; *Re Annesley* [1926] Ch. 692; *post*, p. 96.

⁴³ For other exceptional cases suggested by writers, see Falconbridge, 183-184 and comment thereon by Morris (book review of Falconbridge), 7 U. of Tor.L.J. 528 (1948); Cheshire, 128 (capacity to marry). But this is a question of status, and so within the third exception on its wider interpretation.

3. THE PROBLEM OF CHARACTERISATION ⁵⁷

Introductory. The problem of characterisation ⁵⁸ has been regarded by many European and some English and American writers as a fundamental problem in the conflict of laws. General attention was first directed to it by the French jurist Bartin in 1897. ⁵⁹ The problem was introduced to American lawyers by Lorenzen in 1920 ⁶⁰ and to English lawyers by Beckett in 1934. ⁶¹

Nature of the problem. The conflict of laws exists because there are different systems of domestic law. But systems of the conflict of laws also differ. Yet all systems have at least one common denominator. They are expressed in terms of juridical concepts or categories and local place elements or connecting factors. ⁶² This may be seen by considering some typical rules of the English conflict of laws: 'succession to immovables is governed by the law of the *situs*'; the 'formal validity of a marriage is governed by the law of the place of celebration'; 'capacity to marry is governed by the law of the domicile'; 'the matrimonial property rights of spouses are governed by the law of their domicile'. In these examples, succession to immovables, form, capacity, and matrimonial property are the categories, while *situs*, place of celebration, and domicile, are the connecting factors. Now in the majority of cases it is obvious that the facts fall into a particular legal category, that a particular conflict rule is available, and that the connecting factor indicated by that conflict rule is unambiguous. But sometimes it is not obvious, as the following illustrations show.

1. A husband and wife, domiciled in Malta at the time of their marriage, acquire a domicile in Algiers, where the husband buys land and dies. His widow claims a share in the land. The Maltese conflict of laws and the French conflict of laws (which applies in Algiers) agree that succession to immovables is governed by the *lex situs* (France), and also that the matrimonial property

⁵⁷ Lorenzen, 20 Col.L.Rev. 247 (1920), reprinted in Lorenzen, *Selected Articles on the Conflict of Laws*, Chap. 4; Beckett, 15 B.Y.B.I.L. 46 (1934); Unger, 19 Bell Yard 8 (1937); Robertson, *Characterisation in the Conflict of Laws*; Cheshire, pp. 58-85; Wolff, ss. 188-157; Cook, Chap. 8; Cornsack, 14 So.Calif.L.Rev. 221 (1941); Falconbridge, Chaps. 3, 4, 5, 6; 8 ss. 2-3, 7; Lorenzen, 50 Y.L.J. 743 (1941) reprinted in Lorenzen, Chap. 5. The best discussions in English are those of Falconbridge and Lorenzen. For the more extensive continental literature, see Robertson, pp. xxv-xxix; Lorenzen, Chap. 4. Considerations of space have made it necessary to over-simplify the views of many writers; for a full statement of their views, the references above should be consulted.

⁵⁸ 'Qualification' is the term used by continental writers. 'Classification' is used by some English writers. But both these terms have other connotations.

⁵⁹ (1897) *Clunet* 225.

⁶⁰ 20 Col.L.Rev. 247, reprinted in Lorenzen, Chap. 4.

⁶¹ 15 B.Y.B.I.L. 46. It would appear that the fame, or notoriety, of having first discovered its existence belongs to the German jurist Kahn: (1891) 30 *Thering's Jahrbücher* 1.

⁶² This seems the best English equivalent of the French and German technical terms 'point de rattachement' and 'Anknüpfungspunkt'.

rights of spouses are governed by the law of the matrimonial domicile at the date of the marriage (Malta). But they differ in that according to one law the widow's claim to the land raises a question of succession, while according to the other it raises a question of matrimonial property.⁶⁴

2. A Dutch national makes a holograph will in France. By Dutch law Dutchmen cannot make holograph wills. The Dutch and French conflict of laws agree that the formal validity of wills is governed by the law of the place of execution (France), and also that capacity to make a will is governed by the testator's personal law (Holland). But they differ in that according to one law the Dutch rule is a matter of form, while according to the other it is a matter of testamentary capacity.⁶⁵

3. A Frenchman under 21 marries an Englishwoman in England without obtaining the consent of his parents as required by French law. The English and French conflict of laws agree that the formalities of marriage are governed by the law of the place of celebration (England), and also that capacity to marry is governed by the husband's personal law (France). But they differ in that according to one law the French rule is a matter of form, while according to the other it is a matter of capacity.⁶⁶

✓ 4. A man dies intestate domiciled (in the English sense) in France, leaving movables in England. The English and French conflict of laws agree that succession to movables is governed by the law of the domicile. But they differ in that according to English law the intestate was domiciled in France, while according to French law he was domiciled in England.⁶⁷

✓ 5. An offer is sent by post from London and accepted by letter sent from Moscow. The English and Russian conflict of laws agree.

⁶⁴ These are the (highly abbreviated) facts of the celebrated Maltese Marriage Case, *Anton v. Bartholo* (1889), which first set Bartin thinking about the problem of characterisation: it is discussed by Beckett, 15 B.Y.B.I.L. 50, note 1; Falconbridge, 71-72; Robertson, 158-163; Wolff, 149-150. Some writers deny that the very case which formed the starting point of Bartin's inquiry raised a problem of characterisation at all, on the ground that the French law of succession could operate on so much of the husband's land as was not absorbed by the Maltese law of community property, without any conflict between the two laws.

⁶⁵ These are the (highly abbreviated) facts of Bartin's second example of characterisation, which has been much discussed by continental writers and by Beckett, 15 B.Y.B.I.L. 73, note 1; Falconbridge, 58-59; Robertson, 235-237; Lorenzen, 129-130.

⁶⁶ *Ogden v. Ogden* [1908] P. 46, where the Court of Appeal applied the English characterisation and held the marriage valid. Some aspects of this decision are universally condemned by courts and writers, and on the non-recognition of the French nullity decree it must now be regarded as overruled. See *Att.-Gen. for Alberta v. Cook* [1926] A.C. 444; *Salvesen v. Administrator of Austrian Property* [1927] A.C. 641; Cheshire, 83, 288-290; Beckett, 15 B.Y.B.I.L. 77-81; Falconbridge, 48-53; Robertson, 239-245. See also *Simonin v. Mallac* (1860) 2 Sw. & Tr. 67; *De Massa v. De Massa* [1939] 2 All E.R. 150 n.; *Galens v. Galens* [1939] P. 287.

⁶⁷ See *Re Martin* [1900] P. 211 and *Re Annesley* [1926] Ch. 692, where it was held that the testatrix was domiciled in France, although by French law she was domiciled in England. And see note 52a, *ante*, p. 49.

that the formal validity of contracts is governed by the law of the place of contracting. But they differ in that according to English law the contract is made in Russia, while according to Russian law the contract is made in England.⁶⁸

It will be seen that the problems raised by these illustrations are generically similar but specifically different. Thus, in Illustration 1 the problem is one of characterising the fact situation before the court into the alternative categories of succession to immovables and matrimonial property. In Illustrations 2 and 3 the problem is one of characterising a rule of law: the prohibition of Dutch law against holograph wills, and the prohibition of French law against the marriages of minors without the consent of their parents. In Illustrations 4 and 5, the problem is one of characterising the connecting factor, namely domicile and place of contracting. It is thus apparent that the problem needs to be broken down into separate phases; and an approach towards a solution will be facilitated by considering the different stages of a conflict of laws case.

*Three stages in a conflict of laws case.*⁶⁹ Assuming that the court has jurisdiction, the decision of a conflict of laws case involves three separate stages, each of which must be disposed of by the court. Very often the process will be performed silently, because the solution is so obvious as not to require discussion. In the first place, the court must characterise, that is define the juridical nature of, the question or questions raised by the facts. For example, the court must determine whether the facts raise a question of succession or a question of matrimonial property. Secondly, the court must select a particular connecting factor as being the most significant one with reference to the question so characterised in stage one. For example, the court must determine that succession to immovables is governed by the *lex situs*. Very often the characterisation of the question in stage one will make available a recognised conflict rule at stage two, indicating the appropriate connecting factor; but if the conflict rule is doubtful, the court will have to choose between two or more suggested conflict rules, and if the case is one of first impression, the court will have to formulate a new conflict rule. Thirdly, the court must apply the law of the selected country to the factual situation, that is, determine how much of the foreign law ought to be applied.

*Conflicts between conflict rules.*⁷⁰ In each of the three stages there may be a conflict between the conflict rules of the forum and the conflict rules of a foreign country. Such conflicts of conflict rules are of at least three kinds. In the first place, there

⁶⁸ Lorenzen, 84-85; cf. *Benaim v. Debono* [1924] A.C. 514; see *post*, pp. 598-9. Falconbridge, 36-37, 159-160; Cheshire, 61-63; Robertson, 9; Lorenzen, 115-116. Falconbridge performed notable service in formulating these three stages and his conclusions have been widely accepted.

⁷⁰ Kahn (1891) Jhering's *Jahrbücher* 1; Falconbridge, 38, 160; Robertson, 96-96.

may be a patent conflict, that is, the conflict rules may differ on their faces, as when a British subject dies intestate domiciled in Italy, and the English conflict rule says that succession to movables is governed by the law of the domicile, but the Italian conflict rule says that succession to movables is governed by the law of the nationality. Secondly, the conflict rules may be apparently the same in that they employ the same connecting factor, but in reality different because they interpret that connecting factor in different senses, as in Illustrations 4 and 5.⁷¹ Thirdly, there may be a latent conflict, that is, the forum and the foreign country may have the same conflict rule and may interpret the connecting factor in the same sense, but may yet disagree in the result because they characterise the question differently, as in Illustrations 1, 2 and 3.⁷² Some writers think that there may be yet a fourth kind of conflict between conflict rules, for example, a husband dies intestate domiciled in X, leaving a widow. English law and the law of X agree that the question whether the widow is entitled to a share of his movables is a question of succession, and agree that succession to movables is governed by the law of the domicile, and also agree that the intestate died domiciled in X. But they may not agree that the lady claiming to be the widow of the intestate is entitled to that status, perhaps because the intestate's first marriage was dissolved by a divorce recognised as valid by the English conflict rule, but not recognised as valid by the conflict rule of X.⁷³

Conflicts between conflict rules of the third kind usually arise at the first stage of the court's inquiry, namely the characterisation of the factual situation. Conflicts of the second kind usually arise at the second stage of the court's inquiry, namely the selection of the connecting factor. Conflicts of the first and fourth kinds usually arise at the third stage of the court's inquiry, namely the application of the proper law. It will be seen that the possibility of such conflicts raises problems that are generically similar but specifically different. The problems are generically similar because they all involve the question whether the court should apply the conflicts rule of a foreign country or should apply simply the conflicts rule of the forum. They are specifically different because the first type of conflict raises the problem of renvoi,⁷⁴ the second and third types of conflict raise the problem of characterisation, and the fourth type of conflict raises the problem of the so-called incidental question.⁷⁵ But all these problems are inter-related, and in fact the second type of conflict

⁷¹ *Ante*, p. 68.

⁷² *Ante*, pp. 62-68.

⁷³ This problem is reserved for separate discussion, *post*, p. 73.

⁷⁴ *Ante*, p. 47.

⁷⁵ *Post*, p. 73.

is usually discussed both in connection with the renvoi problem and in connection with the characterisation problem.

Various solutions. Various solutions of the problem of characterisation have been suggested by writers. The principal suggestions are as follows.

(1) *Lex fori*.⁷⁶ The great majority of continental writers think that the process of characterisation must be performed in accordance with the domestic law of the forum.⁷⁷ The principal argument in favour of this view is (apart from the arguments against other views) that if the foreign law is allowed to determine in what situations it is to be applied, the law of the forum would no longer be master in its own home, and would lose all control over the application of its own conflicts rules. The principal arguments against this view are as follows. In the first place, it may result in the forum refusing to apply a foreign law in cases where according to that law it is applicable (as in *Ogden v. Ogden*⁷⁹), or in the forum applying a foreign law in cases where according to that law it is not applicable, with the result that the foreign law is distorted and that the law applied to the case is neither the law of the forum nor the foreign law nor the law of any country whatever. Secondly, this view is said to break down when there is no close analogy in the *lex fori* to an institution or rule of the foreign law.⁸⁰ Thus there is no close analogy in English domestic law to the French system of community property, and no close analogy in French domestic law to the English trust. Yet the English and French conflict rules are framed in terms wide enough to cater for the rights and duties arising from the French community property⁸¹ and the English trust⁸² respectively. Thirdly, this view leads to arbitrary results even when there is a close analogy between the foreign rule or institution and the corresponding rule or institution of the *lex fori*. Thus it clearly does not follow that because section 18 of the Wills Act, 1837 (which provides that a will shall be revoked by marriage) has been characterised by English courts as part of English matrimonial law and not part of English testamentary law,⁸³ therefore the English court must apply the same characterisation to Article 2079 of the German Civil Code (which provides that a will becomes voidable on marriage). Nor does it follow that because the requirement in Lord Hardwicke's Marriage Act of parental consents to the

⁷⁶ Beckett, 15 B.Y.B.I.L. 49-57; Lorenzen, Chap. 4, esp. pp. 91-93. Robertson, 25-33.

⁷⁷ Kahn, (1891) *Jhering's Jahrbücher* 1; Bartin, (1897) *Clunet* 225; *Recueil des Cours* (1930-1) 565; *Principes de Droit International Privé* (1930) 221-239.

⁷⁹ [1908] P. 46. Cf. *ante*, p. 63, n. 66; Beckett, 15 B.Y.B.I.L. 54-55.

⁸⁰ But see Mendelssohn-Bartholdy, 16 B.Y.B.I.L. 38-39 (1935).

⁸¹ *De Nicols v. Curlier* [1900] A.C. 21.

⁸² (1911) *Clunet* 134; Robertson, 33.

⁸³ *Re Martin* [1900] P. 211.

marriages of minors has been characterised by English courts as relating to the formalities of marriage and not to capacity to marry,⁸⁴ therefore English courts must apply the same characterisation to Article 148 of the French Civil Code (which prohibits the marriages of minors without parental consents).⁸⁵

(2) *Lex causae*.⁸⁶ Other continental writers⁸⁷ think that the process of characterisation must be performed in accordance with the *lex causae*, that is, the appropriate foreign law. According to Wolff,⁸⁹ 'every legal rule takes its classification' (i.e., characterisation) 'from the legal system to which it belongs'. The argument in favour of this view is that to say that the foreign law is to govern, and then not apply its characterisation, is tantamount to not applying it at all. But this view bristles with difficulties, and few writers have adopted it. In the first place, it is arguing in a circle to say that the foreign law governs the process of characterisation before the process of characterisation has led to the selection of the appropriate law. Secondly, if there are two potentially applicable foreign laws, why should the forum adopt the characterisation of one rather than that of the other?

(3) *Analytical jurisprudence and comparative law*.⁹⁰ Other writers⁹¹ think that the process of characterisation ought to be performed in accordance with the principles of analytical jurisprudence, 'that general science of law, based on the results of the study of comparative law, which extracts from this study, essential general principles of professedly universal application'.⁹² This view is attractive, because it is free from the formidable objections which have already been considered, and because it envisages one test for every case. Thus it has been said⁹³: 'It cannot be right to use one set of principles to classify the *lex fori* and others for foreign law'. It has been objected that this 'internationalist' view, as it has been called, is vague and impracticable, because there are very few 'general principles of universal application' and very little measure of agreement as to what those principles are.⁹⁴ This objection would appear to be largely one of terminology. If this theory were restated in the terms that

⁸⁴ *Compton v. Bearcroft* (1769) 2 Hagg.Con. 444n.

⁸⁵ Yet the Court of Appeal did just this in *Ogden v. Ogden* [1908] P. 46, with results that are universally condemned by courts and writers: see *ante*, p. 63, n. 66.

⁸⁶ Beckett, 15 B.Y.B.I.L. 58; Lorenzen, Chap. 4, esp. pp. 94-95; Robertson, 27, 32; Wolff, ss. 138-157.

⁸⁷ Despagne, (1898) *Clunet* 253; Wolff, ss. 138, 157.

⁸⁸ At p. 155 (Wolff's italics).

⁸⁹ Beckett, 15 B.Y.B.I.L., 58-60; Falconbridge, 44-46; Robertson, 27, 38-43.

⁹⁰ *Internationale Privato* 97; (1933) 28 *Revue de Droit International Privé* 1; (1945) *The Conflict of Laws: A Comparative Study*, Vol. I, pp. 45-46; Beckett, 15 B.Y.B.I.L. 58-60. This view was also adopted in Cheshire, 1st ed. 12-14.

⁹¹ Beckett, 15 B.Y.B.I.L. 59.

⁹² Cf. Cheshire, 65; Falconbridge, 46; Robertson, 69.

the process of characterisation should be performed in accordance with the dictates of common sense, the theory would seem to be free from the objection mentioned.

(4) *Primary and secondary characterisation.* Other writers⁹⁵ think that the problem can be solved by distinguishing between primary characterisation, a matter for the *lex fori*, and secondary characterisation, a matter for the *lex causae*. According to these writers, primary characterisation is the 'allocation of the factual situation to its correct legal category', or the 'subsumption of facts under categories of law'.⁹⁷ Secondary characterisation is the 'delimitation and application of the proper law'.⁹⁸ The difference between them is that primary characterisation precedes, and secondary characterisation follows, the selection of the proper law.⁹⁹ For reasons of practical convenience rather than logical necessity, primary characterisation ought, with two exceptions, to be governed by the *lex fori*. (The *lex fori* here means the conflicts rules and not the domestic rules of the forum, because the categories of the conflict of laws ought to be wider than the categories of domestic law if the conflict of laws is to serve its purpose.¹) The two exceptions² are (a) that the question whether things or interests in things are movable or immovable is a question for the *lex situs*, and (b) that if there are two potentially applicable foreign laws, and their characterisations agree, the forum should adopt their common characterisation. According to these writers,^{2a} secondary characterisation is governed by the *lex causae*; and the connecting factor must be selected in accordance with the *lex fori*.³

This view has exerted considerable influence on the discussion of the problem by Anglo-American writers. Nevertheless it is submitted that it is open to the following objections.

(a) The distinction between primary and secondary characterisation, on which the writers who hold this view lay so much stress, is unreal and artificial. The process of characterisation should, it is submitted, be as little mechanical as possible.⁴

(b) There seems to be an acute difference of opinion as to where the line is to be drawn between primary and secondary characterisation. Writers are not even in approximate agreement on this

⁹⁵ Robertson, *Characterisation in the Conflict of Laws* (1940); Cheshire, 2nd ed. (1938), pp. 80-45; 3rd ed. (1947), pp. 68-85. In his 3rd ed. Cheshire makes so many modifications to this principle that it appears that in substance he has abandoned it. See *post*, p. 70.

⁹⁷ Robertson, pp. 68, 64, 83, 86.

⁹⁸ P. 118.

⁹⁹ Pp. 119-120.

¹ Robertson, pp. 88-91; cf. Cheshire, 65; Lorenzen, 121-122.

² Robertson, 75-78; Cheshire, 65, 70.

^{2a} Cheshire's view on this question is now subject to an important modification which is considered *post*, p. 70.

³ Robertson, 104-117; Cheshire, 70-72.

⁴ Falconbridge, pp. 98-101, commenting on Robertson's artificial formulation of categories, pp. 86-88.

crucial question, and the same writer analyses a situation in one way at one time and in a different way at another time.⁵

(c) The tendency⁶ of those who hold this view to expand the sphere of secondary characterisation by the *lex causae* introduces all the difficulties inherent in the renvoi doctrine.⁷ It is submitted that 'characterisation strictly in accordance with the *lex causae* is justified only in those exceptional classes of case in which the forum is willing to apply the doctrine of the renvoi'.⁸

(d) The utility of the principle that secondary characterisation is a matter for the *lex causae*, and the likelihood that the principle would be adopted by an English court, may be tested by a hypothetical case. Suppose that a Greek national domiciled in Greece marries an English woman in a London registry office. Suppose that Greek law refuses to recognise a marriage where either party is a Greek unless an Orthodox priest is present at the ceremony. If formalities of marriage and capacity to marry both involve questions of secondary characterisation, it would be necessary to refer to Greek law to determine the essential validity of the marriage. If Greek law characterises the Greek rule as a question of capacity and not (as English law would do) as a question of formalities, an English court would be obliged to hold the marriage invalid, notwithstanding the English conflict rule that the formalities of marriage are governed by the *lex loci celebrationis*. It is inconceivable that an English court would come to any such conclusion.

(e) The view that secondary characterisation is a matter for the *lex causae* involves a curious paradox.¹¹ Suppose that a contract governed by the law of country X is sued on in country F after the relevant periods of limitation fixed by the domestic law of X and F have both expired. If F characterises its statute of limitations as substantive and X characterises its statute of limitations as procedural, the consequence of the view under discussion is that the action will succeed although neither the statute of X nor the statute of F has been complied with. The substantive rules of F cannot apply to a contract governed by the law of X, and the procedural rules of X cannot apply in a court in F.¹² Cheshire¹³

⁵ Compare, as to parental consents to marriage, Robertson, 239-245 (secondary); Cheshire, 2nd ed. 34-36 (primary); Cheshire, 3rd ed. 80-83 (secondary).

⁶ Cf. Nussbaum, Book Review of Robertson, 40 Col.L.Rev. 1467-1468 (1940) quoted Falconbridge, 108, note (y).

⁷ *Ante*, pp. 56-59.

⁸ Falconbridge, p. 164.

¹¹ Lorenzen, 138-134.

¹² This conclusion invites comparison with the notorious decision of the German Reichsgericht in 1882, in which the court held that an action in Germany on a contract governed by the law of Tennessee could succeed, although the relevant periods of limitation under German and Tennessee law had both expired. See Beckett, 76-77; Robertson, pp. 252-253, who appears to accept this extraordinary conclusion with equanimity; Wolff, 161-163, who condemns the decision, but only at the expense of temporarily abandoning his view that the *lex causae* governs characterisation.

¹³ *Id.* pp. 88-85.

seeks to escape from this dilemma by adopting the suggestion¹⁴ that the court in F 'is not necessarily precluded from saying that the statute' of X 'ought to be characterised as "substantive" for the purposes of F's own conflict rule'. But this suggestion admits that the *lex fori* controls the characterisation of the statute of X, and thus involves the complete abandonment of the principle that secondary characterisation is a matter for the *lex causae*.

(f) Cheshire¹⁵ subdivides his discussion of secondary characterisation into (a) cases where there is only one *lex causae*, where characterisation is a matter for that law, and (b) cases where there is more than one *lex causae*, where characterisation is a matter for the *lex fori*. It is submitted that this distinction needlessly adds to the complexities of the problem, and that it is based upon a misconception. Cases in the conflict of laws always involve more than one *lex causae*, because procedure is always governed by the *lex fori*.¹⁶ If secondary characterisation is a matter for the *lex fori* in cases where there is more than one *lex causae*, and if these are the only cases dealt with by the conflict of laws, it follows that Cheshire has in substance abandoned the principle that secondary characterisation is a matter for the *lex causae*. It would seem to follow that the distinction between primary and secondary characterisation should also be abandoned because it no longer has any significance.

(5) *Falconbridge's via media*. Falconbridge sought for a *via media* between the two extremes of characterisation by the *lex fori* and characterisation on the basis of comparative law.¹⁷ He suggests¹⁸ that the forum should consider the provisions of any potentially applicable proper laws in their context before definitely selecting the proper law. In this way the process of characterisation would be rendered fully flexible. He maintains that the thing characterised must itself be juridical and not purely factual, that there is no distinction in principle between the characterisation of the question and the characterisation of rules of law, and therefore no justification for the distinction between primary and secondary characterisation. This approach is vastly preferable to arbitrarily accepting the foreign characterisation on the one hand or mechanically applying the forum's nearest analogy on the other.

Conclusion. It is submitted that the objections to (1) characterisation by the domestic rules of the forum, to (2) characterisation by the *lex causae*, and to (4) characterisation on the basis of a distinction between primary and secondary characterisation, are

¹⁴ Cook, pp. 227-228.

¹⁵ Pp. 79-85.

¹⁶ Cf. Unger, 19 Bell Yard, 17; Robertson, 56, 118.

¹⁷ P. 46.

¹⁸ Pp. 161-165. This suggestion does not extend to the characterisation of the connecting factor.

so numerous and weighty as to be fatal. We are therefore left with a choice between (3) characterisation in accordance with analytical jurisprudence and comparative law, and (5) Falconbridge's *via media*. From the practical point of view it would appear that there is not much difference between Beckett's view that conflict rules 'must be such, and must be applied in such a manner, as to render them suitable for appreciating the character of rules and institutions of all legal systems'¹⁹; and Falconbridge's view that the forum should consider the provisions of any potentially applicable proper laws in their context before definitely selecting the proper law. The important thing is to keep the process of characterisation as elastic as possible. Nor is this inconsistent with the point made by some writers that characterisation is a matter for the conflicts rules and not the domestic rules of the forum.²⁰ The illustrations adduced in support of this view seem convincing²¹; and the reasons for drawing the line between, say, substance and procedure at one place in the domestic sphere may be different from the reasons for drawing the line at another place in the conflicts sphere. Nevertheless it would appear that the proposition that one phase of a conflict of laws case must be determined in accordance with the conflict of laws rules of the forum is a singularly sterile one. It is obvious that any court must apply its own conflict of laws rules; the question under discussion is what those rules are. 'To tell a court to follow its own conflict of laws rule in determining whether a given question is one of substance or procedure, tells it absolutely nothing.'²²

Examples of characterisation in English law. English law is relatively rich in cases raising questions of characterisation, but poor in judicial discussion of the problem. As regards characterisation of the connecting factor, it is settled that domicile must be determined exclusively in accordance with the *lex fori*, and that a person may be domiciled in country X for the purposes of the English conflict of laws although the law of X would not regard him as domiciled in X.²³ Nor is there any reason to doubt that a similar rule would be applied to the characterisation of other connecting factors such as place of contracting, place of tort and situs of things.²⁴

¹⁹ 15 B.Y.B.I.L. 58-59.

²⁰ Robertson, 83-91; Cheshire, 65; Lorenzen, 122.

²¹ *De Nicols v. Curlier* [1900] A.C. 21 (recognition of French community property, although no such institution is known to English domestic law); *Re Hoyles* [1911] 1 Ch. 179; *Re Berchtold* [1923] 1 Ch. 192 (characterisation of proprietary interests in things as movable or immovable and not as realty or personality).

²² Cook, p. 234.

²³ *Re Martin* [1900] P. 211; *Re Annesley* [1926] Ch. 692.

²⁴ Cheshire, 70-72; Falconbridge, 90-94; Lorenzen, 97-100, 123-127; Robertson, 104-117, 224-229. For place of tort, see *Monro v. American Cyanamid Corporation* [1944] K.B. 432, *post*, pp. 803-804; for place of contracting, cf. *Benaim v. Debono* [1924] A.C. 514; *post*, pp. 598-599.

As regards characterisation of other questions than the connecting factor, it has been held that the English statute of frauds relates to procedure, not to substance²⁶; that the English rule that marriage revokes a will is part of English matrimonial law and not part of English testamentary law²⁷; that the English rule that an administrator can postpone the sale of assets relates to administration and not to succession²⁸; that the English rule that a legacy to an attesting witness is void is a rule of essential validity and not a formality²⁹; that the question whether things or interests in things are movable or immovable must be determined in accordance with the *lex situs*³⁰; that French and German Statutes of Limitation are procedural and not substantive³¹; that French rules prohibiting the marriage of minors without the consent of their parents relate to the formalities of marriage and not to capacity to marry³²; that Argentine rules permitting marriages by proxy relate to the formalities of marriage and not to capacity to marry³³; that the question whether a marriage is void or voidable must be determined not merely in a verbal sense, but in the sense of the words as understood in England.^{33a} Many other illustrations have been discussed by writers.³⁴

One of the most interesting cases is *Re Cohn*,³⁵ in which the court adopted the approach to the problem advocated above.³⁶ A mother and daughter, both domiciled in Germany but resident in England, were killed in an air raid on London in circumstances rendering it uncertain which of them survived the other. The daughter was entitled to movables under her mother's will if, but only if, she survived her mother. By English domestic law the presumption was that the elder died first,³⁷ but by German domestic

²⁶ *Leroux v. Brown* (1852) 12 C.B. 801, a decision doubted by Willes, J., in *Wilhams v. Wheeler* (1860) 8 C.B. (N.S.) 299, 316, and *Gibson v. Holland* (1865) L.R. 1 C.P. 1, 8; and condemned by nearly every writer who has discussed it; Cheshire, 76-78, 827; Beckett, 15 B.Y.B.I.L. 69-71; Falconbridge, 63-67; Robertson, 254-255; Cook, 229-231; Lorenzen, Chap. 11. Many writers contrast the decision with that of the French Cour de Cassation in the analogous case of *Benton c. Horeau* (1880) Clunet 480.

²⁷ *Re Martin* [1900] P. 211.

²⁸ *Re Wilks* [1935] Ch. 645.

²⁹ *Re Priest* [1944] Ch. 58.

³⁰ *Re Hoyles* [1911] 1 Ch. 179, *post*, pp. 521, 524, Chap. 21.

³¹ *Huber v. Steiner* (1835) 2 Bing. N.C. 202 (France); *S.A. de Prayon v. Koppel* (1934) 77 S.J. 800 (Germany).

³² *Simonin v. Mallac* (1860) 2 Sw. & Tr. 67; *Ogden v. Ogden* [1908] P. 46; see *ante*, p. 63, n. 66.

³³ *Apt v. Apt* [1948] P. 83.

^{33a} *De Reneville v. De Reneville* [1948] P. 100, 115, *per* Lord Greene, M.R.

³⁴ See, generally, Beckett, 15 B.Y.B.I.L. 66-81; Falconbridge, 48-85; Robertson, 164-188, 245-279.

³⁵ [1945] Ch. 5.

³⁶ It is curious and significant that Cheshire (p. 83, n. 1) claims that the approach adopted by the court in this case is consistent with his view, because it might have been thought that there was only one *lex causae* (in Cheshire's sense), and therefore that characterisation of the German law was entirely a matter for that law.

³⁷ Law of Property Act, 1925, s. 184.

law the presumption was that the deaths were simultaneous. By the English conflict rule, succession to movables is governed by the law of the domicile, procedure is governed by the *lex fori*. Uthwatt, J., first decided, as a matter of first impression, that the English presumption was substantive and not procedural, and therefore did not apply. He next decided that the German presumption was also substantive and not procedural, and therefore did apply. He reached this conclusion for himself by examining the terms of the German article in its context in the German Civil Code, uninfluenced by the characterisation placed upon it by German courts or by the characterisation which he had already placed upon the English presumption.³⁸

4. THE INCIDENTAL OR PRELIMINARY QUESTION³⁹

Since 1934 some writers have discussed a question similar to that of Renvoi and Characterisation, which is called the incidental⁴⁰ or preliminary question. The question arises in this way. Suppose that an English court is considering a main question which has foreign elements, in the course of which other subsidiary questions, also having foreign elements, incidentally arise. Suppose that by the appropriate rule of the English conflict of laws, the main question is governed by the law of a foreign country. Should the subsidiary questions be governed by the appropriate English conflicts rule applicable to such questions, or should they be governed by the appropriate conflicts rule of the foreign law which governs the main question? An illustration will make this clearer. Suppose⁴¹ that a Greek subject domiciled in Greece dies intestate leaving movables in England. By the English conflict of laws rule, succession to his movables is governed by Greek domestic law. Suppose that by Greek domestic law the wife of an intestate is entitled to a share of his movables. Such a share is claimed by W on the ground that she was the wife of the intestate. Suppose that the marriage between the intestate and W was celebrated in England and, though perfectly valid by English domestic law and by the English conflict of laws, was formally void by the Greek conflict of laws rule because no Greek priest was present at the ceremony. Will W's claim to a share in the intestate's movables be governed by the English or the Greek conflicts rule?

Incidental questions of the second degree might arise in the

³⁸ The decision is discussed in 61 L.Q.R. 340, where certain difficulties are pointed out.

³⁹ Breslauer, *The Private International Law of Succession in England, America and Germany* (1937) Chap. 4, pp. 18-21; Morris, book review of Breslauer, 54 L.Q.R. 611-613 (1938); Robertson, Chap. 6, pp. 135-156; Nussbaum, pp. 104-109; Wolff, pp. 206-211; Morris, book review of Wolff, 62 L.Q.R. 89-90 (1946); Falconbridge, pp. 165-166; Cheshire, pp. 128-129.

⁴⁰ This term is used by Wolff and is considered the most suitable English expression. The French and German terms are 'question préalable' and 'Vorfrage'.

⁴¹ Wolff, p. 207.

same case. It is possible, for instance, that the Greek conflict of laws would regard W's marriage as invalid, not because no Greek priest was present at the ceremony, but because W's first marriage was dissolved by a divorce not recognised as valid by Greek law, though recognised as valid by English law. Such questions may also arise in other fields than family law. Suppose, for instance, that A claims restitution of money paid to B which was not due; that the proper law of the payment was the law of country X; but that B pleads that the money was due under an obligation governed by the law of country Y: the question would arise whether the validity of the obligation was governed by the English conflicts rule or the conflicts rule of country X.⁴² The incidental question is usually discussed by writers in connection with legitimacy, and the classic illustration is that of a *propositus* who dies intestate domiciled in country X, leaving movables in the forum and children who are legitimate by the conflicts rule of X but illegitimate by the conflicts rule of the forum, or vice versa.

In order that a true incidental question may squarely be presented, it is necessary first that the main question should by the English conflicts rule be governed by the law of some foreign country; secondly, that a subsidiary question involving foreign elements should arise which is capable of arising in its own right and has choice of law rules of its own available for its determination; and thirdly, that the English choice of law rule for the determination of the subsidiary question should differ from the corresponding choice of law rule adopted by the country whose law governs the main question.⁴⁴ Such cases are rare. Thus, in a succession case, the first requirement would not be satisfied if the testator or intestate died domiciled in England.⁴⁵ The second requirement would not be satisfied if the testator gave a legacy to the 'next of kin' of a foreigner, because this has been held to be a question of construction governed by the *lex successionis*.⁴⁶ The third requirement would not be satisfied if the testator gave a legacy to his wife, but the conflicts rule of his domicile agreed with the English conflict rule that the lady claiming to be his wife did or did not enjoy that status.⁴⁷

In *Shaw v. Gould*,⁴⁸ the testator, who was domiciled in England, gave movables in England upon trust for the children of E. E, who was domiciled in England, married B, also domiciled in England. That marriage was dissolved by decree of the Court of Session in Scotland, where B was never domiciled, and subsequently E

⁴² Nussbaum, p. 104; Robertson, pp. 154-155.

⁴⁴ Cf. Robertson, pp. 148-149.

⁴⁵ As in *Birtwhistle v. Vardill* (1839) 7 Cl. & F. 940; *Re Wright's Trusts* (1856) 2 K. & J. 595; *Re Goodman's Trusts* (1881) 17 Ch.D. 266; *Re Andros* (1888) 24 Ch.D. 687; *Re Paine* [1940] Ch. 46.

⁴⁶ *Re Fergusson's Will* [1902] 1 Ch. 483.

⁴⁷ Cf. *Dogliotti v. Crispin* (1886) L.R. 1 H.L. 301 (legitimacy).

⁴⁸ (1888) L.R. 3 H.L. 55. Cf. *Re Bischoffsheim* [1948] Ch. 79.

married S, a domiciled Scotsman, in Scotland and had children by him. The House of Lords held that the children were illegitimate for the purpose of taking under the English will, because the Scottish divorce was invalid in England, B never having been domiciled in Scotland. The case does not present an incidental question of the first degree, because the testator was domiciled in England, and therefore the first requirement was not satisfied. But it does present an incidental question of the second degree. The marriage between E and S in Scotland was a Scots marriage. Yet it was held that the validity of the divorce, upon which the validity of the marriage depended, was governed by English and not Scots conflict of laws rules.

In *Re Stirling*,⁴⁹ the testatrix, who was domiciled in Scotland, gave land in Scotland to A and the heirs of his body. A's eldest son B married C after C had been divorced from her first husband D in North Dakota, where D was never domiciled. The English court held that the children of B and C were illegitimate, because the North Dakota divorce was invalid, D never having been domiciled in North Dakota. Unfortunately it is impossible to tell from the judgment whether the court reached this result by applying the English or the Scots conflict of laws rule: probably the result would have been the same whichever rule was applied.⁵⁰

The writers who have considered the incidental question are sharply divided. Some think that the incidental question should be determined by the conflict of laws rule of the forum.⁵¹ Others think it should be determined by the conflict of laws rule of the law which governs the main question.⁵² Dicey evidently never considered the question; and the language of Westlake has been cited in support of both views.⁵³ Those who take the first view sometimes deny that the incidental question is a problem in the conflict of laws at all.⁵⁴ Those who take the second view emphasise that the question is not: was the claimant the wife of the intestate? but was she the wife of the intestate by the law of his domicile?⁵⁵ The arguments in favour of the second view are analogous to those in

⁴⁹ [1908] 2 Ch. 344.

⁵⁰ Robertson (pp. 149-150) claims that the English court applied the Scots conflict rule. But this is very doubtful: Welsh, 63 L.Q.R. 86, n. 5, 87, n. 7 (1947).

⁵¹ Raape, *Recueil des Cours* (1934, IV), 485-495; Maury, *Recueil des Cours* (1936, III), 558-563; Breslau, 18-21; Morris, 54 L.Q.R. 611-613; 62 L.Q.R. 89-90; Nussbaum, 104-109; Falconbridge, 165-166; Cheshire, 128-129.

⁵² Melchior, *Die Grundlagen des Deutschen Internationalen Privatrechts* (1932) 245-265; Wengler, *Die Vorfrage im Kollisionsrecht* (1934) 8 *Rabel's Zeitschrift*, 148-251; Robertson, 139-148; Wolff, 206-211.

⁵³ For the first view, Morris, 54 L.Q.R. 612, citing Westlake, p. 231; for the second view, Robertson, pp. 147-148, citing Westlake, p. 102.

⁵⁴ Falconbridge, p. 166; cf. Nussbaum, book review of Robertson, 40 *Columbia Law Review* 1471, note 40 (1940).

⁵⁵ Robertson, pp. 142-146.

favour of the total renvoi theory⁵⁶ and to those in favour of secondary characterisation in accordance with the *lex causæ*.⁵⁷

The second view harmonises well with the tendency of English courts to distinguish between the existence and the incidents of status, the former being governed by the law of the domicile of the person whose status is in question, and the latter by some other law.⁵⁸ Moreover, the second view derives some support from a dictum of Lord Greene in *Baindail v. Baindail*.⁵⁹ Nevertheless, it is submitted (though in the absence of even one clear-cut decision, with the greatest hesitation) that the first view is preferable, because it is the more consistent with the approach adopted by the House of Lords in *Shaw v. Gould*.⁶¹ It may well be that whether a question is an independent one governed by its own appropriate law or whether it is merely incidental to some other question and therefore governed by the appropriate law of that question is, in essence, a question of characterisation.⁶² It cannot be without significance that not a single case can be found in the English, American or continental conflict of laws in which the incidental question has been discussed by a court.⁶³

⁵⁶ *Ante*, pp. 50-51; cf. Robertson, p. 156.*

⁵⁷ *Ante*, pp. 68-70.

⁵⁸ *Post*, pp. 471-475.

⁵⁹ [1946] P. 122, 127.

⁶¹ (1868) L.R. 3 H.L. 55.

⁶² Falconbridge, p. 166.

⁶³ Nussbaum, p. 105.

DOMICILE¹

1. DOMICILE OF NATURAL PERSONS²

(1) NATURE OF DOMICILE

RULE 1.—The domicile of any person is the country which is considered by English law to be his permanent home.³

This is—

- (1) in general, the country which is in fact his permanent home;
- (2) in some cases, the country which, whether it be in fact his home or not, is determined to be so by a rule of English law.

Comment and Illustrations

No definition of domicile has given entire satisfaction to English judges. As, however, a person's domicile may certainly be described as the country which is considered by law to be his home, light is thrown on the nature of domicile by a comparison between the meanings of the two closely connected terms, home and domicile.

Home.—The word 'home' is usually employed without technical precision. Yet, whenever a country is termed a person's home, reference is intended to be made to a connection between two facts, the one physical the other mental. The physical fact is the person's 'habitual physical presence,' or, to use a more ordinary term, 'residence',⁴ within the limits of a particular

¹ Story (8th ed.), Chap. 3, ss. 39–49; Cheshire, Chap. 7; Wolff, ss. 98 *et seq.*; Restatement, Chap. 2; Goodrich, Chap. 2; Johnson, Chap. 2; Westlake, Chap. 14; Foote, Chap. 2.

² For domicile of natural persons, *i.e.*, human beings, see Rules 1–17. For domicile of legal persons or corporations, see Rule 18, *post*.

³ 'Domicile meant permanent home, and if that was not understood by itself, no illustration could help to make it intelligible.' *Whucker v. Hume* (1858) 28 L.J.Ch. 396, 400, *per* Lord Cranworth; *Att.-Gen. v. Rowe* (1862) 31 L.J.Ex. 314, 320.

⁴ The term 'residence' is used by some writers as synonymous with the word 'home', *i.e.*, as including both 'residence', in the sense used in the text, and the 'intention to reside' (*animus manendi*). But it is convenient to restrict the term 'reside' to the description of the physical fact included in the meaning of the word 'home'. 'Residence' has, in many instances, been employed by judges and others to denote a person's habitual physical presence in a place or country which may or may not be his home. See, *e.g.*, *Jopp v. Wood*

country. The mental fact is the person's 'present intention to reside permanently, or for an indefinite period', within the limits of such country; or, more accurately, the absence of any present intention⁵ on his part to remove his dwelling permanently, or for an indefinite period, from such place or country. This mental fact is technically termed the *animus manendi*,⁶ and since the existence of a person's home in a given country depends on a relation between the fact of residence and the *animus manendi*, home may be defined in the following terms.

A person's home is that country, either (i) in which he, in fact, resides with the intention of residence (*animus manendi*), or (ii) in which, having so resided, he continues actually to reside, though no longer retaining the intention of residence (*animus manendi*), or (iii) with regard to which, having so resided there, he retains the intention of residence (*animus manendi*), though he in fact no longer resides there.

The cases to which the formula can be applied are six.

1. D⁷ is a person residing in England, without any intention of leaving the country for good, or of settling elsewhere. England is clearly D's home, even if his residence has been short.⁸

2. D, an inhabitant of England, who has hitherto intended to continue residing there, makes up his mind to settle in France. His home, however, continues to be English till the moment when he leaves the country. It is till then retained by the fact of residence, though the *animus manendi* has ceased to exist. It falls within the second clause of the definition of home.

3. D, an inhabitant of England, goes to France for business or pleasure, with the intention of returning to England and residing there permanently. England is still his home. It is so because the intention of residence (*animus manendi*) is retained, although D's actual residence in England has ceased. The case falls precisely within the third clause of the definition of home.

4. D has never, in fact, resided and has never formed any intention of permanently residing in England. That D, under these circumstances, does not possess an English home is too clear for the matter to need comment.⁹

(1865) 34 L.J.Ch. 212, 218; *Gillis v. Gillis* (1874) Ir.R. 8 Eq. 597. Confusion has sometimes arisen from the employment of the word 'residence' at one time as excluding, and at another time as including, the *animus manendi*. Compare *Jopp v. Wood* (1865) 4 De G.J. & S. 616, with *King v. Foxwell* (1876) 3 Ch.D. 518.

The word 'habitual', in the definition of residence, does not mean presence in a place either for a long or for a short time, but presence there for the greater part of the period, whatever that period may be (whether ten years or ten days), referred to in each particular case.

⁵ See Story, s. 43, for the remark that the absence of all intention to cease residing in a place is sufficient to constitute the *animus manendi*. See *Att.-Gen. v. Pottinger* (1861) 30 L.J.Ex. 284, 292.

⁶ It is often, in strictness, rather the *animus revertendi et manendi* than the *animus manendi*.

⁷ D is, throughout this chapter, used to designate the person, either whose domicile is in question, or upon whose domicile a legal right depends, or may be supposed to depend.

⁸ See, as to the relation of time of residence to domicile, comment on Rule 16, *post*; *Bell v. Kennedy* (1868) L.R. 1 Sc.App. 307, 319.

⁹ The one apparent exception to this remark is the case of children and others who have the home of some person (e.g., a parent) on whom they depend.

5. D, who has been permanently residing in France, is for the moment in England, but has never formed the least intention of permanent residence there. He clearly has not a home in England.

6. D, lastly, is a person who has been permanently residing in France, but has formed an intention of coming to England, where he has not been before, and settling there. He has not yet quitted France. England is clearly not his home

From our formula, as illustrated by these examples, the conclusion follows that, as a home is acquired by the combination of actual residence (*factum*) and of intention of residence (*animus*), so it is (when once acquired) lost, or abandoned, only when *both* the residence *and* the intention to reside cease to exist. If, that is to say, D, who has resided in England as his home, continues either to reside there in fact, or to retain the intention of residing there permanently, England continues to be his home. On the other hand, if D ceases both to reside in England and to entertain the intention of residing there permanently, England ceases to be his home, and the process of abandonment is complete. If, to such giving up of a home by the cessation both of residence and of the *animus manendi*, we apply the terms 'abandon' and 'abandonment', the meaning of the word home may be defined with comparative brevity.

A 'home' (as applied to a country) means 'the country in which a person resides with the *animus manendi*, or intention of residence, or which, having so resided in it, he has not abandoned'.

It is to be noted that the conception of a country as a home is in no sense a legal or a technical idea, since it arises from the relation between two facts, 'actual residence' and 'intention to reside', neither of which has anything to do with the technicalities of law. A person might have a home in a country where law and courts were totally unknown, and the question whether a given country is or is not to be considered a particular person's home is in itself a mere question of fact, and not of law.¹⁰

Results of definition of 'home'.—From the definition of a home flow several conclusions which have a very close connection with the legal rules determining the nature, acquisition, and change of domicile.

(1) The vast majority of mankind (in the civilised parts of the world, at least) have a home, since they generally reside in some country, e.g., England or France, without any intention of ceasing to reside there. It is nevertheless clear that a person may be homeless.¹¹ D, for example, may be an English emigrant, who has left England for good, but is still on his voyage to America, and has

The explanation is that such persons are considered as sharing the home of the person on whom they depend, rather than in strictness possessing a home of their own. See Rule 9 and Sub-Rules 1 and 2, *post*.

¹⁰ For the bearing of this remark on the law of domicile, see comment on Rule 7, *post*; *Casdagli v. Casdagli* [1919] A.C. 145.

¹¹ Contrast Rule 2, *post*, as to domicile.

not yet reached Boston, where he intends to settle. D, again, may be a traveller, who has abandoned his English home, with the intention of travelling from land to land, for an indefinite period, and with the fixed purpose of never returning to England. D, again, may be a vagabond, *e.g.*, a gipsy who wanders from country to country, without any intention of permanently residing in any one country. Here, again, D is homeless, because of the total want of any *animus manendi*. In these instances a person is as a matter of fact homeless, and if, as we shall find to be the case,¹² he is considered by law to have a home in one country, rather than in another, or in other words, if he has a domicile, this is the result of a legal convention or assumption.

(2) The definition of home suggests the inquiry, which has, in fact, been sometimes raised in the courts,¹³ whether a person can have more than one home at the same time, or, in other words, whether each of two or more countries can at the same moment be the home of one and the same person.

The following state of facts certainly may exist. D determines to live half of each year in France and half in England. He possesses a house, lands, and friends, in each country. He resides during each winter in his house in the South of France, and spends each summer in his house in England. His intention is to pursue the same course throughout his life. If the question be asked whether D has two homes, the answer is that the question is mainly one of language. If the intention entertained by D to reside in each country be not a sufficient *animus manendi* as to each, then D is to be numbered among the persons who in fact have no home. If it be a sufficient *animus manendi*, then D is correctly described as having two homes.

(3) The abandonment¹⁴ of one home may either coincide with, or precede the acquisition of a new home.

D goes from England, where he is settled, to France on business, with the fullest intention of returning thence to England, as his permanent residence. At the end of a year he makes up his mind to reside permanently in France. From that moment he acquires a French, and loses his English home. The act of acquisition and the act of abandonment exactly coincide. The act of abandonment, however, often precedes the act of acquisition. D leaves England with the intention of ultimately settling in France, but travels through Belgium and Germany. From the moment he leaves England his English home is lost, but no French home is acquired till France is reached.

The relation between the abandonment of one home and the acquisition of another deserves careful consideration for two reasons.

The first reason is, that the practical difficulty of deciding which

¹² See Rule 2, *post*.

¹³ See Rule 3, *post*.

¹⁴ See Rule 8, *post*.

of two countries a person is at a given moment to be considered as domiciled arises (in general) not from any legal subtleties, but from the difficulty of determining at what moment of time a person resolves to make a country in which he happens to be living his permanent home. The nature of this difficulty is well illustrated by a reported case. The question to be determined was, whether D, who at one time possessed a home in Jamaica, had or had not in the year 1888 acquired a home in Scotland. No one disputed that in 1887 he had left Jamaica for good and was residing in Scotland. It was further undisputed that some years later than 1888 he had acquired a Scottish home or domicile. The matter substantially in dispute was whether at the date in question D had made up his mind to reside permanently in Scotland. The case came on for decision in 1868, and D himself gave evidence as to his own intentions in 1888. His honesty was undoubted, but the court, though having the advantage of D's own evidence, found the question of fact most difficult to determine, and in the result took a different view (chiefly on the strength of letters written in 1888) from that taken by D himself of what was then his intention as to residence.¹⁵

The second reason is, that there exists a noticeable difference between the natural result of abandonment and the legal rule¹⁶ as to its effect. As a matter of fact, a person may abandon one home without acquiring another. As a matter of law, no man can abandon his legal home or domicile without, according to circumstances, either acquiring a new or resuming a former domicile.

(4) From the fact that the acquisition of a home depends upon freedom of action or choice, it follows that a large number of persons¹⁷ either cannot, or usually do not, determine for themselves where their home shall be. Thus, young children cannot acquire a home for themselves; boys of thirteen or fourteen, though they occasionally do determine their own place of residence, more generally find their home chosen for them by their father or guardian; the home of a wife is usually the same as that of the husband; and, speaking generally, persons dependent upon the will of others have, in many cases, the home of those on whom they depend. This fact which is still in the main in accordance with social usage, lies at the root of what might otherwise appear to be arbitrary rules of law, *e.g.*, the rule that a wife can in no case have any other domicile other than that of her husband.

Domicile not same as home.—As a person's domicile is the country which is considered by law to be his home, and as the law in general holds that country to be a man's home which is so in fact, the notion naturally suggests itself that the word 'domicile'

¹⁵ *Bell v. Kennedy* (1868) L.R. 1 Sc.App. 307. Compare *Craignish v. Hewitt* [1892] 3 Ch.(C.A.) 180.

¹⁶ See Rule 8, *post*.

¹⁷ See Rule 9, and Sub-Rules, *post*.

and the word 'home' (as already defined) mean in reality the same thing, and that the one is merely the technical equivalent for the other.¹⁸

The notion, however, is fallacious, and is based on the erroneous assumption that the law always considers that place to be a person's home which actually is his home, and on the omission to notice the fact that the law in several instances attributes to a person a domicile in a country where in reality he has not, and perhaps never had, a home. Thus a domiciled Englishman, who has in fact abandoned England without acquiring any other home, retains his English domicile,¹⁹ and a married woman is always domiciled in the country where her husband has his domicile though she never has lived there, and has her real home in another. Any attempt to obtain a complete definition of the legal term domicile by a precise definition of the non-legal term home can never meet with complete success, for a definition so obtained will not include in its terms the conventional or technical element which makes up part of the meaning of the word domicile.

The explanation of this conventional element is as follows: It is for legal purposes of vital importance that every man should be fixed with some home or domicile since otherwise it may be impossible to decide by what law his rights, or those of other persons, are to be determined. The cases, therefore, of actual homelessness must be met by some conventional rule, or, in other words, a person must have a domicile or legal home assigned to him, even though he does not possess a real one. It is, again, convenient that a person should be treated as having his home or being domiciled in the place where persons of his class or in his position would, in general, have their home. Thus the home of an infant is generally that of his father, and the home of a wife is generally that of her husband. Hence the rule of law assigning to an infant, in general, the domicile of his father, and to a married woman, invariably, the domicile of her husband.

These considerations of necessity or of convenience introduce into the rules as to domicile that conventional element which makes the idea itself a technical one and different from the natural conception of home. As these conventional rules cannot be conveniently brought under any one head, there is a difficulty in giving a neat definition of domicile as contrasted with home. Since, however, the courts generally hold a country to be a person's domicile because it is in fact his permanent home, though occasionally they hold a country to be a person's domicile because it is fixed as such by a rule of law, a domicile may accurately be described in the terms of our Rule, and we may lay down that a person's domicile is in general the country which is in fact his permanent home, though

¹⁸ *Att. Gen. v. Rowe* (1862) 31 L.J.Ex. 314, 320. Contrast *Walcot v. Botfield* (1864) Kay 594; *Ward v. Maconochie* (1891) 7 T.L.R. 536.

¹⁹ See Rule 8, *post*.

in some cases it is the country which is determined to be his home by a rule of law. Or in the words of Holmes, J.,²⁰ 'What the law means by domicile is one technically pre-eminent headquarters, which as a result either of fact or of fiction every person is compelled to have in order that by aid of it certain rights and duties which have been attached to it by the law may be determined'.

Area of Domicile.—The area contemplated throughout the Rules relating to domicile is a 'country' or 'territory' subject to one system of law.²¹ The reason for this is that the object of this treatise, in so far as it is concerned with domicile, is to show how far a person's rights are affected by his having his legal home or domicile within a territory governed by one system of law, *i.e.*, within a given country, rather than within another. If, indeed, it happened that one part of a country, governed generally by one system of law, was in many respects subject to special rules of law, then it would be essential to determine whether D was domiciled within such particular part, *e.g.*, California in the United States; but in this case, such part would be *pro tanto* a separate country, in the sense in which that term is employed in these Rules.

It may, indeed, be suggested that a person cannot be domiciled in a country unless his domicile can be fixed at some particular place in that country. This notion, however, is erroneous.²²

It is, of course, obvious that if D resides and intends to reside in one particular place in a country, he is domiciled in that country, *e.g.*, England; but the converse does not hold good. D may reside in England, with the full intention of permanent residence, and may therefore be domiciled there, and this fact may be well known, and capable of proof, and yet there may be no one place in England which can be termed D's home. As has been stated:—

'If the purpose of remaining in the territory be clearly proved, *aliter*, a particular home is not necessary'.²³

The principle laid down in the passage cited is of importance. For if many of the received and best definitions of domicile, *e.g.*, that of Story, 'that place in which [a person's] habitation is fixed without any present intention of removing therefrom',²⁴ be adopted, and the unnecessary assumption be also made that a

²⁰ *Bergner & Engel Brewing Co. v. Dreyfus* (1898) 172 Mass. 154.

²¹ *Trotter v. Rajotte* [1940] 1 D.L.R. 493.

²² *Conf. Doucet v. Geoghegan* (1878) 9 Ch.D.(C.A.) 441, especially judgment of Brett, L.J., p. 457. See also *Re Bullen Smith* (1888) 58 L.T. 578; *Craigish v. Hewitt* [1892] 3 Ch.(C.A.) 180.

²³ *Arhott v. Groom* (1846) 9 D. 142, 150. The fact, however, that a person has no one place at which he permanently resides in England may be evidence of his not intending to make England his home. *Re Patience* (1885) 29 Ch.D. 976, 984. See also *Bradford v. Young* (1885) 29 Ch.D.(C.A.) 617.

²⁴ Story, s. 43. See *Doucet v. Geoghegan* (1878) 9 Ch.D.(C.A.) 441. In this case the testator certainly was domiciled in England, for he 'had the intention of residing in England permanently', but it can hardly be said that he was domiciled in his house in London, which he took on a lease for three years.

person who is domiciled in a country must be necessarily domiciled at some definite place in that country, the result will follow that persons whom every one will admit to have an English domicile cannot be shown to be domiciled in England.²⁵

The confusion of thought in such cases arises from confounding home and domicile. 'My home is London' and 'my home is England' are both legitimate phrases with a distinct sense. But as regards domicile the phrase 'my domicile in London' would have no distinct meaning, for domicile is a legal conception whose area is a country only.

RULE 2.—No person can at any time be without a domicile.²⁶

Comment

~~'It is a settled principle that no man shall be without a domicile.'~~²⁷ ~~'It is clear that by our law a man must have some domicile.'~~²⁸ or (to use the expression of another authority) 'it is undoubted law that no man can be without a domicile'.²⁹

The principle here laid down is, in effect, that for the purpose of determining a person's legal rights or liabilities, the courts will invariably hold that there is some country in which he has a home, and will not admit the possibility of his being in fact homeless,³⁰ or, in other words, even if he is in fact homeless, a home will, for the purpose of determining his legal rights, or those of other persons, always be assigned to him by a rule of law. The mode by which this result is achieved will appear from the Rules laid down in this chapter.³¹ It consists for the most part in the assumption that every one for whom no other domicile can be found retains what is called his domicile of origin,³² i.e., the domicile assigned to him by a rule of law at the time of his birth, combined with the principle that a domicile is retained until it is changed by the act of the domiciled person himself, or in some cases by the act of a person on whom he is dependent.³³

²⁵ The question as to the place or area within a country to which a person's intention of residence applies may conceivably become of importance. The question was, through the separation of Queensland from New South Wales, nearly raised in *Platt v. Att.-Gen. of New South Wales* (1878) 3 App.Cas. 336, but was not decided. For Ireland, see *Egan v. Egan* [1928] N.Ir. 159; *Re M.* [1937] N.I. 151.

²⁶ *Udny v. Udny* (1869) L.R. 1 Sc.App. 441, 453, 457; *Bell v. Kennedy* (1868) L.R. 1 Sc.App. 307. See esp. *per* Lord Westbury at p. 320. See also *Gout v. Cimitian* [1922] 1 A.C. 105.

²⁷ *Udny v. Udny* (1869) L.R. 1 Sc.App. 441, 457, *per* Lord Westbury.

²⁸ *Ibid.*, p. 443, *per* Hatherley, C.

²⁹ *Ibid.*, p. 453, *per* Lord Chelmsford.

³⁰ See as to the principle that not only has a person always a home, but that his home can always be ascertained, Rule 12, *post*.

³¹ See Rules 4-17, *post*.

³² See Rule 6, p. 38, *post*.

³³ Rules 4 and 9, pp. 86, 101, *post*.

RULE 3.—No person can have at the same time more than one domicile.³⁴

Comment

‘It is clear that, by our law, a man must have some domicile, and must have a single domicile’.³⁵

The courts, when called upon to determine rights, *e.g.*, of succession, depending on D’s domicile at a given time, will assume as a rule of law that D was at the time in question domiciled in some one country only. If it be doubtful whether D was at his death domiciled in England or in Scotland, the minutest evidence will be weighed in order to settle in which of the two countries he had his legal home, but our courts will always decide that he died domiciled in one country only, and will not admit the possibility of his dying domiciled in two countries.

A doubt has, however, been raised, whether a person cannot have at the same moment a domicile in one country for the determination of one class of rights (*e.g.*, rights of succession), and a domicile in another country for the determination of another class of rights (*e.g.*, capacity for marriage).³⁶

The notion, however, that a person may be held to have been domiciled in Scotland for the purpose of determining the validity of his will, and to have been domiciled at the same moment in Germany for the purpose of determining the validity of his marriage, is opposed to the principles by which the law of domicile is governed, and is not, it is believed, supported by any decided case. The prevalence of the notion is due to two causes:—

(1) The term ‘domicile’ is often used in a lax sense, meaning no more than is meant by the term ‘residence’, as used in this treatise. Thus, a ‘forensic domicile’, or a ‘commercial domicile’, often signifies something far short of domicile, strictly so called. Now, it is obvious that a person may have a ‘residence’ in one place and a ‘domicile’ in another,³⁷ and that residence may often be sufficient to confer rights, or impose liabilities, *e.g.*, the liability to pay income tax. It is from cases in which ‘residence’ alone has been in question that the possibility of contemporaneous domiciles in different countries for different purposes has suggested itself.

³⁴ *Udny v. Udny* (1869) L.R. 1 Sc.App. 441, 448; *Somerville v. Somerville* (1801) 5 Ves. 750; 5 R.R. 155, which is one of the first cases in which the modern idea of domicile clearly appears; *Saccharin Corporation, Ltd. v. Chemische Fabrik von Heyden Aktiengesellschaft* [1911] 2 K.B. (O.A.) 516, 526, 527; and note especially the absence of any case in which a person has been held to have more than one domicile at the same time. But see *Re Capdevielle* (1864) 2 H. & C. 985; *Crocker v. Marquis of Hertford* (1844) 4 Moo.P.C. 339. See also the Domicile Act, 1861. No convention has been made under the Act, which is therefore at present a dead letter.

³⁵ *Udny v. Udny* (1869) L.R. 1 Sc.App. 441, 448, *per* Hatherley, C.

³⁶ See *Re Capdevielle* (1864) 33 L.J.Ex. 806, 816; *Crocker v. Marquis of Hertford* (1844) 4 Moo.P.C. 339; Cook, Chap. 7.

³⁷ *Gillis v. Gillis* (1874) Ir.R. 8 Eq. 597.

(2) The inquiry, which of two countries is to be considered a person's domicile, has (especially in the earlier cases) been confused with the question, whether one person can at the same time have a domicile in two countries.³⁸

RULE 4.—A domicile once acquired is retained until it is changed

(1) in the case of an independent person,³⁹ by his own act;

(2) in the case of a dependent person,⁴⁰ by the act of some one on whom he is dependent.

Comment

The principle here enunciated may (it being granted that no one can have more than one domicile) appear too obvious to need statement, but requires to be attended to, as it lies at the bottom of most of the rules as to the acquisition and change of domicile.

If D is a man of full age, then the person capable of changing his domicile is D himself, and D will retain his English domicile until some act on his own part which has the legal effect of changing it for, e.g., a French domicile.

If D is an infant, the person capable of changing D's domicile is the person on whom D is, for this purpose at any rate, dependent, who in most instances is D's father. D retains his domicile until some act on the part of his father changes it. The only act, it may here be added, which can have that effect is a change in the father's own domicile.⁴¹

The operation of this Rule may have a curious result. If an Englishman takes up residence in India, at first for temporary purposes, and always entertains the intention of returning home, presumably he retains his English domicile, and transmits it to his children, who, if they maintain the hope of settling in England, may never acquire an Indian domicile, so that an English domicile may be preserved for successive generations.⁴² It has actually been held that a Scottish grandfather, despite service under the East India Co., had retained a Scottish domicile, had given it to his son, and ultimately to his grandson.⁴³

³⁸ See *Forbes v. Forbes* (1854) Kay 341, compared with *Aitchison v. Dixon* (1870) L.R. 10 Eq. 589.

³⁹ See for meaning of term, pp. 40; 44, *ante*.

⁴⁰ See for meaning of term, pp. 40, 44, *ante*.

⁴¹ See Rule 9, Sub-Rule 1, p. 102, *post*.

⁴² *Peal v. Peal* [1931] P. 97.

⁴³ *Grant v. Grant* [1931] S.C. 238.

(2) ACQUISITION AND CHANGE OF DOMICILE

Domicile of Independent Persons.⁴⁴

RULE 5.—Every independent person has at any given moment either

- (1) the domicile received by him at his birth (which domicile is hereinafter called the domicile of origin),⁴⁵ or,
- (2) a domicile (not being the same as his domicile of origin) acquired or retained⁴⁶ by him while independent by his own act (which domicile is hereinafter called a domicile of choice).⁴⁷

Comment

D's domicile of origin is, we will suppose, English. What the rule lays down is, that D, being an independent person, will at any moment be found to be domiciled either in England or in some other country, such as France, in which he has settled, or has acquired for himself, or has had acquired for him during infancy, a home.⁴⁸ It is of course possible (as before pointed out)⁴⁹ that D may be in fact homeless, as where he has left England for good, and has not yet settled in France, or where, having settled in France, he has left France for good and is on his way to America; but under these circumstances he has his domicile or legal home in England,⁵⁰ i.e., he is legally in possession of his domicile of origin.

The two domiciles differ from each other in two respects: first, in their mode of acquisition⁵¹; and secondly, in the mode in which they are changed.⁵²

⁴⁴ See for meaning of term, pp. 40, 44, *ante*.

⁴⁵ See Rule 6, p. 88, *post*.

⁴⁶ The word 'retained' is inserted to cover the case of a person who on coming of age is in possession of a domicile not being that of origin, which was acquired for him by his father during infancy. D is born in England, where his father A, is then domiciled. During D's infancy his father acquires or resumes a French domicile and when D comes of age is domiciled in France. D's domicile at the moment of his coming of age is French, and is retained as a domicile of choice until D does some act whereby he changes his domicile. See, however, Westlake, s. 261, but see *Re Craignish* [1892] 3 Ch. 180, 184. See also *Crumpton's Judicial Factor v. Finch-Noyes* [1918] S.C. 378, 389-391: *Re Macreight* (1885) 30 Ch.D. 165.

⁴⁷ See Rule 7, p. 89, *post*.

⁴⁸ Rule 3, p. 85, *ante*, precludes the possibility of D's being domiciled both in England and in France.

⁴⁹ See pp. 79-80, *ante*.

⁵⁰ See Rule 8, *post*.

⁵¹ See Rules 6 and 7, *post*.

⁵² See Rule 8, *post*.

Domicile of Origin.

RULE 6.—Every person receives at (or as from) birth a domicile of origin.⁵³

- (1) In the case of a legitimate child born during his father's lifetime, the domicile of origin of the child is the domicile of the father at the time of the child's birth.⁵⁴
- (2) In the case of an illegitimate,⁵⁵ or posthumous, or legitimated child, the domicile of origin is the domicile of his mother at the time of his birth.
- (3) In the case of a foundling, the domicile of origin is the country where he is found.⁵⁶

Comment and Illustrations

Every person is held by a rule of law to be at birth domiciled, or to have his legal home, in the country in which, at the time of the infant's birth, the person (in most cases the infant's father) on whom the infant is legally dependent is then domiciled.

As to this domicile of origin, the following points require notice :—

(1) The existence of a 'domicile of origin' must be considered an assumption of law.⁵⁷

(2) The domicile of origin, though received at birth, need not be either the country in which the infant is born, or the country in which his parents are residing, or the country to which his father belongs by race or allegiance, or the country of the infant's nationality. 'I speak', says an eminent Judge, 'of the domicile of origin rather than of birth. I find no authority which gives, for the purpose of succession, any effect to the place of birth. If the son of an Englishman is born upon a journey, his domicile will follow that of his father'.⁵⁸ Thus D, the son of an Englishman and a British subject, is born in France, where his father is residing

⁵³ *Udny v. Udny* (1869) L.R. 1 Sc.App. 441, 450, 457; *Munroe v. Douglas* (1820) 5 Madd. 379; *Forbes v. Forbes* (1854) Kay 341; *Dalhousie v. McDouall* (1840) 7 Cl. & F. 817; *Munro v. Munro* (1840) 7 Cl. & F. 842; *Re Wright's Trusts* (1856) 2 K. & J. 595; *Somerville v. Somerville* (1801) 5 Ves. 750, 786, 787; *Re Goodman's Trusts* (1881) 17 Ch.D. (C.A.) 266; *Re Grove* (1888) 40 Ch.D. (C.A.) 216.

⁵⁴ *Udny v. Udny* (1869) L.R. 1 Sc.App. 441; *Dalhousie v. McDouall* (1840) 7 Cl. & F. 817; *Goulden v. Goulden* [1892] P. 240.

⁵⁵ *Re Wright's Trusts* (1856) 2 K. & J. 595; *Urquhart v. Butterfield* (1887) 37 Ch.D. (C.A.) 357.

⁵⁶ Cheshire, p. 235; Westlake, s. 248.

⁵⁷ See *Udny v. Udny* (1869) L.R. 1 Sc.App. 441, 457, per Lord Westbury. Several foreign codes tend to do away with the distinction between domicile and nationality by making a person's civil, no less than his political, rights, depend not on his domicile but on his nationality or allegiance.

⁵⁸ *Somerville v. Somerville* (1801) 5 Ves. 750, 786, 787, per Arden, M.R.

for the moment though domiciled in New York. D's domicile of origin is neither English nor French, but New York.

(1) Case of a Legitimate Child.—A legitimate child born during his father's lifetime has his domicile of origin in the country where the infant's father is domiciled at the moment of the child's birth.

(2) Case of Illegitimate or Posthumous Child.—Such a child has for his domicile of origin the domicile of his mother at the time of his birth.

D is an illegitimate child born in France at a time when his father, an Englishman, is domiciled in England, and his mother, a Frenchwoman, is domiciled in France. D's domicile of origin is not English but French.⁵⁹

D is a posthumous child, whose father was domiciled at the time of death in England. At the time of D's birth his mother has acquired a domicile in France. D's domicile of origin is French.

(3) Case of a Foundling.

D is a foundling, i.e., a child whose parents are unknown. He is found in Scotland. His domicile of origin is Scottish.⁶⁰

(4) Case of a Legitimated Child.—A child born illegitimate, but afterwards legitimated, e.g., by the subsequent intermarriage of its parents,⁶¹ takes the domicile of his father at and from the time of such legitimation. His domicile of origin remains apparently the country where his mother was domiciled at the time of his birth.⁶²

D is the child of a Scottish father and an Englishwoman, who are unmarried at the time of his birth. At that moment the domicile of his father is Scottish and of his mother English. A year or two afterwards, whilst his father is still domiciled in Scotland, D's parents marry. D's domicile of origin probably remains English, though it may possibly become Scottish. His actual domicile certainly becomes Scottish, and during infancy changes with the domicile of his father.⁶³

Domicile of Choice.

RULE 7.—Every independent person can acquire a domicile of choice by the combination of residence (*factum*), and intention of permanent or indefinite residence (*animus manendi*), but not otherwise.⁶⁴

Comment

It will be convenient to consider separately the meaning of, and the authorities for, first, the affirmative, secondly, the negative portion of this Rule.

⁵⁹ *Re Wright's Trusts* (1856) 2 K. & J. 595.

⁶⁰ This is really rather a result of rules of evidence than a direct rule of law.

⁶¹ See as to *legitimatio per subsequens matrimonium*, Rules 121, 122, *post*.

⁶² See Westlake, ss. 246-248, 261; Wolff, p. 118; but see Cheshire, p. 235.

⁶³ Compare *Urquhart v. Butterfield* (1887) 37 Ch.D. (C.A.) 357. See Rule 9, Sub-Rule 1, clause 1, p. 102, *post*; *Re Grove* (1888) 40 Ch.D. (C.A.) 216.

⁶⁴ *Udny v. Udny* (1869) L.R. 1 Sc.App. 441, 457, 458; *Bell v. Kennedy* (1868) L.R. 1 Sc.App. 307, 450; *Collier v. Rivaz* (1841) 2 Curt. 855; *Maltass v. Maltass* (1844) 1 Rob.Ecc. 67, 78; *Forbes v. Forbes* (1854) Kay 341; *Haldane*

(i) *Mode of acquisition.*

Acquisition by residence and intention of residence.—Every person begins life as an infant, and therefore as a dependent person. When he becomes an independent person (which can in no case happen before he attains his majority),⁶⁵ he will find himself in possession of a domicile,⁶⁶ which will in most cases be his domicile of origin, but may be a domicile acquired by the act of the person on whom he is dependent during infancy.

He can then obtain or retain for himself by his own act and will a legal home or domicile different from the domicile of origin, and called a domicile of choice. This domicile is acquired by the combination of residence, and the intention to reside, in a given country.

'It may', it has been said, 'be conceded that, if the intention of permanently residing in a place exists, a residence in pursuance of that intention will establish a domicile'.⁶⁷ The process by which this new domicile is acquired has been thus aptly described. 'A change of [the domicile of origin] can only be effected *animo et facto*—that is to say, by the choice of another domicile evidenced by residence within the territorial limits to which the jurisdiction of the new domicile extends. [A person] in making this change does an act which is more nearly designated by the word "settling", than by any one word in our language'.⁶⁸ The acquisition, in short, of a domicile of choice is nothing more than the technical expression for settling in a new home or country, and therefore involves the existence of precisely those conditions of act and intention which we have seen to be requisite for the acquisition of a home.⁶⁹

v. Eckford (1869) L.R. 8 Eq. 631; *Hoskins v. Matthews* (1856) 8 De G.M. & G. 13; *Jopp v. Wood* (1865) 4 De G.J. & S. 616, 621, 622; *Moorhouse v. Lord* (1855) 10 H.L.C. 272; *Winans v. Att.-Gen.* [1904] A.C. 287; *Huntly v. Gaskell* [1906] A.C. 56; *Lord-Advocate v. Brown's Trustees* [1907] S.C. 333; *Drexel v. Drexel* [1916] 1 Ch. 251, 259; *Casdagli v. Casdagli* [1919] A.C. 145; *Gulbenkian v. Gulbenkian* (1937) 54 T.L.R. 241.

⁶⁵ It may happen later, e.g., in the case of a woman who marries while an infant, and becomes a widow late in life. The age of majority is fixed by English law at twenty-one; by other laws, at other periods. A question may arise, as to which no English decision exists, whether a man, an infant under the law of his foreign domicile, will be considered by the English courts as capable of acquiring a domicile at the age of twenty-one. It may be conjectured that the answer to this inquiry depends, in part at least, on the law of the country where he acquires a domicile. He would probably in English law, under which domicile is a technical conception, be held capable of acquiring an English domicile. A question may also arise as to the domicile of an infant widow. Most probably it is the domicile of her deceased husband at the time of his death. In the case of an infant whose marriage is annulled, presumably her domicile is that which she had before her marriage.

⁶⁶ See Rules 9 and 11, pp. 101, 110, *post*.

⁶⁷ *Bell v. Kennedy* (1866) L.R. 1 Sc.App. 307, 319, *per* Lord Cranworth.

⁶⁸ *Udny v. Udny* (1869) L.R. 1 Sc.App. 441, 449, *per* Lord Chelmsford.

⁶⁹ Though the legal conditions necessary for the acquisition of a domicile of choice are, in substance, the same as the conditions necessary for the acquisition of a home, these conditions are, for legal purposes, defined with technical precision. The legal theory, further, that every one has a domicile of origin, which is, so to speak, presumably his home, leads to the result that the law

It is, in short, admitted in general terms that 'the question of domicile is a question of fact and intention'.⁷⁰

Particular attention, therefore, is due to the nature both of the requisite fact, viz., 'residence', and of the requisite 'intention'.

(a) *Residence*.—The nature of residence considered as a part of domicile, and thus looked at as a physical fact, independently of the *animus manendi*, has been little discussed.⁷¹ It may be defined (as already suggested) as 'habitual physical presence in a place or country'. The word 'habitual', however, must not mislead. What is meant is not presence in a place or country for a length of time, but presence there for the greater part of the time, be it long or short, which the person using the term 'residence' contemplates.

The residence which goes to constitute domicile certainly need not be long in point of time. 'If the intention of permanently residing in a place exists, a residence in pursuance of that intention, however short, will establish a domicile.'⁷²

The residence must, however, be in pursuance of, or influenced by, the intention. Mere length of residence will not of itself constitute domicile. D, a Scotsman, born in Scotland, never leaves England during the last twenty-two years of his life. D, however, has never exhibited the intention of settling in England. D, therefore, at death retains his Scottish domicile,⁷³ though he has not visited it for seventy-two years.

(b) *Intention*.—The main problem in determining the nature of domicile, in so far as it depends upon choice, consists in defining the

requires stronger proof of deliberate intention to acquire a new domicile than would be demanded by any person who, without reference to legal rules, wished to determine whether D had or had not left England and settled in Queensland and generally the courts, in judging whether a man has acquired a domicile of choice, look more to intention, and less to length of residence, than would popular judgment in inquiring whether he had acquired a new home. Thus, it can hardly be doubted either that the decision in *Bell v. Kennedy* (L.R. 1 Sc. App. 307) is legally correct or that it is opposed to ordinary notions. A layman would probably have held that Mr. Bell had settled in Scotland. In *Bell v. Bell* [1922] 2 Ir. R. 152, the change of home was deliberate and stated to be permanent, but the court denied change of domicile. In *Winans v. Att.-Gen.* [1904] A.C. 287, change was denied as attachment to his American domicile of origin was held to exist, though he spent many years in, and died in, England.

⁷⁰ *Att.-Gen. v. Kent* (1862) 31 L.J.Ex. 391, 393.

⁷¹ It may be well to note again that residence is often used as including the *animus manendi*, and hence as equivalent to home or domicile. See, e.g., *King v. Foxwell* (1876) 3 Ch.D. 518, 520, for expressions of Jessel, M.R., as to residence, where the term is probably used as including the *animus manendi*. For the difference between residence and domicile, see *Walcut v. Botfield* (1854) Kay 534, 543, 544; *Ward v. Maconochie* (1891) 7 T.L.R. 536.

⁷² *Bell v. Kennedy* (1868) L.R. 1 Sc.App. 307, 319, per Lord Cranworth.

⁷³ *Re Patience* (1885) 29 Ch.D. 976. Cf. *Bradford v. Young* (1885) 29 Ch.D. (C.A.) 617; *Winans v. Att.-Gen.* [1904] A.C. 287. So over thirty-five years residence in England by a man of inert character, dependent on the bounty of relatives, is quite ineffective to change domicile: *Ramsay v. Liverpool Royal Infirmary* [1930] A.C. 588. See also *Wahl v. Att.-Gen.* (1932) 147 L.T. 382; *Att.-Gen. v. Yule* (1931) 145 L.T. 9; *Inland Revenue Commissioners v. Cohen* (1937) 21 Tax.Cas. 301; contrast *Re Joyce* [1946] Ir.R. 277.

character of the necessary intention or *animus*. The best definition or description of the requisite *animus* appears to be, 'the present intention of permanent or indefinite residence in a given country', or (if the same thing be expressed in a negative form) 'the absence of any present intention of not residing permanently or indefinitely in a given country'.⁷⁴

Four points as to its character deserve notice.

(1) The intention must amount to a purpose or choice.

The 'domicile of choice is a conclusion or inference which the law derives from the fact of a man fixing voluntarily his sole or chief residence in a particular place'.⁷⁵ It must not be 'prescribed or dictated by any external necessity'.⁷⁶ 'In order that a man may change his domicile of origin he must choose a new domicile—the word "choose" indicates that the act is voluntary on his part; he must choose a new domicile by fixing his sole or principal residence in a new country (that is, a country which is not his country of origin), with the intention of residing there for a period not limited as to time'.⁷⁷

The expression that the residence must be 'voluntary', or a matter of choice, is not in itself a happy one⁷⁸ since, supposing a person to make up his mind to settle in a country for an indefinite time, the 'motive', whether it be economy, pleasure, the intention of marriage,⁷⁹ or even considerations of health,⁸⁰ is indifferent, though certainly the residence would not in some of these cases be termed, in ordinary language, a matter of choice. What, however, is intended to be expressed, and is undoubtedly true, is that the residence must be connected with the distinct purpose, or intention, to reside. Hence,—to take a familiar example,—residence in a country, arising from sudden illness, as when D, domiciled in England, falls ill on a journey through France and is delayed there from week to week, does not entail a change of domicile. Or again,

⁷⁴ See Story, s. 43; and compare *Bell v. Kennedy* (1868) L.R. 1 Sc.App. 307, 318. See also *Att.-Gen. v. Kent* (1862) 31 L.J.Ex. 391, 395, 396.

⁷⁵ *Udny v. Udny* (1869) L.R. 1 Sc.App. 441, 458, per Lord Westbury.

⁷⁶ *Ibid.*

⁷⁷ *King v. Foxwell* (1876) 3 Ch.D. 518, 520, per Jessel, M.R. Cf. *Briggs v. Briggs* (1880) 5 P.D. 163. For lack of intention see *Ramsay v. Liverpool Royal Infirmary* [1930] A.C. 588; contrast *Re Joyce* [1946] Ir.R. 277.

⁷⁸ The words 'voluntary' or 'voluntarily' may easily mislead. Cf. *Urquhart v. Butterfield* (1887) 37 Ch.D. (C.A.) 357; *Re Marrett* (1887) 36 Ch.D. (C.A.) 400, 407; *D'Etchegoyen v. D'Etchegoyen* (1888) 13 P.D. 132, 136.

⁷⁹ See *Fasbender v. Att.-Gen.* [1922] 1 Ch. 282; (C.A.) 2 Ch. 580. Compare *Arnott v. Groom* (1846) 9 D. 142, where betrothal to an Englishman and even residence in England were held not to have effected a change to English domicile in the case of a Scotswoman. Desire to obtain a divorce was the cause of change of domicile in *Drexel v. Drexel* [1916] 1 Ch. 251.

⁸⁰ See *Hoskins v. Matthews* (1856) 8 De G.M. & G. 13, compared with *Udny v. Udny* (1869) L.R. 1 Sc.App. 441, 458. See, as to domicile of invalids when abroad, comment on Rule 17, *post*. A person may change his domicile, though his object in doing so is to defeat his creditors (*Re Robertson* [1885] W.N. 217), or to evade the jurisdiction of the English courts (*Drexel v. Drexel* [1916] 1 Ch. 251, 259).

if a man is too old and feeble, he may not be mentally capable of forming an intention to change.⁸¹

How far this intention or choice must be distinct or conscious has been disputed.

Some judges have held that it is not necessary, in order to establish a domicile, that a person should have absolutely made up his mind which of two countries is the place where he intends to make his permanent home.⁸²

Others have laid down that a somewhat more distinct intention must exist. 'It must', it has been said, 'be shown that the intention required actually existed, or made reasonably certain that it would have been formed or expressed if the question [whether a person intended to change his domicile] had arisen in a form requiring a deliberate or solemn determination.'⁸³ This is in accord with the stress laid in a comparatively recent case⁸⁴ on the necessity of intention.

(2) The intention must be an intention to reside permanently, or for an indefinite period.

It must be, that is to say, not an intention to reside for a limited time or definite purpose, but ~~an intention of continuing to reside for an unlimited time~~.⁸⁵

If, for example, D, domiciled in England, goes to America for six months, or to finish a piece of business, or even with the intention of staying there only until he has made a fortune,⁸⁶ he retains his English domicile. Thus, a residence in a foreign country for twenty-five years⁸⁷ will not change a person's domicile in default of the intention of settling permanently or indefinitely in such foreign country; but it is, of course, 'true that residence originally temporary, or intended for a limited period, may afterwards become general and unlimited, and in such a case, as soon as the change of purpose, or *animus manendi*, can be inferred, the fact of domicile is established'.⁸⁸ If D, who goes to New York, intending to stay

⁸¹ *Ramsay v. Liverpool Royal Infirmary* [1930] A.C. 588; contrast *Re Joyce* [1946] Ir.R. 277.

⁸² *Att.-Gen. v. Pottinger* (1861) 30 L.J.Ex. 284, 292, per Bramwell, B.

⁸³ *Douglas v. Douglas* (1871) L.R. 12 Eq. 617, 645, per Wickens, V.-C.

⁸⁴ *Ramsay v. Liverpool Royal Infirmary* [1930] A.C. 588; contrast *Re Joyce* [1946] Ir.R. 277. So also *Wmans v. Att.-Gen.* [1904] A.C. 287.

⁸⁵ *Udny v. Udny* (1869) L.R. 1 Sc.App. 441, 458, per Lord Westbury; *The Lauderdale Peerage* (1885) 10 App.Cas. 692. Compare *Bell v. Bell* [1922] 2 Ir.R. 152.

⁸⁶ *Jopp v. Wood* (1865) 4 De G.J. & S. 616; compare *James v. James* (1908) 98 L.T. 438. See, however, *Doucet v. Geoghegan* (1878) 9 Ch.D. (C.A.) 441; *Davis v. Adair* [1895] 1 Ir.R. (C.A.) 379, 400; *Moffett v. Moffett* [1920] 1 Ir.R. (C.A.) 57; *Re Joyce* [1946] Ir.R. 277, which are distinctly suggestive that vague hopes of ultimate return are not enough to prevent the acquisition of domicile.

⁸⁷ *Jopp v. Wood* (1865) 4 De G.J. & S. 616.

⁸⁸ *Udny v. Udny* (1869) L.R. 1 Sc.App. 441, 458, per Lord Westbury. The American doctrine accepts as sufficient to acquire domicile the intention to make a home in a given place here and now, even if there is a distinct intention to leave later (e.g., on finishing a college course): Goodrich, s. 25.

there for a limited period, after living there for a year or two, makes up his mind to reside there permanently, he at once acquires a New York domicile.

(3) The intention must be an intention of abandoning, i.e., of ceasing to reside permanently in, the country of the former domicile.

'The intention must be to leave the place where the party has acquired a domicile, and to go to reside in some other place as the new place of domicile, or the place of new domicile.'⁸⁹ Indeed, if it be granted that a man can have but one domicile at the same time,⁹⁰ it necessarily follows that the purpose, or *animus*, requisite for acquiring a domicile in France must exclude the purpose requisite for retaining a domicile in England.

A difficult question arises when the intention is dependent on some purpose which may be frustrated. If a woman goes to Germany to be married there to a German, and to settle in a German town, has she changed her domicile by arrival in Germany and a short residence prior to marriage? It may be held that her intention is conditional on marriage, and thus does not constitute an *animus manendi* sufficient to change her domicile before that is altered on and by the actual marriage to a domiciled German.⁹¹

(4) The intention need not be an intention to change allegiance.

The intention to reside permanently or settle⁹² in a country is not the same thing as the intention or wish to become a citizen of that country.

It was, indeed, at one time held by a confusion of the ideas of domicile and nationality that a man could not change his domicile, for example, from England to California, without doing at any rate as much as he could to become an American citizen. He must, as it was said, '*intend quatenus in illo exuere patriam*'.⁹³ But this doctrine has now been pronounced erroneous by the highest authority,⁹⁴ and when an Englishman leaves England, where he is domiciled, and goes to the United States, he changes his domicile if he intends to settle in the new country and to establish his principal

⁸⁹ *Lyall v. Paton* (1856) 25 L.J.Ch. 746, 749.

⁹⁰ See Rule 3, p. 85, *ante*.

⁹¹ In *Fasbender v. Att.-Gen.* [1922] 1 Ch. 232; 2 Ch. (C.A.) 850, this point was discussed but not decided; see 2 Ch. 857, *per* Lord Sterndale, M.R.; 863, *per* Warrington, L.J.; 869, *per* Younger, L.J. Compare *Arnatt v. Groom* (1846) 9 D. 142.

⁹² See *Winans v. Att.-Gen.* [1904] A.C. 287, 299, 300; in *Huntly v. Gaskell* [1906] A.C. 56, the judgment of Lord Halsbury, L.C., shows a—probably inconsistent—tendency to revert to the doctrine of *Moorhouse v. Lord* (1863) 10 H.L.C. 272. But see *Casdagli v. Casdagli* [1919] A.C. 145, 171, 172, *per* Lord Haldane; 178, *per* Lord Atkinson; 201, *per* Lord Phillimore.

⁹³ *Moorhouse v. Lord* (1863) 10 H.L.C. 272, 283, *per* Lord Cranworth, followed by *Re Capdevielle* (1864) 2 H. & C. 985; *Att.-Gen. v. Countess de Wahlstatt* (1864) 3 H. & C. 374; *Re Grove* (1888) 40 Ch.D. (C.A.) 216.

⁹⁴ *Udny v. Udny* (1869) L.R. 1 Sc.App. 441, 460, *per* Lord Westbury; *Haldane v. Eickford* (1869) L.R. 8 Eq. 631; *Winans v. Att.-Gen.* [1904] A.C. 287, 299, 300, *per* Lord Lindley; *Brunel v. Brunel* (1871) L.R. 12 Eq. 298; *Wahl v. Att.-Gen.* (1932) 147 L.T. 382 (H.L.).

or sole and permanent home there, even though the legal consequences of his so doing may never have entered his mind⁹⁵; and though he may have had no intention of becoming an American citizen, and has remained a British subject to the end of his life.⁹⁶

(ii) No other mode of acquisition.

The concurrence of residence and intention, for however short a time, is essential for the acquisition of a domicile.

'We are all agreed', it has been said, 'that to constitute a domicile, there must be the fact of residence . . . and also a purpose on the part of [D] to have continued that residence. While I say that both must concur, I say it with equal confidence that nothing else is necessary.'⁹⁷

'Residence' alone clearly will not suffice.

This is sufficiently apparent from the ordinary case of persons travelling, or living abroad, who retain a domicile in a country they may not have seen for years.⁹⁸

'Intention' alone will not suffice.

D, who has never resided in Australia, will clearly not acquire a domicile there by the mere intention to reside there. Nor will the fact that D has set forth from England on his voyage to Australia give him a domicile in an Australian State until he arrives there.⁹⁹

This must be noticed, because it was at one time thought¹ that a new domicile could be acquired *in itinere*, i.e., that if D left England, intending to settle, e.g., in Australia, he acquired a domicile in an Australian State the moment he quitted England. But this notion is apparently erroneous, and the principle may probably be taken as established that a domicile of choice can be acquired by nothing short of the concurrence of residence and intention.

From the fact that the acquisition of a domicile of choice depends solely on the co-existence of residence and intention to reside, two important results may be deduced.

(1) A person's wish to retain a domicile in one country will not enable him to retain it if, in fact, he resides with the *animus manendi* in another.

D, an Englishwoman, originally domiciled in England, resided in France for more than fifty years, with the intention of living

⁹⁵ See especially *Douglas v. Douglas* (1871) L.R. 12 Eq. 617, 643, 644. Compare *Corbridge v. Somerville* [1913] S.C. 858.

⁹⁶ *Brunel v. Brunel* (1871) L.R. 12 Eq. 298. See also *Winans v. Att.-Gen.* [1904] A.C. 287.

⁹⁷ *Arnott v. Groom* (1846) 9 D. 142, 149-152. Compare *Collier v. Rivaz* (1841) 2 Curt. 855, 857. See also *Udny v. Udny* (1869) L.R. 1 Sc.App. 441, 450.

⁹⁸ See further for cases where there is no change of domicile because there is residence without the *animus manendi*, comment on Rule 17, p. 117, *post*.

⁹⁹ *Lyall v. Paton* (1856) 25 L.J.Ch. 746 Contrast *Baker v. Baker* [1945] A.D. 708 (S. Africa).

¹ See *Munroe v. Douglas* (1820) 5 Madd. 379, 405.

there permanently. She made a will in English form in which she expressly stated that she did not intend to abandon her English domicile of origin. It was held that she died domiciled in France.

Russell, J., said: 'It must, I think, be conceded that domicile cannot depend upon mere declaration, though the fact of the declaration having been made must be one of the elements to be weighed in arriving at a conclusion on the question of domicile. But if a particular domicile clearly emerges from a consideration of the other relevant facts, a declaration of intention to retain some other domicile will not suffice to destroy the result of these facts. If (as I think she had) Mrs. Annesley had by the *factum* of long residence and by her *animus manendi* acquired before the date of her codicil a French domicile of choice, her statement that she never intended to abandon her English domicile will not prevent the acquisition of a French domicile of choice'.²

(2) *The acquisition of a domicile cannot be affected by rules of foreign law.*³

By the law of some countries, e.g., of France under Article 18 of the Code Napoléon, a provision abolished since August 10, 1927, in view of the enactment of a new law of naturalisation, a person is required to fulfil certain legal requirements before he is considered by the French courts to be at any rate fully domiciled in France; but, if a person in fact resides with the *animus manendi* in France (i.e., is really settled in France), he will be considered by our courts to be domiciled there, even though he has not complied with the requirements of French law. That is to say, any question of domicile arising in litigation falls to be decided by the *lex fori*.

D, an Englishwoman, lived in France for more than fifty years with the intention of residing there permanently. She was held to have acquired a French domicile of choice although she had not complied with the provisions of Article 18 of the French Civil Code already referred to.⁴

In another case it was stated: 'The domicile of the testatrix must be determined by the English Court of Probate according to those legal principles applicable to domicile which are recognised in this country and are part of its law. Until the question of the domicile of the testatrix at the time of her death is determined,

¹ *Re Annesley* [1926] Ch. 692 at pp. 701-702. See also *Re Steer* (1858) 3 H. & N. 594; *Corbridge v. Somerville* [1913] S.C. 858; *Moffett v. Moffett* [1920] 1 Ir.R. 57; *Doucet v. Geoghegan* (1878) 9 Ch.D. (C.A.) 441; *Douglas v. Douglas* (1871) L.R. 12 Eq. 617, 644; *Robinson v. Robinson's Trustees* [1934] Sc.L.T. 183.

Re Martin [1900] P. (C.A.) 211.

Re Annesley [1926] Ch. 692, 704. See also *Hamilton v. Dallas* (1876) 1 Ch.D. 257; compare *Anderson v. Laneuville* (1854) 9 Moo. P.C. 325; *Bremer v. Freeman* (1857) 10 Moo. P.C. 306, 378, 374; *Collier v. Rivaz* (1841) 2 Curt. 855; *Re Brown-Séquard* (1894) 70 L.T. 811; *Drexel v. Drexel* [1916] 1 Ch. 251, 258, 259; *Re Cunningham* [1924] 1 Ch. 68.

the Court of Probate cannot tell what law of what country has to be applied. The testatrix was a Frenchwoman, but it would be contrary to sound principle to determine her domicile at her death by the evidence of French legal experts. The preliminary question, by what law is the will to be governed, must depend in an English court on the view that court takes of the domicile of the testatrix when she died.⁵

Change of Domicile.

RULE 8.⁶

- (1) The domicile of origin is retained until a domicile of choice is in fact acquired.
- (2) A domicile of choice is retained until it is abandoned, whereupon either
 - (i) a new domicile of choice is acquired; or
 - (ii) the domicile of origin is resumed.

Comment and Illustrations

An independent person⁷ retains a domicile in a country where he has once acquired it until he has (in the strict sense of the term 'abandonment') abandoned⁸ that country by giving up, not only his residence there but also his intention to reside there. But, though a domicile is never changed without actual abandonment of an existing domicile, the legal effect of a man's having left a country where he is domiciled for good differs according as the domicile is a domicile of origin or a domicile of choice.

(1) Domicile of origin.—How changed.—'Every man's domicile of origin must be presumed to continue, until he has acquired another domicile by actual residence, with the intention of abandoning his domicile of origin. This change must be *animo et facto*, and the burden of proof unquestionably lies on the party who asserts that change.'⁹

D, the descendant of a Scottish family, had a domicile of origin in Jamaica. In 1837, after he came of age, he sold his estates in Jamaica and

⁵ *Re Martin* [1900] P. (C.A.) 211, 227, Lindley, L.J. All the judges in the Court of Appeal were agreed on this point, though they differed in the result.

⁶ *Udny v. Udny* (1869) L.R. 1 Sc.App. 441; *Bell v. Kennedy* (1868) L.R. 1 Sc.App. 307; *Fleming v. Horniman* (1928) 44 T.L.R. 315. It requires stronger evidence to establish the intention to abandon a domicile of origin than the intention to abandon a domicile of choice. *The Lauderdale Peerage* (1885) 10 App.Cas. 692, 739, 740; *Winans v. Att.-Gen.* [1904] A.C. 287, and *Huntly v. Gaskell* [1906] A.C. 56. See also for Scotland, *Steel v. Steel* (1888) 15 R. 896; *Vincent v. Buchan* (1889) 16 R. 637; cf. *Att.-Gen. v. Yule* (1931) 145 L.T. 9; *Ross v. Ross* [1930] A.C. 1; *Ramsay v. Liverpool Royal Infirmary* [1930] A.C. 588. It is otherwise in the United States: *Goodrich*, s. 21.

⁷ For meaning of term 'independent person', see p. 40, *ante*.

⁸ See p. 80, *ante*.

⁹ *Aikman v. Aikman* (1861) 3 Macq. 854, 877, *per* Lord Wensleydale; 863 *per* Lord Cranworth; *Ross v. Ross* [1930] A.C. 1.

left the island, to use his own expression, for good. He then went to Scotland, and was resident there during 1838, but without making up his mind whether to settle in Scotland or not. The question came before the courts whether on September 28, 1838, D was or was not domiciled in Scotland. The House of Lords held that D still remained domiciled in Jamaica.

Their decision was based on the ground that, though D was on September 28, 1838, resident in Scotland, he had not at that moment any fixed or settled purpose to make Scotland his future home; that, in short, he was resident in Scotland, but without the *animus manendi*, and therefore had not acquired a Scottish domicile, but still retained his domicile of origin, i.e., was domiciled in Jamaica.¹⁰

(2) *Domicile of choice*.—*How changed*.—A domicile of choice or a home is retained until both residence (*factum*) and intention to reside (*animus*) are in fact given up, but when once both of these conditions have ceased to exist, it is abandoned as well in law as in fact.

D, a widow, whose domicile of origin was English, acquired by marriage a domicile in France. After her husband's death she determined to return to England as her home. She went on board an English steamer at Calais, but was seized with illness, and before the vessel left the harbour, re-landed in France, where after some months (though wishing to return to England) she died, having been unable on account of ill-health to leave France. D retained her French domicile.¹¹

The case exactly illustrates the principle that a domicile of choice is retained until actual residence in a country is brought to an end. In another case D, an Englishman, who had acquired a domicile of choice in Germany, returned for a time to England, but retained his intention to reside permanently in Germany. He did not lose his German domicile.¹² This case illustrates the principle that a domicile once acquired is retained until the intention to reside is brought to an end. It is necessary, however, that actual residence should also be brought to an end before such a domicile will be held to have been abandoned.¹³

The principle, on the other hand, that actual abandonment of such a domicile puts an end to its existence, not only in fact, but in law, has been judicially stated in the following terms:

‘It seems reasonable to say that, if the choice of a new abode and actual settlement there constitute a change of the original

¹⁰ *Bell v. Kennedy* (1868) L.R. 1 Sc.App. 307; see especially, judgment of Lord Westbury, pp. 320, 321, 322.

¹¹ *In Goods of Raffeneil* (1863) 32 L.J.P. & M. 203, 204, per Sir C. Cresswell; *Fleming v. Horniman* (1928) 44 T.L.R. 315. In *Att.-Gen. v. Gasquet* (1877) 41 J.P. 487, 42 J.P. 346, a Frenchwoman who had acquired an English domicile of choice was held to have retained it to her death, although she had intended to settle in her native town and had set out thither, but falling ill at Paris, had returned to London for treatment and died there.

¹² *Re Steer* (1858) 3 H. & N. 594.

¹³ *Re Marrett* (1887) 36 Ch.D. (C.A.) 400, 407; *Nelson v. Nelson* [1925] 3 D.L.R. 22.

domicile, then the exact converse of such a procedure, *viz.*, the intention to abandon the new domicile, and an actual abandonment of it, ought to be equally effective to destroy the new domicile. That which may be acquired may surely be abandoned.’¹⁴

(i) Acquisition of new domicile of choice.—The abandonment of one domicile of choice, may, as a matter of fact, coincide with the acquisition of another. D has acquired a domicile of choice in France. He goes to Germany, intending to reside there for a short time. But after residing in Germany for some time, he makes up his mind to reside there permanently; at that moment, both his French domicile of choice is abandoned, and a German domicile of choice is acquired.

So far there is no difference between a domicile of origin and a domicile of choice; either may be abandoned simultaneously with the actual acquisition of another domicile.

(ii) Resumption of domicile of origin.—A person in possession of a domicile of choice may abandon it, and at the same moment, in actual fact, resume his domicile of origin. This case presents no peculiarity. But another state of circumstances is possible. A person may, as a matter of fact, abandon a home or domicile of choice in one country without in fact acquiring a home in another.¹⁵

D, for example, whose domicile of origin is English, has an acquired home or domicile of choice in France. He leaves France for good, without any intention of returning to England, or of settling in any country whatever. He is in fact homeless. As, however, no one can in the eye of the law be without a domicile,¹⁶ in order to give D a domicile, one of two rules must be adopted.

It might be held, that in the case of a domicile of choice, as of a domicile of origin, any existing domicile was retained until another was actually acquired. This view, however, which was at one time adopted by our courts, is now rejected,¹⁷ and it is now ruled by English courts that on the simple abandonment of a domicile of choice, the domicile of origin is by a rule of law at once resumed or re-acquired. ‘This is a necessary conclusion, if it be true that an acquired domicile ceases entirely whenever it is intentionally abandoned, and that a man can never be without a domicile. The domicile of origin always remains, as it were, in reserve, to be resorted to in case no other domicile is found to exist.’¹⁸

¹⁴ *Udny v. Udny* (1869) L.R. 1 Sc.App. 441, 450, *per* Hatherley, C. *Bell v. Bell* [1922] 2 Ir.R. 152, is a very strong case where a husband who abandoned his wife, left Ireland, and gave London as a permanent address, was yet ruled to have retained an Irish domicile of choice.

¹⁵ See pp. 79, 80-81, *ante*.

¹⁶ See Rule 2, p. 84, *ante*.

¹⁷ See *Munroe v. Douglas* (1820) 5 Madd. 379. It is still the American doctrine; see *Goodrich*, pp. 36, 37.

¹⁸ *Udny v. Udny* (1869) L.R. 1 Sc.App. 441, 454, *per* Lord Chelmsford; *Strike v. Gleich* (1879) O.B. & F. 50.

Hence, whenever a person in fact abandons a domicile of choice, without actually acquiring a new domicile of choice, his domicile of origin is always resumed; for either he resumes it in fact, or if he does not do so in fact, he is held by a rule of law to resume or re-acquire it.

The precise difference in this matter between a domicile of origin and a domicile of choice may be seen from the following illustration:

An Englishman whose domicile of origin is English, and a Scotsman whose domicile of origin is Scottish, are both domiciled in England, where the Scotsman has acquired a domicile of choice. They leave England together, with a view to settling in America, and with the clearest intention of never returning to England. At the moment they set sail their position is in matter of fact exactly the same; they are both persons who have left their English home, without acquiring another. In matter, however, of law their position is different; the domicile of the Englishman remains English, the domicile of the Scotsman becomes Scottish. The Englishman retains his domicile of origin, the Scotsman abandons his domicile of choice, and re-acquires his domicile of origin. If they perish intestate on the voyage, the succession¹⁹ to the movables of the Englishman will be determined by English law, the succession to the movables of the Scotsman will be determined by Scottish law. The Englishman will be considered to have his legal home in England, whilst the Scotsman will be considered to have his legal home in Scotland.

The distinction pointed out in Rule 8 between a domicile of origin and a domicile of choice is borne out by the decision of the House of Lords in *Udny v. Udny*.

D's domicile of origin was Scottish. He settled in England, and acquired there a domicile of choice; he then abandoned England as his home, and went to reside at Boulogne, without, however, intending to settle or becoming domiciled in France. It was held that under these circumstances D resumed his Scottish domicile of origin at the moment when he left England.²⁰

Re-acquisition of domicile of choice.—If a domicile of choice is duly acquired, and then abandoned, with the result that the domicile of origin revives, the domicile of choice can only be re-acquired in precisely the same manner as it was originally acquired.

D, whose domicile of origin is English, acquires by residence and intention of settlement a domicile of choice in the Argentine. Later he leaves the Argentine, intending to settle in England, though he contemplates paying a further visit to the Argentine. He loses his domicile of choice, and can only acquire it again by both residence and intention, not by intention alone.²¹

Rule 8 applies only to the domicile of independent persons. An infant, for example, may lose his domicile of origin without, in

¹⁹ See Rule 178, *post*.

²⁰ *Udny v. Udny* (1869) L.R. 1 Sc.App. 441. This is the leading case on the change of domicile, and taken together with *Bell v. Kennedy*, L.R. 1 Sc.App. 807, contains nearly the whole of the law on the subject. The judgment of Lord Westbury, pp. 458, 459, should be particularly studied.

²¹ *Fleming v. Horniman* (1928) 44 T.L.R. 315.

fact, acquiring a home or domicile of choice in any country. But by operation of law he of course acquires a new domicile.

Thus D is the infant son of M, whose domicile of origin is English. At D's birth M is domiciled in France. D's domicile of origin is therefore French.²² M leaves France for good, taking D with him, and intending to settle in America. During the voyage across the Atlantic, M's domicile,²³ and therefore D's,²⁴ is English; but D has never resided in England, and is, in fact, homeless. D therefore has lost his domicile of origin without the acquisition of a home in any country.

It is easy to work out a similar result in the case of a wife.

Domicile of Dependent Persons (Infants and Married Women).²⁵

RULE 9.—The domicile of every dependent person²⁶ is the same as, and changes (if at all) with, the domicile of the person on whom he is, as regards his domicile, legally dependent.

Comment

The general principle here stated is, that a person not *sui juris* such as an infant or a wife, has the domicile of the person on whom he or she is considered by law to be dependent.

The words 'if at all' should be noticed. They are intended to meet the position of a dependent person whose domicile cannot, at the moment, be changed at all. Such is the position of an infant without parents or guardians. He cannot change his domicile himself, for he is not independent. It cannot at the moment be changed for him, because there is no person in existence on whom he is legally dependent.

The Rule applies to all infants and married women, whatever their domicile and whatever their power under the law of that domicile to acquire a new domicile by their own action. Thus a minor by the law of Scotland has power to select a domicile and the law of the Union of South Africa allows a married minor to establish a separate domicile, and the laws of some of the United States concede the right to married women in certain cases. But there is no English authority to show that change of domicile, at any rate in the case of an attempt to obtain an English domicile, would be held effective. Presumably, a Russian aged eighteen, though of full age by Russian law, could not acquire a domicile in England, or perhaps elsewhere, by his own act. The case, of course, might easily arise if a minor were held by Scottish law to have obtained an English domicile and

²² See Rule 6, p. 88, *ante*.

²³ See pp. 99, 100, *ante*.

²⁴ See Rule 9, and Sub-Rule 1, *post*.

²⁵ As to the domicile of a lunatic or idiot, see pp. 119, 120, *post*.

²⁶ For meaning of 'dependent person', see p. 40, *ante*.

thereafter made a will, for Scottish courts would clearly be bound to apply English law to the will so far as it dealt with movables, and English courts would be bound to apply Scottish law, the result being that the Scottish courts would have to hold the will invalid for lack of testamentary capacity, and English courts would give effect to it as valid by Scottish law. So if the minor died intestate in England the courts would disagree on the governing law as to succession to his movables.

The operation of the Rule is seen from the resulting Sub-Rules.

SUB-RULE 1.—Subject to the Exceptions hereinafter mentioned, the domicile of an infant is during infancy determined as follows :—

- (1) The domicile of a legitimate or legitimated infant is, during the lifetime of his father, the same as, and changes with, the domicile of his father.²⁸
- (2) The domicile of an illegitimate infant, or of an infant whose father is dead, is, whilst the infant lives with his mother, the same as, and changes with, the domicile of the mother.²⁹
- (3) The domicile of an infant without living parents, or of an illegitimate infant without a living mother, probably cannot be changed by his guardian.³⁰
- (4) The domicile of an adopted infant is, during the lifetime of the adopting parent, the same as, and changes with, the domicile of that parent.³¹

Comment and Illustrations

(1) *Case of legitimate infant.*—A child's domicile during infancy changes, while the father is alive, with the domicile of the father.

D is the legitimate son of a man domiciled in England and is himself born in England. When D is ten years old his father emigrates to New York

²⁸ *Somerville v. Somerville* (1801) 5 Ves. 750; *Sharpe v. Crispin* (1869) L.R. 1 P. & D. 611; *Forbes v. Forbes* (1854) Kay 341; *Re Macreight* (1885) 30 Ch.D. 165; *Re Duleep Singh* (1890) 7 Mor.Bk.Rep. 228; *Re Beaumont* [1893] 3 Ch. 490; *Goulder v. Goulder* [1892] P. 240.

²⁹ *Pottinger v. Wightman* (1817) 3 Mer. 67; *Re Beaumont* [1893] 3 Ch. 490. See the Scottish case, *Arnott v. Groom* (1846) 9 D. 142 and Cheshire, p. 237.

³⁰ *Pottinger v. Wightman* (1817) 3 Mer. 67; *Johnstone v. Beattie* (1843) 10 Cl. & F. 42, 66, *per* Lyndhurst, C.; 138-140, *per* Lord Campbell; *Re Beaumont* [1893] 3 Ch. 490. But these authorities refer wholly to the authority of a mother to change the domicile of a child whose father is dead, and do not really determine what is the authority in that respect of a guardian.

³¹ This is the rule in America and is eminently reasonable; see Goodrich, p. 61; Restatement, s. 35.

and settles there. D is left at school in England.³² D thereupon acquires a New York domicile.

D is the infant son of Scottish parents domiciled in Scotland, who marry after D's birth. D is thereby legitimated. His father then, while D is still an infant, acquires an English domicile. D's domicile thereupon becomes English.³³

(2) *Case of infant who is illegitimate, or whose father is dead.*³⁴—The domicile of an illegitimate child, or of a child whose father is dead, is, during his infancy, if he lives with his mother,³⁵ the same as, and (subject to the possible effect of Exception 1)³⁶ changes with, the domicile of his mother.

D is the illegitimate son of a domiciled Englishman and a Frenchwoman, domiciled at the time of D's birth in England. The mother, when D is five years old, goes with him to France, and resumes her original French domicile. D acquires a French domicile.

There was at one time a doubt whether, after the death of the father, the children, remaining under the care of the mother, followed her domicile, or, until the end of their infancy, retained that which their father had at the time of his death. The case, however, of *Pottinger v. Wightman*³⁷ must now be taken conclusively to have settled the general doctrine, that (subject to the Exceptions hereinafter mentioned) if, after the death of the father, an unmarried infant lives with his mother, and the mother acquires a new domicile, it is communicated to the infant.³⁸

Prior at any rate to the Guardianship of Infants Act, 1925, the principle on which the domicile of an infant may be changed through the acquisition of a new domicile by his mother, when a widow, appears to have been this. The domicile of the infant did not in strictness, follow, as a matter of law, the domicile of his mother, but might be changed by her, for 'the change in the domicile of an infant which, as is shown by the decision in *Pottinger v. Wightman*,³⁹ may follow from a change of domicile in the part of the mother, is not to be regarded as the necessary consequence of a change of the mother's domicile, but as the result of the exercise by her of a power vested in her for the welfare of the infants, which, in their interest,

³² See especially, *Urquhart v. Butterfield* (1887) 37 Ch.D. (C.A.) 357, 381.

³³ *Udny v. Udny* (1869) L.R. 1 Sc.App. 441.

³⁴ *Crumpton's Judicial Factor v. Finch-Noyes* [1918] S.C. 378. A minor, aged eleven—a pupil in Scottish law, which apparently permits a minor proper to change his own domicile—brought from his domicile of origin after his father's death, who lives with his mother in Scotland for six years, acquires a Scottish domicile.

³⁵ If he does not live with his mother, his domicile need not necessarily change together with hers. See *Scrimshire v. Scrimshire* (1752) 2 Hagg.Cons. 395, 406, 407; *Re Beaumont* [1898] 3 Ch. 490. But see pp. 104, 105, *post*.

³⁶ See p. 106, *post*.

³⁷ (1817) 3 Mer. 67.

³⁸ *Johnstone v. Beattie* (1843) 10 Cl. & F. 42, 138, judgment of Lord Campbell. See *Re Beaumont* [1898] 3 Ch. 490.

³⁹ (1817) 3 Mer. 67.

she may abstain from exercising, even when she changes her own domicile'.⁴⁰

The position of a widow, then, with regard to her child, who is an infant, might and perhaps still may be thus described. She may change her own domicile and settle with him in another country. She in this case, in fact, changes the infant's domicile, but she does not, as a matter of law, change his domicile simply by changing her own. Thus, a widow is left, on the death of her husband, with three children, who are infants. She and they are domiciled in Scotland. She afterwards settles in England with her two eldest children and acquires an English domicile. The two eldest children, thereupon, become domiciled in England. The youngest child, D (though occasionally visiting his mother), remains and resides permanently in Scotland until he attains his majority. D retains his Scottish domicile.⁴¹

The question, however, arises whether this state of affairs can be held applicable under the principle of equality in law between the sexes recognised in the Sex Disqualification (Removal) Act, 1919, and various other enactments and expressly enacted in the Guardianship of Infants Act, 1925, with respect to the guardianship of infants and the rights and responsibilities conferred thereby. As the two parents are now placed on an equality in these matters, there appears no good reason for denying to the mother, being guardian, any power, when a widow, to change the domicile of a child by her own change of domicile. It is, however, still open to argument that a change of domicile by re-marriage should not be regarded as changing the domicile of the child if it does not live with its mother in the actual place in which she is domiciled.

Questions as to effect of widow's change of domicile when not guardian.—Difficult questions may be raised as to the effect of a widow's change of domicile on that of her children, when she is not their guardian.⁴² Such questions may refer to the two different cases of infants who reside and of infants who do not reside with their mother.

(1) Suppose that an infant resides with his mother, who is not his guardian. The question may be raised whether the domicile of the infant is determined by that of the mother, or by that of the guardian. No English case absolutely decides the precise point, but it may be laid down with confidence that, even if a guardian can in any case change the domicile of his ward, yet the domicile of a child

⁴⁰ *Re Beaumont* [1893] 3 Ch. 490, 496, 497.

⁴¹ See *Re Beaumont* [1893] 3 Ch. 490. This case is not quite decisive, as the widow changed her domicile in consequence of re-marriage.

⁴² A widow is now normally a guardian, with or without a guardian designated by her husband or appointed by the court. But she may be deprived of this position by the court; see s. 5 (4) of the Guardianship of Infants Act, 1925. In such a case she might be deprived of the custody of the child, but not necessarily.

living with his mother, whilst still a widow, will be that of the mother and not of the guardian.

(2) Suppose that an infant resides away from his mother, who is not his guardian. The question whether it is on his mother or his guardian that the change of the child's domicile depends presents some difficulty. Still, in general, the rule appears to hold good that the domicile of an infant, whose father is dead, usually in fact changes not with the guardian's domicile but with the domicile of the child's mother.⁴³

(3) *Case of infant without living parents.*—It is just possible that the domicile of an orphan follows that of his guardian, but whether this be so or not is an open question.⁴⁴

The power of a guardian to change at all the domicile of his ward is extremely doubtful. In the leading English case on the subject,⁴⁵ the guardian was also the mother of the children, and the decision appears clearly to be based on her status as mother and to have been understood in this sense. Should the question ever arise, it will probably be held in accordance with the prevailing Continental opinion that a guardian cannot⁴⁶ change the domicile of his ward, and certainly that he cannot do this unless the ward's residence is, as a matter of fact, that of the guardian.⁴⁷

D is the orphan son of a domiciled Englishman. M is D's guardian. M takes D to reside in Scotland, where M himself settles and acquires a domicile. D probably retains his English domicile.

Sub-Rule 1 may, perhaps, be extended to the domicile of an adult, who, though he has attained his majority, has never attained sufficient intellectual capacity to choose a home for himself. From the language used by the court in one case, it would appear that such a person may be considered to occupy a condition of permanent infancy.

D, in the case referred to, was the son of an Englishman domiciled in Portugal. There never was a period when D, though he attained his majority, could think and act for himself in the matter of domicile otherwise than as an infant could. After D became of age, his father acquired an English domicile. Under these circumstances, the effect of the father's change of domicile had to be considered, and on the analogy of infancy it was held that D was domiciled in England.⁴⁸

⁴³ See *Pottinger v. Wightman* (1817) 3 Mer. 67; compare *Re Beaumont* [1893] 3 Ch. 490.

⁴⁴ See, however, *Westlake*, s. 250.

⁴⁵ *Pottinger v. Wightman* (1817) 3 Mer. 67; approved in *Johnstone v. Beattie* (1843) 10 Cl. & F. 42, 188, *per* Lord Campbell.

⁴⁶ 'It seems doubtful whether a guardian can change an infant's domicile. The difficulty is that a person may be guardian in one place and not in another'. *Douglas v. Douglas* (1871) L.R. 12 Eq. 617, 625. See, as to the position of a guardian, *Rule 119, post*.

⁴⁷ In the United States the power of a grandparent guardian to change the domicile of a ward has been recognised in several cases. See *Goodrich*, p. 68. See also *Restatement*, s. 39.

⁴⁸ *Sharpe v. Crispin* (1869) L.R. 1 P. & D. 611, 618. The case is not decisive, as the court held that if D was capable of choosing a domicile, he had, as a matter of fact, chosen that of his father.

The extension of the general rule applies only to persons of continuously unsound mind. If a son on attaining his majority enjoys a period of mental capacity, he can acquire a domicile for himself. Whether, if he became incapable, his acquired domicile could be changed, is a matter of doubt. The question in his case is the same as the inquiry which is hereinafter considered,⁴⁹ how far the domicile of a lunatic can be changed during lunacy.

Exception 1 to Sub-Rule 1.—The domicile of an infant is not automatically changed merely by a change of his mother's domicile by reason of re-marriage.⁵⁰

Comment

It has been held that the re-marriage of a widow, whereby she acquires a new domicile, does not of itself affect the domicile of her infant children. But if a woman, after her re-marriage, in fact changes her residence to the domicile of her husband and takes the infant children of her former marriage with her, they too acquire her new domicile.⁵¹

It is open to serious doubt whether in view of the legislative recognition of the equality of the sexes in the Guardianship of Infants Act, 1925, the differential treatment of the mother can be regarded as justified in law. If at all it must be on the score that marriage alters her domicile, not by her own act merely, but by a rule of law, the result of which is a compulsory change of domicile.

Exception 2 to Sub-Rule 1.—The change of an infant's home by a mother, if made with a fraudulent purpose, possibly does not change the infant's domicile.

Comment

A mother, perhaps, cannot change the domicile of an infant when the change of home is made for a fraudulent purpose, *e.g.*, to affect the distribution of an infant's estate, in case of his death.⁵² The existence, however, of this exception is open to very serious doubt. It should apply equally to a husband, and no English case establishes it. The view would, of course, a fortiori, apply to a guardian, but, as we have seen, the right of a guardian to change an infant's domicile is extremely dubious. The doctrine rests on the dogma of the subordination of the wife to the husband and her secondary

⁴⁹ See comment on Rule 17, p. 117, *post*.

⁵⁰ *Re Beaumont* [1898] 3 Ch. 490.

⁵¹ *Re Beaumont* [1898] 3 Ch. 490.

⁵² See *Pottinger v. Wightman* (1817) 3 Mer. 67, which is not an authority for the Exception, for fraud was patently lacking. See Pollak, 51 South African Law Journal, pp. 25-26 (1934).

control of their children, and ought to disappear in the changed circumstances of today. It must be noted also that English law does not forbid a man to change his domicile so as to affect adversely his wife's interest's *e.g.*, as to divorce.⁵³

SUB-RULE 2.—The domicile of a married woman is during coverture the same as, and changes with, the domicile of her husband.⁵⁴

Comment

A woman, of whatever age, acquires at marriage the domicile of her husband, and her domicile continues to be the same as his, and changes with his, throughout their married life.

The fact that a wife actually lives apart from her husband,⁵⁵ that they have separated by agreement,⁵⁶ that there has been a judicial separation,⁵⁷ that the husband has been guilty of misconduct, such as would furnish defence to a suit by him for restitution of conjugal rights,⁵⁸ does not enable the wife to acquire a separate domicile.

This does not accord with the prevailing view in America where it is accepted that a wife who has cause for divorce may acquire a domicile separate from her husband. There is much modern American authority for the proposition that a wife may establish a separate domicile whenever she lives apart from her husband without being guilty of desertion under the law of the State which was the common domicile at the time of the separation. It is not required in such a case that she should have cause for divorce.⁵⁹ The English doctrine runs contrary to the general legal trend towards sex equality, and has been convincingly criticised.⁶⁰

Questions of some difficulty arise in the case of void and voidable marriages. In the first place, it is clear that if a woman who is lawfully married goes through a ceremony of marriage with another man during the subsistence of the former marriage, she retains the

⁵³ *H. v. H.* (No 2) [1928] P. 206. But it may make a court less willing to admit a change; see *Ross v. Ross* [1930] A.C. 1.

⁵⁴ *Dolphin v. Robins* (1859) 7 H.L.C. 390; *Warrender v. Warrender* (1835) 2 Cl. & F. 488; *Re Daly's Settlement* (1858) 25 Beav. 456; *Lord Advocate v. Jaffrey* [1921] 1 A.C. 146; *Att.-Gen. for Alberta v. Cook* [1926] A.C. 444; *Re White* [1941] Ch. 192. For Australia, see *Renton v. Renton* [1917] S.A.S.R. 277.

⁵⁵ *Warrender v. Warrender* (1835) 2 Cl. & F. 488. So in Canada: *Edwards v. Edwards* (1873) 20 Gr. 392; *Allen v. Allen* (1893) 15 P.R. 458.

⁵⁶ *Dolphin v. Robins* (1859) 7 H.L.C. 390, followed *Re Mackenzie* [1911] 1 Ch. 578.

⁵⁷ *Att.-Gen. for Alberta v. Cook* [1926] A.C. 444. See also *Lord Advocate v. Jaffrey* [1921] 1 A.C. 146, per Lords Haldane at pp. 151-153 and Shaw at pp. 168-171. The point was there left open by Lords Finlay and Dunedin at pp. 155-156, and p. 163.

⁵⁸ *Yelverton v. Yelverton* (1859) 1 Sw. & Tr. 574; *Dolphin v. Robins* (1859) 7 H.L.C. 390.

⁵⁹ Goodrich, s. 33. Restatement, s. 28.

⁶⁰ The decision in *Att.-Gen. for Alberta v. Cook* [1926] A.C. 444 is strongly criticised by Read, *Recognition and Enforcement of Foreign Judgments*, pp. 202 *et seq.*

domicile of her husband, and the subsequent ceremony does not affect her domicile.⁶¹ Secondly, there are cases which suggest that if a single woman goes through a ceremony of marriage which is void ab initio, she does not, merely by going through the ceremony, acquire the domicile of the man, even if she lives with him in the country of his domicile.⁶² It is otherwise, however, if she lives with him in the country of his domicile for a long period, for then she may acquire his domicile as a matter of fact, which is a very different thing from acquiring it as a matter of law by reason of the ceremony. It was this situation which was present to the mind of Lord Hannen in *Turner v. Thompson*⁶³ when he said: 'A woman when she marries a man, not only by construction of law but absolutely as a matter of fact, does acquire the domicile of her husband if she lives with him in the country of his domicile'.⁶⁴

If, however, the marriage is merely voidable, the woman automatically acquires the domicile of the man and retains it as a matter of law until a decree of nullity has been pronounced by a court having jurisdiction,⁶⁵ since until that time there is a valid and subsisting marriage capable of producing legal consequences.

Illustrations

1. D married M, a domiciled Scotsman. M subsequently left Scotland for Australia and acquired a domicile in Queensland, which he retained until his death. It was held that D, who predeceased M, died domiciled in Queensland, although she never left Scotland.⁶⁶

2. D married M, domiciled in Ontario. She subsequently obtained a decree of judicial separation from M in Alberta. It was held that notwithstanding this decree she retained M's domicile in Ontario.⁶⁷

3. D, a domiciled Englishwoman, married M, a domiciled Frenchman. The parties subsequently separated and after some years D went through a form of marriage with B, a domiciled Englishman, believing M to be dead. It was held that D retained M's domicile until his death, which did not occur until many years later.⁷⁰

4. D, an Englishwoman domiciled in England, went through a form of marriage with M, domiciled in India, without the intention of so doing, as she was mistaken as to the character of the ceremony. It was held that the marriage was void and that D never lost her English domicile.⁷¹

⁶¹ *Re Cooke's Trusts* (1887) 56 L.T. 737. For this reason, Cheshire's statement (p. 237; compare p. 451) that 'a woman who goes through the ceremony of marriage with a man and who lives with him in his own country acquires his domicile' certainly calls for modification.

⁶² *White v. White* [1937] P. 111; *MacDougall v. Chitnavis* [1937] S.C. 390; *Mangrulkar v. Mangrulkar* [1939] S.C. 239; *Mehta v. Mehta* [1945] 2 All E.R. 690; *Gagen v. Gagen* [1929] N.Z.L.R. 177; *Manella v. Manella* [1942] 4 D.L.R. 712; *De Reneville v. De Reneville* [1948] P. 100 (C.A.).

⁶³ (1888) 13 P.D. 37, 41.

⁶⁴ Compare *Salvesen v. Administrator of Austrian Property* [1927] A.C. 641, and contrast *Ogden v. Ogden* [1908] F. 46, where the woman never lived with the man in the country of his domicile (France).

⁶⁵ *De Reneville v. De Reneville* [1948] P. 100 (C.A.). For jurisdiction in suits for nullity, see p. 244, *post*.

⁶⁸ *Lord Advocate v. Jaffrey* [1921] 1 A.C. 146.

⁶⁹ *Att.-Gen. for Alberta v. Cook* [1926] A.C. 444.

⁷⁰ *Re Cooke's Trusts* (1887) 56 L.T. 737.

⁷¹ *Mehta v. Mehta* [1945] 2 All E.R. 690.

5. D, an Englishwoman, marries M, domiciled in a Canadian province. The parties never live together in Canada, and the marriage is subsequently annulled on the ground of D's wilful refusal to consummate it. D acquires M's domicile upon the celebration of the marriage.⁷²

RULE 10.—A domicile cannot be acquired by a dependent person through his own act.⁷³

Comment

A person who is not *sui juris* in the view of English law may, as a matter of fact, acquire an independent home. Thus D, an infant of eighteen, emigrates to Australia, buys a farm, and settles there. He in fact makes a home for himself in Australia. So, again, if D, a married woman, has entirely ceased to live with her husband (who resides in England), and goes and settles in Germany, with the intention of passing the rest of her life there, it is clear that she has in fact acquired an independent German home. What the rule in effect lays down is that there is a distinct difference, in the point under consideration, between a home and a domicile, and that though an infant or a wife may sometimes in fact, as in the cases supposed, acquire a home, neither of them can acquire an independent domicile.

(1) *Infant*.—It is certain that, as a general rule, no one domiciled in England can during his infancy acquire a domicile for himself.⁷⁴

It is generally agreed⁷⁵ that under no circumstances can a male infant acquire a domicile for himself, whether by marriage, by entering the army, civil service or business on his own account, or by setting up an independent household. The domicile of a female infant will be that of her husband on marriage, but apart from this case, she is, as regards change of domicile, in the same position as a male infant.

If a person is domiciled in some country by the law of which infancy ends at an age less than twenty-one, can he acquire a domicile in England or in some other country by his own act if he is above the age of majority by the law of his domicile of origin, but

⁷² See *De Reneville v. De Reneville* [1948] P. 100 (C.A.).

⁷³ *Somerville v. Somerville* (1801) 5 Ves. 750, 787, judgment of Arden, M.R. The case of a female infant who changes her domicile on marriage, as where an Englishwoman of eighteen marries a domiciled Frenchman, may perhaps be held to afford a verbal exception to this Rule. This is not a real exception. The change is not effected by the infant's act, but by a consequence attached by law to the status arising from her marriage.

⁷⁴ *Somerville v. Somerville* (1801) 5 Ves. 750, 787. Conf. *Forbes v. Forbes* (1854) Kay 341; *Jopp v. Wood* (1865) 4 De G.J. & S. 616, 626; *Urquhart v. Butterfield* (1887) 37 Ch.D. (C.A.) 357, 383, 384, judgment of Lindley, L.J.; 384, 385, judgment of Lopes, L.J.

⁷⁵ *Stephens v. McFarland* (1845) 8 Ir.Eq.Rep. 444; *Robertson v. Robertson* (1905) 30 Vict.L.R. 546; Cheshire, p. 236, though he notes that there is no English decision in which the question of the capacity of a male infant to change his domicile in any circumstances has arisen. See also Wolff, p. 116, Schmitthoff, p. 86. See, however, Westlake, s. 249. There is in American law, authority for the proposition that an infant on marriage or emancipation by his parents can acquire a separate domicile: Goodrich, pp. 63-4.

under the age of twenty-one? There is no authority on these topics, but the sound view seems to be that English law decides domicile on its own lines and allows acquisition in England only at age twenty-one.

(2) *Married Women*.—Though a wife may acquire a home for herself, she cannot have any other domicile than that of her husband.⁷⁶

SUB-RULE.—Where there is no person capable of changing an infant's domicile, he retains, until the termination of his infancy, the last domicile which he has received.⁷⁸

Illustration

D is an infant who at the death of his father has an English domicile. His mother is dead, and he has no guardian. D cannot change his own domicile, there is no person capable of changing it, and, even if he had a guardian, probably the latter could not effect any change. D therefore retains his English domicile.

RULE 11.—The last domicile which a person receives while he is a dependent person continues, on his becoming an independent person, unchanged until it is changed by his own act.

Comment

This is an obvious result of Rule 4.⁷⁹ It applies to the case, first, of a person who attains his majority, and secondly, of a wife whose coverture is determined either by death or by divorce.

SUB-RULE 1.—A person on attaining his majority retains the last domicile which he had during his infancy until he changes it.⁸⁰

Illustration

D is the son of M, a domiciled Englishman. While D is an infant M emigrates to New York. D thereupon acquires a New York domicile. When D attains his majority, M is still domiciled in New York. D retains his New York domicile until by his own act he either resumes his English domicile or acquires a new, *e.g.*, a French domicile.

⁷⁶ *Warrender v. Warrender* (1885) 2 Cl. & F. 488; *Dolphin v. Robins* (1859) 7 H.L.C. 390; *Yelverton v. Yelverton* (1859) 1 Sw. & Tr. 574; *Att.-Gen. for Alberta v. Cook* [1926] A.C. 444.

⁷⁸ See Rules 4-10, pp. 86-109, *ante*.

⁷⁹ See p. 86, *ante*.

⁸⁰ A possible question may be raised as to domicile of an infant widow. Probably it remains that of her husband, and cannot be changed (except in consequence of re-marriage) till she comes of age.

SUB-RULE 2.—A widow retains her late husband's last domicile until she changes it.

Illustrations

1. D, a woman whose domicile of origin is English, is married to a German domiciled in Germany. Her husband dies. D continues living in Germany. D retains her German domicile.

2. D, after the death of her German husband, leaves Germany to travel, without any intention of returning to Germany. D resumes her English domicile of origin.

3. D, after the death of her German husband, settles in France with the intention of residing there permanently. D acquires a French domicile.

4. D, after the death of her German husband, marries at Berlin an American domiciled in New York. D acquires a domicile in New York.

SUB-RULE 3.—A woman who is divorced or whose marriage is declared a nullity retains the domicile which she had immediately before, or at the moment of, divorce or declaration of nullity, until she changes it.

Comment

The position of a divorced woman or a woman whose marriage has been annulled is presumably for the present purpose the same as that of a widow.

(3) ASCERTAINMENT OF DOMICILE

Domicile—How Ascertained.

RULE 12.—The domicile of a person can always be ascertained by means of either

- (1) a legal presumption ; or
- (2) the known facts of the case.

Comment

Even on the assumption that every one has at all times a domicile it is often hard to determine where a given person, D, had his home or domicile at a particular moment. The difficulty may arise from ignorance of the events of D's life, or from the circumstance that the facts which are known to us leave it an open question whether D was at a given moment domiciled in England or in Scotland. Under such circumstances, an inquirer who had no other object than the investigation of truth, and who was neither aided nor trammelled by legal rules, would be forced to acquiesce in the merely negative conclusion that D's domicile at that date could not be ascertained. To this negative result the courts, from obvious motives of convenience, refuse to come, and will always, by means whose

artificiality is often ignored by writers on domicile, determine in what country D was at a given moment domiciled.

This result is obtained partly by the use of certain legal presumptions,⁸² partly, where the claims of each of two places to be D's domicile are on the known facts of the case all but equally balanced, by allowing the very slightest circumstance⁸³ to turn the scale decisively in favour of the one rather than of the other.⁸⁴

Legal Presumption.

RULE 13.—When a person is known to have had a domicile in a given country he is presumed, in absence of proof of a change, to retain such domicile.⁸⁵

Illustration

D is proved to have been domiciled in Scotland in 1870. If in 1879 it be alleged that D's domicile is not Scottish, the person who makes this allegation must prove it. D's domicile in Scotland, that is to say, is presumed to continue until a change is proved.⁸⁶

Facts which are Evidence of Domicile.

RULE 14.—Any circumstance may be evidence of domicile which is evidence either of a person's residence (*factum*), or of his intention to reside permanently (*animus*), within a particular country.

Comment

As domicile consists of, or is constituted by, residence and the due *animus manendi*, any fact from which it may be inferred either that D 'resides', or has the 'intention of indefinite residence',

⁸² See Rule 13, *post*.

⁸³ See Rules 14–17, pp. 112–126, *post*.

⁸⁴ Compare *Re Patience* (1885) 29 Ch.D. 976; *Bradford v. Young* (1885) 29 Ch.D. (C.A.) 617; *Craigsmish v. Hewitt* [1892] 3 Ch. (C.A.) 180.

⁸⁵ See *Munro v. Munro* (1840) 7 Cl. & F. 842, 891; *Aikman v. Aikman* (1861) 3 Macq. 854, 877; *Douglas v. Douglas* (1871) L.R. 12 Eq. 617, 642, 643; *Re Martin* [1900] P. (C.A.) 211; *Concha v. Concha* (1886) 11 App.Cas. 541, 563; *Mazzeu v. McClure* (1860) 2 L.T. (H.L.) 65; *Cochrane v. Cochrane* (1847) 9 L.T.(o.s.) 167; *Att.-Gen. v. Rowe* (1862) 1 H. & C. 31. So in Quebec: *Converse v. Converse* (1882) 5 L.N. 69; *Mallock v. Graham*, 27 K.B. 446; *Sylvestre v. Grisé*, 20 R.L. 89.

For the special difficulty of proving the loss of a domicile of origin, see *Winans v. Att.-Gen.* [1904] A.C. 287; *Re De Almeida* [1901] W.N. 142; *Huntly v. Gaskell* [1906] A.C. 56; *Ramsay v. Liverpool Royal Infirmary* [1930] A.C. 588; *Ross v. Ross* [1930] A.C. 1.

⁸⁶ This principle of evidence must be carefully distinguished from the legal rules that every one retains his domicile of origin until another domicile is acquired, and resumes it whenever a domicile of choice is simply abandoned. See Rule 8, p. 97, *ante*. These are simply conventional rules of law, resorted to in order to maintain the general principle that no person can be without a domicile. See Rule 2, p. 84, *ante*. Compare *Re Patience* (1885) 29 Ch.D. 976; and *Bradford v. Young* (1885) 29 Ch.D. (C.A.) 617.

within a particular country is, as far as it goes, evidence that D is domiciled there.

'There is', it has been said, 'no act, no circumstance in a man's life, however trivial it may be in itself, which ought to be left out of consideration in trying the question whether there was an intention to change the domicile. A trivial act might possibly be of more weight with regard to determining this question than an act which was of more importance to a man in his lifetime',⁸⁷ and the cases with regard to disputed domicile bear out this dictum.

There is no transaction in the course of a person's life which the courts have not admitted (for whatever it is worth) in evidence of his domicile.⁸⁸ Hence presence in a place,⁸⁹ time of residence,⁹⁰ the mere absence of proof that a domicile once acquired has been changed,⁹¹ the purchase of land,⁹² the mode of dealing with a household establishment,⁹³ the taking of lodgings,⁹⁴ the buying of a burial place,⁹⁵ the deposit of plate and valuables,⁹⁶ the exercise of political

⁸⁷ *Drevon v. Drevon* (1864) 34 L.J.Ch. 129, 133. For the different inferences as to domicile deducible from the same facts, compare the judgment of the Court of Appeal in *Bradford v. Young* (1885) 29 Ch.D. (C.A.) 617, with the judgment of Pearson, J., in the court below (1884) 26 Ch.D. 656; *Munro v. Munro* (1840) 7 Cl. & F. 842; *Wilson v. Wilson* (1872) L.R. 2 P.D. 435; 10 M. 573. In *Re Martin* [1900] P. (C.A.) 211, Sir F. Jeune, P., and Lindley, M.R., held that there was no change of Martin's domicile, Rigby and Vaughan-Williams, L.J.J., that there was; cf. *Robinson v. Robinson's Trustees* [1934] Sc L.T. 183.

⁸⁸ See, especially, *Drevon v. Drevon* (1864) 34 L.J.Ch. 129; *Hoskins v. Matthews* (1856) 8 De G.M. & G. 13; *Atchison v. Dixon* (1870) L.R. 10 Eq. 589; *Douglas v. Douglas* (1871) L.R. 12 Eq. 617; *Hodgson v. De Beauchesne* (1858) 12 Moore P.C. 285; *Re Patience* (1885) 29 Ch.D. 976; *Bradford v. Young* (1885) 29 Ch.D. (C.A.) 617; *Stevenson v. Masson* (1873) L.R. 17 Eq. 78; *Winans v. Att.-Gen.* [1904] A.C. 287; *Ross v. Ross* [1930] A.C. 1.

⁸⁹ *Bruce v. Bruce* (1790) 2 B. & P. 229; *Bempde v. Johnstone* (1796) 3 Ves. 198; *M'Lelland v. M'Lelland* [1942] S.C. 502, 510. But note the point made in that case by Lord Moncreiff at p. 510, that it cannot be argued that 'the single fact of residence, no matter what its conditions, character, quality or colour may be, is per se sufficient to shift the onus of proof by affording in all cases without distinction even a prima facie presumption of a change of domicile'.

⁹⁰ *The Harmony* (1800) 2 C.Rob. 322; *Gillis v. Gillis* (1874) Ir.R. 8 Eq. 597; *Stanley v. Bernes* (1831) 3 Hagg Ecc. 373; *Haldane v. Eckford* (1869) L.R. 8 Eq. 631.

⁹¹ *Munro v. Munro* (1840) 7 Cl. & F. 842, 891; *Cochrane v. Cochrane* (1847) 9 L.T.(o.s.) 167; *Ramsay v. Liverpool Royal Infirmary* [1930] A.C. 588.

⁹² *Re Capdevielle* (1864) 2 H. & C. 985; *Fleming v. Horniman* (1928) 44 T.L.R. 315, 317; *Sells v. Rhodes* (1905) 26 N.Z.L.R. 87; *Bradfield v. Swanton* [1931] Ir.R. 446; *Boldrini v. Boldrini* [1932] P. 9; compare *Wahl v. Att.-Gen.* (1932) 147 L.T. 382.

⁹³ *Somerville v. Somerville* (1801) 5 Ves. 750; *Ross v. Ross* [1930] A.C. 1.

⁹⁴ *Craigie v. Lewin* (1843) 3 Curt. 485; lease of apartments, *Re Garden* (1895) 11 T.L.R. 167.

⁹⁵ *Re Capdevielle* (1864) 2 H. & C. 985; *Platt v. Att.-Gen. of New South Wales* (1878) 3 App.Cas. 336; *Douglas v. Douglas* (1871) L.R. 12 Eq. 617; *Fleming v. Horniman* (1928) 44 T.L.R. 315, 317; *Ramsay v. Liverpool Royal Infirmary* [1930] A.C. 588; *Re Garden* (1895) 11 T.L.R. 167; *Bradfield v. Swanton* [1931] Ir.R. 446; *Munster and Leinster Bank v. O'Connor* [1937] Ir.R. 462; removal of children's remains, *Haldane v. Eckford* (1869) L.R. 8 Eq. 642.

⁹⁶ *Curling v. Thornton* (1823) 2 Add. 6, 18; *Hodgson v. De Beauchesne* (1858) 12 Moore P.C. 285; *Att.-Gen. v. Dunn* (1840) 6 M. & W. 511.

rights,⁹⁷ the form of will,⁹⁸ the mode in which he describes himself in documents,⁹⁹ the way of spelling a Christian name,¹ oral or written expressions² of intention to make a home in a particular place, or from which such an intention, or the absence of it, may be inferred, have all been deemed matters worth consideration in determining the question of a person's domicile.

While, however, it is true that there is no circumstance in a man's life which may not be used as evidence of domicile, it is also true that there are two classes of facts, *viz.*, first, 'expressions of intention', and secondly, 'residence', which are entitled to special weight, as evidence of the matter which, in questions of domicile, it is generally most difficult to establish, *viz.*, the existence of the necessary *animus manendi*, and that certain rules, though of a very general character, may be laid down as to the effect of such facts in proving the existence of such intention.³

RULE 15.—Expressions of intention to reside permanently in a country are evidence of such an intention, and in so far evidence of domicile.⁴

⁹⁷ *De Bonneval v. De Bonneval* (1838) 1 Curt. 856, 869; *Brunel v. Brunel* (1871) L.R. 12 Eq. 298; *Drevon v. Drevon* (1864) 34 L.J.Ch. 129, 137; *Maxwell v. McClure* (1860) 3 Macq. 852, 859, *per* Lord Campbell. However, naturalisation does not necessarily involve change of domicile: *Wahl v. Att.-Gen.* (1932) 147 L.T. 382. For place of education of children, *Drevon v. Drevon*, at p. 139; place of investment of property and selection of trustees of will and guardians of children, *ibid.*, p. 136; trustees of will on English trusts, *Att.-Gen. v. Wahlstatt* (1864) 3 H. & C. 387; apprenticing a son, and buying him a partnership, *Stevenson v. Masson* (1873) L.R. 17 Eq. 78; submission to jurisdiction based on domicile, *Ex p. Langworthy* (1887) 3 T.L.R. 544, 545; entering into life partnership; *Scott v. Att.-Gen.* (1886) 11 P.D. 128, 131; considerations of income tax, *Ross v. Ross* [1930] A.C. 1; marrying a native of the new country: *Drevon v. Drevon*, at p. 135.

⁹⁸ *United States v. Drummond* (1864) 33 L.J.Ch. 501; *Re Garden* (1895) 11 T.L.R. 167; *Sells v. Rhodes* (1905) 26 N.Z.L.R. 87. Compare *Ramsay v. Liverpool Royal Infirmary* [1930] A.C. 588; *Bradfield v. Swanton* [1931] Ir.R. 446.

⁹⁹ *Kennedy v. Kelly* (1862) 14 Ir.Jur. 326; *Brooks v. Brooks' Trustees* (1902) 4 F. 1014; *Re Bruce* (1836) 2 C. & J. 436.

¹ *Brunel v. Brunel* (1871) L.R. 12 Eq. 298; assumption of English name, *Sells v. Rhodes* (1905) 26 N.Z.L.R. 87.

² *Udny v. Udny* (1869) L.R. 1 Sc.App. 441; *Bell v. Kennedy* (1868) L.R. 1 Sc.App. 307; *Doucet v. Geoghegan* (1878) 9 Ch.D. (C.A.) 441; *Drexel v. Drexel* [1916] 1 Ch. (C.A.) 251; *Davis v. Adair* [1895] 1 Ir.R. (C.A.) 379; *Moffett v. Moffett* [1920] 1 Ir.R. (C.A.) 57; *Re Eschmann* (1898) 9 T.L.R. 426; *In Goods of West* (1860) 6 Jur. (n.s.) 831; *Goulder v. Goulder* [1892] P. 240; *Re Wills-Sandford* (1897) 41 S.J. 366; *Waddington v. Waddington* (1920) 36 T.L.R. 359; *Thiele v. Thiele* (1920) 150 L.T.Jo. 387; *Fleming v. Horniman* (1928) 44 T.L.R. 815; *Brown v. Brown* [1928] S.C. 542; *Ross v. Ross* [1930] A.C. 1; *Ramsay v. Liverpool Royal Infirmary* [1930] A.C. 588; *Re Annesley* [1926] Ch. 692; *Bryce v. Bryce* [1933] P. 83; *Wahl v. Att.-Gen.* (1932) 147 L.T. 382.

³ See Rules 15-17. *post*

⁴ See *Hamilton v. Dallas* (1875) 1 Ch.D. 257; *Crookenden v. Fuller* (1859) 1 Sw. & Tr. 441; *Udny v. Udny* (1869) L.R. 1 Sc.App. 441; *Bell v. Kennedy* (1868) L.R. 1 Sc. App. 307; *Wilson v. Wilson* (1872) L.R. 2 P. & D. 435, 445; *Maxwell v. McClure* (1860) 3 Macq. 852; *Spurway v. Spurway* [1894] 1 Ir.R. 385; *Waddington v. Waddington* (1920) 36 T.L.R. 359; *Re De Almeida, Sordis v. Keyser* (1902) 18 T.L.R. (C.A.) 414; *Re Steer* (1858) 3 H. & N. 594; *Sells*

Comment and Illustration

A person's intention with regard to residence may be inferred from his expressions on the subject. These expressions may be direct, as where D says or writes that it is his purpose to settle in Scotland. They may be indirect, as where D by his acts, *e.g.*, the purchase of a burial-ground at Edinburgh, intimates an intention of acquiring or keeping a Scottish home.

D, an English peer, who had lived for some time in France, expressed in a letter a deliberate intention of never returning to England. He also accepted the jurisdiction of a French court on the ground, expressed in a letter to his solicitor, of his being bona fide domiciled in France, and added, 'I have no domicile in England or any other country excepting the one [France] from which I now write'⁵ These expressions, combined with other circumstances, were, after D's death, held to prove that he was in fact domiciled in France.

Direct expressions, however, of intention may be worth little as evidence.⁶ The person who uses them may not know what constitutes a domicile.⁷ He may call a place his home, simply because he often lives there. He may wish to be or to appear, domiciled in one country, while in fact residing permanently and intending so to reside, *i.e.*, being domiciled, in another. 'Declarations as to intention are rightly regarded in determining the question of a change of domicile, but they must be examined by considering the person to whom, the purposes for which, and the circumstances in which they are made, and they must further be fortified and carried into effect by conduct and action consistent with the declared intention'.⁸ A declaration in a will, suggested by a solicitor's enquiry, of retention of English domicile despite residence in France, will not be allowed to outweigh clear evidence of deliberate choice of residence.⁹ A direct statement, in short, that D considers himself domiciled, or to have his home in France, though it may sometimes be important, may often carry little weight. This remark specially applies to the description which a person gives of himself in formal documents, as, *e.g.*, 'D residing in France'.¹⁰

v. *Rhodes* (1905) 26 N.Z.L.R. 87. The person whose domicile is in dispute may, of course, give evidence in court and be examined on it; see *Re Craignish* [1892] 3 Ch. 180; *Wilson v. Wilson* (1872) L.R. 2 P.D. 435; *Maxwell v. McClure* (1860) 3 Macq. 852. In *Bryce v. Bryce* [1938] P. 83, it was said that statements of intention by a living person are admissible in evidence though not against interest, but they are not considered to be of much weight.

⁵ *Hamilton v. Dallas* (1875) 1 Ch.D. 257, 259.

⁶ See *Doucet v. Geoghegan* (1878) 9 Ch.D. (C.A.) 441; compare *Re E. R. Smith* (1896) 12 T.L.R. 223, 224; *Re Craignish* [1892] 3 Ch. 180; *Moore v. Darell* (1832) 4 Hag. Ecc. 346; *Bryce v. Bryce* [1938] P. 83.

⁷ *Att.-Gen. v. Yule* (1931) 145 L.T. 9.

⁸ *Ross v. Ross* [1930] A.C. 1, 6, 7, per Lord Buckmaster, where 'expression' must be a misprint.

⁹ *Re Annesley* [1926] Ch. 692; *Re Liddell-Grainger's Will Trusts* (1936) 53 T.L.R. 12; *Robinson v. Robinson's Trustees* [1934] Sc.L.T. 183.

¹⁰ *Att.-Gen. v. Kent* (1862) 1 H. & C. 12; *Hamilton v. Dallas* (1875) 1 Ch.D. 257; *Udny v. Udny* (1869) L.R. 1 Sc.App. 441; *Spurway v. Spurway* [1894] 1 Ir.R. 385; *Corbridge v. Somerville* [1915] S.C. 858; *Wahl v. Att.-Gen.* (1932) 147 L.T. 392.

A person's purpose may be more certainly inferred from his acts than from his language. Thus the fact that D keeps up a large establishment in England,¹¹ that he occupies a particular kind of house,¹² that he deposits his plate and valuables,¹³ and a hundred other circumstances may be indicative of a purpose to live permanently in England, and, therefore, be evidence of his having an English domicile.

RULE 16.—Residence in a country is prima facie evidence of the intention to reside there permanently (*animus manendi*), and in so far evidence of domicile.¹⁴

Comment

'Residence', though not the same as domicile, is not only one of the elements which go to make up domicile, but is also in many cases the main evidence for the existence of the other element which constitutes domicile, *viz.*, the *animus manendi*. 'Residence alone has no effect *per se*, though it may be most important, as a ground from which to infer intention'.¹⁵ But the effect of residence as evidence depends both on the *time* and on the *mode* of residence.

Time.—Time or length of residence does not of itself constitute domicile.¹⁶ An ambassador, for example, might reside thirty years in the country of the court to which he is sent, without acquiring a domicile in a foreign country. Nor does the law of England, like some other systems, prescribe a definite length of residence, *e.g.*, ten years, after which a person shall be assumed to have acquired a domicile in a particular country. On the other hand, no length of time is necessary for the acquisition of a home or domicile. D emigrates to Ontario, with the intention of settling there, and actually begins his residence there; he forthwith acquires an Ontario domicile. But time, which is not an element of domicile, is very important evidence of domicile; a residence, that is to say, by D

¹¹ *Somerville v. Somerville* (1801) 5 Ves. 750; *Forbes v. Forbes* (1854) Kay 341.

¹² *Craigie v. Lewin* (1843) 3 Curt. 435; *Ross v. Ross* [1930] A.C. 1.

¹³ *Curling v. Thornton* (1823) 2 Add. 6, 18.

¹⁴ *Munro v. Munro* (1840) 7 Cl. & F. 842; *The Harmony* (1800) 2 C.Rob. 322; *M'Lelland v. M'Lelland* [1942] S.C. 502, 510. Compare *Re Patience* (1885) 29 Ch.D. 976; *Bradford v. Young* (1885) 29 Ch.D. (C.A.) 617; *Re Bullen-Smith* (1888) 4 T.L.R. 398; *MacKinnon's Trustees v. Inland Revenue* [1920] S.C. (H.L.) 171.

¹⁵ *Munro v. Munro* (1840) 7 Cl. & F. 842, 877, *per* Cottenham, C. See also *M'Lelland v. M'Lelland* [1942] S.C. 502, 510.

¹⁶ *Re Patience* (1885) 29 Ch.D. 976; *Bradford v. Young* (1885) 29 Ch.D. (C.A.) 617; *Huntly v. Gaskell* [1906] A.C. 56; *Winans v. Att.-Gen.* [1904] A.C. 287; *Wahl v. Att.-Gen.* (1932) 147 L.T. 382; *Att.-Gen. v. Yule* (1931) 145 L.T. 9; *Gillis v. Gillis* (1874) Ir.R. 8 Eq. 597; *Re de Hosson* [1937] Ir.R. 467; *Van Straaten v. Van Straaten* [1911] T.P.D. 686; *Ramsay v. Liverpool Royal Infirmary* [1930] A.C. 588; *Ling Pack v. Gleeson* (1913) 15 C.L.R. 725; *Fairbairn v. Neville* (1897) 25 R. 192; *Connolly v. Woolrich* (1867) 11 L.C.J. 197; 1 R.L. 258.

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¹³ *Curling v. Thornton* (1823) 2 Add. 6, 18.

¹⁴ *Munro v. Munro* (1840) 7 Cl. & F. 842; *The Harmony* (1800) 2 C. Rob. 322; *M'Lelland v. M'Lelland* [1942] S.C. 502, 510. Compare *Re Patience* (1885) 29 Ch.D. 976; *Bradford v. Young* (1885) 29 Ch.D. (C.A.) 617; *Re Bullen-Smith* (1888) 4 T.L.R. 398; *MacKinnon's Trustees v. Inland Revenue* [1920] S.C. (H.L.) 171.

¹⁵ *Munro v. Munro* (1840) 7 Cl. & F. 842, 877, *per* Cottenham, C. See also *M'Lelland v. M'Lelland* [1942] S.C. 502, 510.

¹⁶ *Re Patience* (1885) 29 Ch.D. 976; *Bradford v. Young* (1885) 29 Ch.D. (C.A.) 617; *Huntly v. Gaskell* [1906] A.C. 56; *Winans v. Att.-Gen.* [1904] A.C. 287; *Wahl v. Att.-Gen.* (1932) 147 L.T. 382; *Att.-Gen. v. Yule* (1931) 145 L.T. 9; *Gillis v. Gillis* (1874) Ir.R. 8 Eq. 597; *Re de Hosson* [1937] Ir.R. 467; *Van Straaten v. Van Straaten* [1911] T.P.D. 686; *Ramsay v. Liverpool Royal Infirmary* [1930] A.C. 588; *Ling Pack v. Gleeson* (1913) 15 C.L.R. 725; *Fairbairn v. Neville* (1897) 25 R. 192; *Connolly v. Woolrich* (1867) 11 L.C.J. 197; 1 R.L. 258.

for thirty years in England is strong evidence of his purpose to reside there, and therefore of his having an English domicile.

However, the effect of time must not be exaggerated. It is weighty as evidence, but it is not more than evidence of domicile.¹⁷

Mode.—The effect of residence in a country as evidence of a man's intention to continue residing there depends, to a great extent, on the manner of his residence.

If D not only lives in France, but buys land there, and makes that country the home of his wife and family, there is clearly far more reason for inferring a purpose of residence on his part, than if he has merely taken lodgings in Paris, and lives there alone. If a lady lives in France and buys a house there, making from 1866 to 1924 only occasional visits to England, it is the strongest evidence of domicile, despite an intimation in her will of her desire to retain an English domicile and her failure to apply for authorisation to acquire a domicile in France under Article 13 of the Civil Code.¹⁸ If a rich man lives in a commonplace flat in New York and has estates in Scotland, the fact suggests that he is not domiciled in the State of New York.¹⁹

The presence, indeed, of a man's wife and family is sometimes spoken of as decisive,²⁰ which it certainly is not; but this and various less important facts, such as the place where a man educates his children²¹ or exercises his political rights,²² indicate, though they do not prove, a fixed residence, and thus go to make up the evidence for domicile.

RULE 17.—Residence in a country is not even prima facie evidence of domicile, when the nature of the residence either is inconsistent with, or rebuts the presumption of, an intention to reside there permanently (*animus manendi*).²³

¹⁷ See *Cockrell v. Cockrell* (1856) 25 L.J.Ch. 730, 732; *Re Grove* (1888) 40 Ch.D. 216, 226; *Winans v. Att.-Gen.* [1904] A.C. 287; *Ramsay v. Liverpool Royal Infirmary* [1930] A.C. 588.

¹⁸ *Re Annesley* [1926] Ch. 692.

¹⁹ *Ross v. Ross* [1930] A.C. 1.

²⁰ *Douglas v. Douglas* (1871) L.R. 12 Eq. 617; *Forbes v. Forbes* (1854) Kay 341. Conf. *Platt v. Att.-Gen. of New South Wales* (1878) 3 App.Cas. 336; *D'Etchegoyen v. D'Etchegoyen* (1888) 13 P.D. 132; *Hurley v. Hurley* (1892) 67 L.T. 384; *Bell v. Bell* [1922] 2 Ir.R. 152. In *Att.-Gen. v. Yule* (1931) 145 L.T. 9, place where wife and child lived held material in decision that husband was domiciled in England. But in *Abraham v. Att.-Gen.* [1934] P. 17, despite residence of wife (Japanese) and children in Japan, husband held domiciled in England. See also *Wahl v. Att.-Gen.* (1932) 147 L.T. 382. It does not make any difference that the house is provided and maintained by the wife: *Aitchison v. Dixon* (1870) L.R. 10 Eq. 589.

²¹ *Haldane v. Eckford* (1869) L.R. 8 Eq. 631.

²² *Brunel v. Brunel* (1871) L.R. 12 Eq. 298.

²³ See *Jopp v. Wood* (1865) 4 De G.J. & S. 616; *Hodgson v. De Beauchesne* (1858) 12 Moo.P.C. 285, 329, 330; *Urquhart v. Butterfield* (1887) 37 Ch.D.

Comment and Illustrations

This Rule may be considered in relation to certain classes of persons who reside in a country in circumstances which may rebut or may be inconsistent with an intention to reside there permanently. The point may be illustrated by reference to the following classes of persons:—

1. Prisoners;
2. Persons liable to deportation;
3. Exiles or refugees;
4. Lunatics;
5. Invalids residing abroad on account of health;
6. Officials generally;
7. Ambassadors;
8. Consuls;
9. Persons in military, naval or air force service;
10. Residents in Oriental and non-Christian countries;
11. Servants;
12. Students.

(1) *A Prisoner.*—A prisoner normally retains, during imprisonment, the domicile which he possessed at its commencement. He cannot be presumed to form any purpose or intention as to his residence in the place where he is imprisoned. But there seems no legitimate ground to lay down that he cannot do so if he will.

D, a domiciled Irishman, was imprisoned in England. 'It could not', it was laid down, 'be supposed that he acquired a domicile in England by residence within the walls of the King's Bench Prison. *All such residence goes for nothing*'.²⁴

It is possible that in the case of a sentence of transportation for life (now abolished in England), a prisoner might be held to have lost his domicile in the country from which he is transported.²⁵

(2) *Persons Liable to Deportation.*—An alien, resident in England, who is liable to be deported may nevertheless acquire an English domicile of choice.²⁶ Similarly, an alien who has acquired a domicile of choice in England and whose deportation has been recommended, will not lose this domicile until the order has been

(C.A.) 357; *Abdallah v. Rickards* (1888) 4 T.L.R. 622; *Goulder v. Goulder* [1892] P. 240; *Re Duleep Singh* (1890) 7 Mor.Bk.Rep. 228; *Johnson v. Johnson* [1931] A.D. 391.

²⁴ *Burton v. Fisher* (1828) Milward's Reps. 188, 191, 192. Compare *Burton v. Dolben*, 2 Lee 312; *In Goods of Napoleon Bonaparte* (1853) 2 Rob.Ecc. 606, 610 (prisoner of war); *Dunston v. Paterson* (1858) 28 L.J.C.P. 97; *Moffat v. Moffat* (1866) 3 W.W. & A.B. 87; *Whitehouse v. Whitehouse* (1900) 21 N.S.W. L.R. 16. The Restatement, s. 21, goes so far as to deny the possibility of acquiring a domicile of choice in a place which one cannot leave.

²⁵ *Uday v. Uday* (1869) L.R. 1 Sc.App. 441, 458. In *Nesfer v. Nesfer* [1906] O.R.C. 7, it was held that a man sentenced to life imprisonment acquired by this fact a domicile in the country of imprisonment.

²⁶ *Boldrini v. Boldrini* [1932] P. 9; *May v. May* (1943) 169 L.T. 42; *Zanelli v. Zanelli* (1948) 64 T.L.R. 556.

carried out.²⁷ When the order has been carried out, however, the English domicile of choice will be destroyed.²⁸

(3) An Exile or Refugee.—An exile or refugee cannot dwell in his own country, but he is not compelled to live in England. His residence in England, however, certainly affords no presumption of an intention to adopt an English home. Mere residence, therefore, during the time of his exile, however long, does not give him an English domicile.

D, whose domicile of origin was English, acquired a domicile of choice in Belgium. In 1940 he returned to England because of the German invasion of Belgium. He resided in furnished flats in England until his death in 1943, and always intended to return to Belgium after the war. It was held that D retained his Belgian domicile of choice at his death.²⁹

However, an exile or refugee certainly can acquire a domicile of choice in a foreign country if he chooses to adopt it as his home.

D, a German Jewish refugee, landed in England in March, 1939, by permission of the Home Secretary. At that time he intended to proceed to the United States. D continued to reside in England and in 1941 stated that he would not return to Germany even if the Nazis were overthrown. During 1941 his intention of proceeding to the United States gradually faded. It was held that D had acquired an English domicile of choice by January, 1942.³⁰

If an exile or refugee remains in a foreign country after return to his own country is possible, a presumption of having acquired a domicile in the foreign country may arise.

Whether a person convicted of crime in the country of his domicile, who to escape punishment resides in another country, acquires a new domicile in such other country, may depend on the answer to the inquiry whether, under the law of the former country, lapse of time bars liability to punishment. It seems probable that only where the offence is trivial and the term of prescription relatively short, would it be reasonable to hold that the former domicile is retained.³¹

(4) A Lunatic.—There are two views as to the position of a lunatic when under restraint.

The first is, that he retains the domicile which he possessed at the time he became insane, or, more strictly, when he began to be legally treated as insane. This is the sound view, and is favoured by the English cases on the subject.³² If this view be correct,

²⁷ *Cruh v. Cruh* (1945) 62 T.L.R. 16.

²⁸ *Cruh v. Cruh* (1945) 62 T.L.R. 16. For South Africa, see *Ex p. Donnelly* [1915] W.L.D. 29; *Ex p. Gordon* [1937] W.L.D. 35; *Ex p. Macleod* [1946] C.P.D. 312.

²⁹ *Re Lloyd Evans* [1947] Ch. 695. See also *De Bonneval v. De Bonneval* (1898) 1 Curt. 856.

³⁰ *May v. May and Lehmann* (1943) 169 L.T. 42. See also *Cruh v. Cruh* (1945) 62 T.L.R. 16.

³¹ *Re Martin* [1900] P. (C.A.) 211. See Cheshire, pp. 224-5.

³² See *Bempde v. Johnstone* (1796) 3 Ves. Jun. 198; *Re Bariatinski* (1843) 13 L.J.Ch. 71; *Hepburn v. Skirving* (1861) 9 W.R. 764; *Urquhart v. Butterfield* (1887) 37 Ch.D. (C.A.) 357. Cf. *Rifkin v. Rifkin* [1936] W.L.D. 69.

the lunatic under restraint is in the same position as a prisoner. He cannot exercise choice, or will. He cannot, therefore, acquire a domicile. Hence he retains his existing domicile. D, for example, is an Englishman, who becomes lunatic, and is under restraint. He is taken to Scotland, and placed in a Scottish asylum. He remains there until his death. He retains, on this view, his English domicile. The time in the asylum counts for nothing.

The second view is, that a lunatic is a person not *sui juris*, who stands in somewhat the same relation to his committee as a child to his father, and that, therefore, his domicile can be fixed by his committee.³³ This view is open to objection. In the case of father and child, the infant's domicile follows that of the father, but a father cannot give his son a domicile apart from his own. In the case of a committee and a lunatic, it appears to be maintained, not that a lunatic's domicile follows that of the committee, but that it can be fixed by the committee, or, in effect, that a committee has greater power over the domicile of a lunatic than a father over that of his son. If the position of a committee be compared to that of a guardian, then it must be remarked that the power of a guardian to change a ward's domicile is itself extremely doubtful.³⁴

On the whole, the first view appears to be (at least under ordinary circumstances) the right one. The second arises from a confusion between the power to change a lunatic's residence and the right to change his domicile.

(5) *An Invalid*.—There is at first sight considerable difficulty in determining whether D, an Englishman, who resides abroad on account of his health, loses his English domicile or not. For there exists an apparent inconsistency between the different judicial dicta on the subject.

On the one hand, it has been laid down that such a residence, being 'involuntary', does not change D's domicile.

'There must', it has been said, 'be a residence freely chosen, and not prescribed or dictated by any external necessity, such as the duties of office, the demands of creditors, or the *relief from illness*'.³⁵

'A man might leave England with no intention of returning, nay, with a determination never to return, e.g., a man labouring under mortal disease, and told that to preserve his life, or even to alleviate his sufferings, he must go abroad. Was it to be said that if he went to Madeira he could not do so without losing his character of an English subject—without losing the right to the intervention of the English law in the transmission of his property

³³ See *Sharpe v. Crispin* (1869) L.R. 1 P. & D. 611, 617, 618, which, however, does not decide this point.

³⁴ See pp 105-106, *ante*.

³⁵ *Udny v. Udny* (1869) L.R. 1 Sc.App. 441, 458, *per* Lord Westbury.

after his death and in the construction of his testamentary instruments? Such a proposition was revolting to common sense.’³⁶

On the other hand, it has been maintained that, if D chooses to reside abroad with the intention of making the foreign country his residence permanently, or indefinitely, the fact that the motive of the change is health does not prevent D from changing his domicile.

‘That there may be cases in which even a permanent residence in a foreign country, occasioned by the state of the health, may not operate a change of domicile, may well be admitted. Such was the case put by Lord Campbell in *Johnstone v. Beattie*, but such cases must not be confounded with others in which the foreign residence may be determined by the preference of climate, or the hope or the opinion that the air or the habits of another country may be better suited to the health or the constitution. In the one case, the foreign abode is determined by necessity; in the other, it is decided by choice. . . . In settling [in Tuscany, D] was exercising a preference, and not acting upon a necessity; and I cannot venture to hold that in such a case the domicile cannot be changed. If domicile is to remain unchanged upon the ground of climate being more suitable to health, I hardly know how we could stop short of holding that it ought to remain unchanged also upon the ground of habits being more suitable to fortune. There is in both cases a degree of moral compulsion’.³⁷

The apparent inconsistency between these doctrines may be removed, or explained, if we dismiss all reference to motive, and, recurring to the principle that residence combined with the purpose of permanent or indefinite residence constitutes domicile, apply it to the three different cases or circumstances under which a domiciled Englishman may take up a foreign residence for the sake of his health.

Case 1.—D goes to France for relief from sickness, with the fixed intention of residing there for six months and no longer.

This case presents no difficulty. D does not acquire a French domicile any more than he does if he goes to France for six months on business or for pleasure, since he has not the *animus manendi*.

Case 2.—D, finding that his health suffers from the English climate, goes to France to reside there permanently or indefinitely. D in this case acquires a French domicile,³⁸ because he resides in France with the *animus manendi*.

Case 3.—D goes to France in a dying state, to alleviate his sufferings, without any expectation of returning to England.

³⁶ *Moorhouse v. Lord* (1868); 10 H.L.C. 272, 292, per Lord Kingsdown. See *Johnstone v. Beattie* (1843) 10 Cl. & F. 42, 139 per Lord Campbell.

³⁷ *Hoskins v. Matthews* (1856) 8 De G.M. & G. 13, 28, 29; per Turner, L.J.

³⁸ This is precisely what *Hoskins v. Matthews* (1856) 8 De G.M. & G. 13, decides, and decides correctly. Compare *Winans v. Att.-Gen.* [1904] A.C. 287, 288, 289.

This is the case which has suggested the doctrine that a change of residence for the sake of health does not involve a change of domicile. It would be absurd to say that D, who goes to Pau to spend there in peace the few remaining months of his life, acquires a French domicile. But the doctrine, as applied to this case, is in conformity with the general theory of the law of domicile. D does not acquire a domicile in France, because he does not go to France with the intention of permanent or indefinite residence, in the sense in which these words are applied to a person settling in another country, but goes there for the definite and determinate purpose of passing in France the few remaining months of his life. The third case, is in its essential features like the first, and not like the second, of the cases already examined. That the definite period for which he intends to reside is limited, not by a fixed day, but by the expected termination of his life, can make no difference in the character of the residence.

In no one of the three cases is there any necessity, in order to arrive at a right conclusion, for reference to the motive, as contrasted with the purpose or intention of residence.

We may now see that the contradictory dicta as to the effect of a residence for the sake of health do not of necessity imply any fundamental difference of opinion among the high authorities by whom these dicta were delivered. The court which gave judgment in *Hoskins v. Matthews*³⁹ had to deal with the second of our supposed cases, and arrived at what, both according to common sense and according to theory, is a perfectly sound conclusion. The dicta, on the other hand, of the authorities who lay down that a residence adopted for the sake of health does not involve a change of domicile are obviously delivered by persons who had before their minds the third, not the second, of our supposed cases. Their only defect is that they are expressed in terms which are too wide, and further, that, while embodying a sound conclusion, they introduce an unnecessary and misleading reference to the motives which may lead to the adoption of a foreign domicile.

(6) *Officials generally.*—Official residence in a country is not in itself evidence of an intention to settle there, because all that can (in general) be inferred from such residence is that the official resides during the time and for the purpose of his office. This is clearly so when the office is held for a limited period. There is no reason to infer from the fact of a domiciled Englishman becoming Governor-General of Canada,⁴⁰ that he means to give up his English home or domicile. The presumption is strongly (if not conclusively) in favour of his intending to retain his English domicile.

³⁹ 8 De G.M. & G. 13. Compare *James v. James* (1908) 98 L.T. 438.

⁴⁰ See *Att.-Gen. v. Pottinger* (1861) 6 H. & N. 733; *Att.-Gen. v. Rowe* (1862) 1 H. & C. 31. But see *Clarke v. Newmarsh* (1886) 14 S. 488, 500; *In Goods of Smith* (1850) 2 Rob. Ecc. 332; *Inland Revenue Commrs. v. Gordon's Executor* (1850) 12 D. 657.

Occasionally, however, official residence may be *prima facie* proof of a change of domicile. This is so when the office itself, from its tenure and nature, requires the official to make a home in the country where he resides. Thus, it has been suggested that if a domiciled Scotsman takes an English living, he may, on coming into residence, be assumed to have the intention of residing permanently in England, hence to acquire an English domicile,⁴¹ but this is doubtful. As a rule, official residence is not a fact from which a change of domicile can be inferred, but much depends on the nature of the office.

(7) *An Ambassador*.—An ambassador or other diplomat who represents his sovereign at a foreign court in general retains his existing domicile which is, in most cases, the country the sovereign whereof he represents.

The reason of this is obvious. The residence of an English ambassador in France or of a French ambassador, though continued for many years, in London, does not raise the slightest presumption of his intention to make his home in France or England, and it is possible, though not certain, that the duties of an ambassador may be held absolutely incompatible with his *acquiring* a domicile in the country where he resides whilst he remains an ambassador.

An ambassador, however, if he is before his appointment already domiciled in the country where he resides as ambassador, retains his domicile in spite of his office, and this, though the domicile in the place of his residence is a domicile of choice and the country which he represents is his domicile of origin. D, an Australian, acquires a domicile in England. He afterwards is appointed a representative of the Commonwealth Government in England. D retains his English domicile.⁴² Though, in short, an ambassador or *attaché* does not in general acquire a domicile in the country where he resides, this is simply the result of his residence being in general unconnected with any intention to reside permanently. In a case where it was held that an *attaché* to the Portuguese Embassy retained the English domicile which he had acquired before his appointment, the court said. 'We are not saying that if a man should have continued an *attaché* for forty or fifty years, that he would thereby, *simpliciter*, acquire an English domicile, and that his property would be subject to legacy duty. We affirm nothing of the sort. What we do affirm is, that he, having acquired an English domicile, does not lose it *ipso facto*, without more, by taking this office of an *attaché*'⁴³ The same observations apply, of course, to a High Commissioner for a Dominion, whose domicile is not changed merely because he comes to London on an official

⁴¹ See *Arnott v. Groom* (1846) 9 D. 142, 149-152.

⁴² See *Heath v. Samson* (1851) 14 Beav. 441.

⁴³ *Att.-Gen. v. Kent* (1862) 31 L.J.Ex. 391, 397, per Bramwell, B. See also *Macartney v. Garbutt* (1890) 24 Q.B.D. 368.

mission of limited duration, though it may be if he decides to end his life in England.

(8) *A Consul*.—A consul does not and cannot be presumed to acquire a domicile by merely living in a country as consul. On the other hand, he does not, by becoming consul, lose any domicile he already possesses. The length of his residence as consul is immaterial.⁴⁴

D, an Englishman, resides at Leghorn for twenty years as English consul. D does not acquire an Italian domicile.

(9) *A Person in Military, Naval or Air Force Service*.—Although there are dicta to the contrary,⁴⁵ it is submitted that there is no rule of law that a soldier, sailor or airman cannot acquire a domicile in the place where he is stationed. If all that appears is the mere fact that a soldier, sailor or airman is resident in a country under orders, and there is nothing more to qualify his service, then it may be said that such residence does not involve the acquisition of a new domicile. If, on the other hand, there is evidence that such a person has voluntarily formed the intention of remaining indefinitely in the country in which he is stationed, he may be held to have acquired a domicile there. However, a heavy onus lies upon a person alleging that such a domicile has been acquired to show that the necessary intention to acquire a domicile in that country does exist.⁴⁶

(10) *Residents in Oriental and Non-Christian Countries*.—At one time, it was considered that residence in an Oriental or other non-Christian country coupled with such an intention as would normally give rise to the acquisition of domicile in a country did not produce that result in the case of a member of a Christian State unless, in addition to these normal requirements of domicile, there was established an intention to merge himself in the general life of

⁴⁴ *Udny v. Udny* (1869) L.R. 1 Sc.App. 441; *Sharpe v. Crispin* (1869) L.R. 1 P. & D. 611; *The Indian Chief* (1801) 3 C.Rob. 12, 22; *Niboyet v. Niboyet* (1878) 4 P.D. (C.A.) 1.

⁴⁵ The view stated in former editions of this work (see 5th ed., p. 131) that 'a soldier or sailor in the service of his own sovereign retains the domicile which he had on entering the service wherever he may be stationed', was cited with approval by Lindley, L.J., in *Re Mitchell, ex p. Cunningham* (1884) 13 Q.B.D. (C.A.) 418 at p. 425. However, the only point for decision was whether a debtor was domiciled in England, and it was held, clearly correctly, that the mere fact that he entered the British army did not confer an English domicile. In *Re Macreight* (1885) 30 Ch.D. 165, it was held that a Jerseyman who entered the British army did not lose his Jersey domicile. On the facts, the decision was clearly correct. Pearson, J., however, stated (at p. 168): 'so long as he remains in the army, he retains that domicile which he had when he entered it'. It is submitted that this is too wide, and is not supportable. And see *In bonis Patten* (1860) 6 Jur.(n.s.) 151.

⁴⁶ *Schache v. Schache* (1931) 31 S.R. (N.S.W.) 633; *Cox v. Cox* [1945] V.L.R. 105. See also dicta in *Sellars v. Sellars* [1942] S.C. 206; *Fitzgibbon-Lloyd v. Fitzgibbon-Lloyd* [1944] V.L.R. 29; *Baker v. Baker* [1945] A.D. 708; *Wilton v. Wilton* [1946] 1 D.L.R. 397. See also Cheshire, p. 228.

the native inhabitants.⁴⁷ It has now been established authoritatively that the conditions for the acquisition of a domicile in such a country are precisely the same as in every other case, namely, residence with the intention of remaining there indefinitely.⁴⁸ Hence, this case now presents no peculiarity whatever.

D, a domiciled Englishman, resides in Egypt with the intention of remaining there indefinitely. D acquires a domicile of choice in Egypt.⁴⁹

(11) *A Servant*.—There is not any authority in English law, or anything in the circumstances of modern life, establishing a definite rule, or even a presumption, as to the domicile of a servant, or even of an apprentice. Whether he has, or has not, a 'permanent home', in the same country as his master must, as in other cases, depend upon the combination of fact and intention. The nature of the service may, under some circumstances, tell in favour of, and in others against, a presumption that the servant adopts his employer's domicile.⁵⁰

(12) *A Student*.—There is certainly in English law nothing to justify any peculiar rule or presumption as to the domicile of a student. A domiciled Englishman who goes to a Scottish University intending to stay there for several years in order to obtain a degree would not be presumed to have obtained thereby a Scottish domicile,⁵¹ nor even if he married a Scotswoman would this result be presumed. Still less, of course, in the case of an Indian student, even if his residence were prolonged, as in the case of one engaged in studying medicine.

Motive and Domicile.—It is often said that the reason why, in some of the cases under consideration, and in others which might be mentioned, residence does not produce domicile is that the residence is 'involuntary', or 'under compulsion'.

What is intended by these expressions is no doubt true, viz., that where residence is not a consequence or a result of a purpose or intention to reside indefinitely (*animus manendi*), there cannot be a change of domicile, but the terms 'involuntary', or 'under compulsion', are so ambiguous, and so closely connected with logical and metaphysical problems, that they lead to confusion. Hence it has been laid down that 'there must be a residence freely chosen, and not prescribed or dictated by any external necessity, such as the duties of office, the demands of creditors, or the relief from

⁴⁷ See *Re Tootal's Trusts* (1888) 23 Ch.D. 532; *Abd-ul-Messih v. Farra* (1888) 13 App.Cas. 431.

⁴⁸ *Casdagli v. Casdagli* [1919] A.C. 145.

⁴⁹ See *Casdagli v. Casdagli* [1919] A.C. 145. Contrast *Att.-Gen. v. Yule* (1931) 145 L.T. 9, 16.

⁵⁰ *Moncrieff v. Moncrieff* [1934] C.P.D. 208 (employee with English domicile of origin sent to South Africa on five years' contract of service held not to have lost his English domicile despite intention to settle permanently in South Africa). Contrast *Russell v. Russell* [1935] S.A.S.R. 85. See also *Re Martin* [1900] P. (C.A.) 211, 226.

⁵¹ *Steel v. Lindsay* (1881) 9 R. 160.

illness',⁵² whence it might be inferred that the effect of residence in producing a change of domicile depends not upon the presence or absence of the *animus manendi*, but upon the motive for the residence. This doctrine, which has already perplexed the discussion of the effect of residence abroad for the sake of health, at once suggests the inquiry whether an Englishman, who resides abroad for the sake of economy, or to earn high wages, and therefore in one sense against his will, acquires a foreign domicile. Such questions can only be disposed of by adhering to the sound principle that residence and the *animus manendi* are the sole constituents of domicile. If these exist, the motive for the residence becomes immaterial. The only way in which consideration of a person's motive for dwelling in one place rather than in another can be important is from its effect as evidence for the existence or non-existence of the *animus manendi*.

2. DOMICILE OF LEGAL PERSONS OR CORPORATIONS⁵³

RULE 18.—The domicile of a corporation is the country in which it is registered. If it is not required by law to be registered, its domicile is in the country by the law of which it is incorporated.⁵⁴

Comment

The conception of a home or domicile, depending as it does on the combination of residence and intention to reside, is, in its primary sense, applicable only to human beings; but by a rule of law, a domicile is attributed to corporations. The point is not without importance, for in certain cases Admiralty jurisdiction is affected by the English domicile of companies owning ships.⁵⁵ Other practical problems, for example, whether individual members are personally liable⁵⁶; whether the transactions of a corporation are *intra vires*,⁵⁷ are determined by the rules of the constitution of the company as interpreted by the law of its domicile.⁵⁸ Again, liability to income tax in the United Kingdom in respect of income derived from stocks, shares and rents earned outside the United Kingdom but not remitted to England, depends upon the question

⁵² *Udny v. Udny* (1869) L.R. 1 Sc.App. 441, 458, per Lord Westbury. The existence of a debt tells as evidence against the acquisition of a domicile of choice in the country where it is, *De Greuchy v. Wills* (1879) 4 C.P.D. 362, 368. It is evidence of abandonment of a domicile of choice which is *de facto* left. *Re Robertson* (1885) 2 T.L.R. 178. So in New Zealand it has been ruled that a person who flees a country to avoid bankruptcy does not thereby change his domicile: *Strike v. Gleich* (1879) O.B. & F. 50.

⁵³ See generally, Farnsworth, *The Residence and Domicile of Corporations*.

⁵⁴ *Gasque v. Inland Revenue Commissioners* [1940] 2 K.B. 80. See Farnsworth, *The Residence and Domicile of Corporations*, pp. 201 *et seq.*

⁵⁵ See *The Eskbridge* [1931] P. 51.

⁵⁶ *General Steam Navigation Co. v. Guillou* (1848) 11 M. & W. 877.

⁵⁷ *Risdon Iron and Locomotive Works v. Furness* [1906] 1 K.B. 49 at pp. 56, 57.

⁵⁸ See Cheshire, *op. cit.* 253-4.

whether the corporation has a domicile within the United Kingdom.⁵⁹

Of the domicile of a corporation, it has been stated : ' It is quite true that a body corporate cannot have a domicile in the same sense as an individual. . . . But by analogy with a natural person, the attributes of residence, domicile and nationality can be given, and are, I think, given by the law of England to a body corporate. It is not disputed that a company formed under the Companies Acts, has British nationality, though unlike a natural person, it cannot change its nationality. So too, I think such a company has a domicile—an English domicile, if registered in England. . . . The domicile of origin, or the domicile of birth, using with respect to a company a familiar metaphor, clings to it throughout its existence '.⁶⁰

The D Company is registered in Guernsey. It is domiciled in Guernsey, and it cannot change that domicile.⁶¹

It will be seen therefore that the incapacity to change its domicile under any circumstances distinguishes a corporation from a natural person.

It may be added that the domicile of a corporation is entirely distinct from the domicile (or domiciles) of the persons who are its members. Thus, the D. Co., being registered in England, has its domicile in England. Its shareholders have their domiciles in different countries determined by the rules of residence and intention already stated as applicable to natural persons.⁶²

Residence of a Corporation.—A brief note may be appended on the residence of a corporation. The residence of a corporation is important in determining liability to income tax. English law adopts as its test of residence, the country of central control of the affairs of the corporation, that is to say, where the principal direction of the corporate business is located.⁶³ The country of registration, which, as we have seen,⁶⁴ is the test of domicile, is not necessarily therefore the residence of a corporation.

Although it would appear that the test of central control permits of only one country of residence, it was held by the House of Lords

⁵⁹ Income Tax Act, 1918, Schedule D, Rule 2, Case IV. See Farnsworth, p. 215.

⁶⁰ *Gasque v. Inland Revenue Commissioners* [1940] 2 K.B. 80 at p. 84, *per* Macnaghten, J.

⁶¹ *Ibid.*

⁶² See Rules 1-17, *ante*.

⁶³ *Cesena Sulphur Co. v. Nicholson* (1876) 1 Ex.D. 428; *San Paulo (Brazilian) Railway Co. Ltd. v. Carter* [1896] A.C. 31; *Goerz v. Bell* [1904] 2 K.B. 136; *De Beers Consolidated Mines v. Howe* [1906] A.C. 455; *American Thread Co. v. Joyce* (1913) 108 L.T. 353; *Egyptian Delta Land and Investment Co. v. Todd* [1929] A.C. 1; *Kotaki Para Rubber Estates Ltd. v. Federal Commissioner of Taxation* (1941) 64 C.L.R. 241; *Waterloo Pastoral Co. v. Federal Commissioner of Taxation* (1946) 72 C.L.R. 262.

⁶⁴ See p. 126, *ante*.

in *Swedish Central Ry. v. Thompson*,⁶⁵ that a corporation may have more than one residence. Reconciliation of the decisions causes some difficulty, and it may be that a distinction is to be drawn between an active trading corporation in which the test of central control is referable only to one country, and an administrative or static corporation in which no real business is carried on, where it may be reasonably held that the corporation is resident in any country in which a substantial part of its purely administrative business is performed.⁶⁶

⁶⁵ [1925] A.C. 495. See Cheshire, pp. 246-9.

⁶⁶ See Cheshire, pp. 248-9.

PART TWO

JURISDICTION

THE subject of Part 2 is Jurisdiction.¹

The Rules contained in Part 2 deal with two different matters.

The first matter is the jurisdiction, in cases which contain any foreign element,² of the High Court of Justice.³

Under this head are to be considered two different though closely connected questions: (1) What are, according to English law, the limits to the jurisdiction of the High Court in cases which contain any foreign element? or, in other words, What are the cases containing a foreign element which the High Court has, according to English law, a right to determine or adjudicate upon? (2) What are, as far as English courts can decide the matter, the extra-territorial effects of the exercise of jurisdiction of the High Court?

The second matter is the jurisdiction of foreign courts.

Under this head again are to be considered two different though closely connected questions: (1) What are, according to English law, the proper limits to the jurisdiction of foreign courts? or, in other words, What are the cases which the courts of a foreign country have, according to English law, a right to determine or adjudicate upon? (2) Under what circumstances, and how far, will the High Court give effect in England to the exercise of jurisdiction by the courts of a foreign country in the form either of judgments or otherwise? or, in other words, What is the effect in England of foreign judgments, or of foreign proceedings, such as sentences of divorce, or adjudications of bankruptcy, which resemble judgments?

Hence Part 2 is divided into two §§.

1. *Jurisdiction of High Court.*⁴ The Rules contained herein define the limits within which, in cases containing any foreign element, the High Court can exercise jurisdiction⁵; and the extra-territorial effect, so far as it depends on English law, of the exercise of jurisdiction by the High Court.⁶

The word 'jurisdiction' is throughout this Digest used as meaning 'the right or authority of a Court'; the word is not used as normally, in English text-books, judgments, and statutes,

¹ See Intro., pp. 2, 22-35, *ante*.

² See Intro., pp. 1, 2, *ante*.

³ Questions affecting county court proceedings do not normally require consideration in this Digest.

⁴ Chaps. 3-10.

⁵ See Chaps. 3-9.

⁶ See Chaps. 9, 10.

as meaning the 'area of territory over which a Court has jurisdiction'.⁷

2. *Jurisdiction of Foreign Courts.*⁸ The Rules contained herein define (1) the cases in which (according to the principles recognised by English law) the courts of a foreign country have a right to exercise jurisdiction,⁹ i.e., are courts of competent jurisdiction,¹⁰ and (2) the effect in England of the exercise of jurisdiction by foreign courts.¹¹

Inquiries, however, as to the jurisdiction properly exercisable by the courts of a foreign country and its effect in England always, or nearly always, come before English judges in the form of inquiries as to the effect to be given in England to a foreign judgment, or to some proceeding such as an adjudication in bankruptcy which partakes to a certain extent of the nature of a judgment. If we for the moment, therefore, give a wide sense to the term 'foreign judgment', it may be laid down with substantial accuracy that § 2 treats of foreign judgments.

⁷ This is the case, for instance in Ord XI, r. 1.

⁸ Chaps. 11-17.

⁹ See Chaps. 11-15.

¹⁰ See Rule 64, *post*.

¹¹ See Chaps. 16 and 17.

JURISDICTION OF THE HIGH COURT

CHAPTER 3

GENERAL RULES AS TO JURISDICTION

1. WHERE JURISDICTION DOES NOT EXIST

(1) *In respect of Persons.*

RULE 19.—The court has (subject to the Exceptions hereinafter mentioned) no jurisdiction,¹ to entertain an action² or other proceeding against—

- (1) any foreign sovereign³;
- (2) any ambassador or other diplomatic agent⁴ representing a foreign sovereign and duly accredited here⁵;

¹ Generally see Cheshire, p. 130-139; Wolff, ss. 46-52; Beale, Vol. 1, p. 326-434. As regards actions against the Crown in England, see Crown Proceedings Act, 1947; for the former position see 5th ed. of this work, p. 192, note (a).

² The word 'action' has in these Rules the meaning given it by the Supreme Court of Judicature (Consolidation) Act, 1925, s. 225, taken together with Ord. I, r. 1.

³ *Mighell v. Sultan of Johore* [1894] 1 Q.B. (C.A.) 149. Oppenheim: *International Law*, Vol. 1, Part 3, Chap. 1, p. 675, and p. 239-244. The court takes judicial cognisance not only of the status but possibly also of the boundaries, the enemy or neutral character, and the *de facto* or *de jure* character of the Government of a foreign State, and if in doubt will apply for information to the appropriate Secretary of State whose answer is conclusive. *Foster v. Globe Venture Syndicate* [1900] 1 Ch. 811; *Taylor v. Barclay* (1828) 2 Sim. 213; *The Gagara* [1919] P. (C.A.) 95; *Duff Development Co., Ltd v. Government of Kelantan* [1924] A.C. 797; *Engelke v. Musmann* [1928] A.C. 433; *Bank of Ethiopia v. National Bank of Egypt* [1937] Ch. 513, criticised by McNair, *Legal Effects of War*, pp. 340-342; *Haile Selassie v. Cable and Wireless* (No. 2) [1939] Ch. 182 (Italo-Abyssinian conflict); *Banco de Bilbao v. Sancho and Rey* [1938] 2 K.B. 176; *The Arantzazu Mendi* [1939] A.C. 256 (Spanish Civil War); *R. v. Bottrill* [1947] K.B. (C.A.) 41 (on existence of state of war). The Attorney-General is an appropriate channel of communication to the court. On the whole subject *v. A. B. Lyons*, 23 B.Y.B.I.L. (1946) p. 240. As to how far a provisional Government existing during a period of revolution ought to be treated as a sovereign power, see generally, Lauterpacht, *Recognition in International Law* (1947).

⁴ See Diplomatic Privileges Act, 1708; Diplomatic Privileges (Extension) Acts, 1941 (relating to Exiled Governments), 1944 (relating to Representatives at Conferences) and 1946 (relating to U.N. Organisation Officials), see *post*, p. 136.

⁵ Oppenheim, *International Law*, Vol. 1, pp. 710-719; *Parkinson v. Potter* (1885) 16 Q.B.D. 152; *Taylor v. Best* (1854) 14 C.B. 487; *Magdalena, etc. Co. v. Martin* (1859) 2 E. & E. 94; *Musurus Bey v. Gadban* [1894] 1 Q.B. 533; [1894] 2 Q.B. (C.A.) 352.

(3) any person belonging to the suite of such ambassador or diplomatic agent⁶;

(4) any person or organisation specially protected by an English statute.

An action or proceeding against the property of any of the foregoing is, for the purpose of this Rule, an action or proceeding against such person or organisation.⁷

Comment

(1) *Foreign sovereign*.—No action or other proceeding can be taken in the courts of this country against a foreign sovereign,⁸ nor can the property of a foreign sovereign be seized or arrested.⁹ In *The Cristina*,¹⁰ Lord Atkin said there are 'two propositions of international law engrafted on to our domestic law which seem to me to be well established and to be beyond dispute. The first is that the courts of a country will not implead a foreign sovereign. That is they will not by their process make him against his will a party to legal proceedings, whether the proceedings involve process against his person or seek to recover from him specific property or damages. The second is that they will not by their process, whether the sovereign is a party to the proceedings or not, seize or detain property which is his, or of which he is in possession or control'. The objections to the immunity of governmental ships engaged in commerce are so obvious that a Convention was achieved at an International Maritime Conference at Brussels in 1926 amended by a protocol of May 24, 1934, on the principles that

⁶ Oppenheim, Vol. 1, pp 723-727. *The Amazone* [1940] P. (C.A.) 40, and cases *supra*.

⁷ *The Parlement Belge* (1880) 5 P.D. (C.A.) 197; in *The Cristina* [1938] A.C. 485, Lords Thankerton, Macmillan and Maugham (doubting *The Porto Alexandre* [1920] P. (C.A.) 30), suggested that the immunity of sovereigns may not extend to vessels engaged only in trade. See also *The Gagara* [1919] P. (C.A.) 95; *The Annette*, *ibid.*, 105; *Compania Mercantil Argentina v. United States Shipping Board* (1924) 93 L.J.K.B. (C.A.) 816; *The Jupiter* [1924] P. (C.A.) 236.

⁸ *Mighell v. Sultan of Johore* [1894] 1 Q.B. (C.A.) 149; *Musurus Bey v. Gadban* [1894] 1 Q.B. 533. Compare *Duke of Brunswick v. King of Hanover* (1844) 6 Beav. 1; (1848) 2 H.L.C. 1; *Wadsworth v. Queen of Spain* (1851) 17 Q.B. 171; *De Haber v. Queen of Portugal* (1851) 17 Q.B. 211; *Munden v. Duke of Brunswick* (1847) 10 Q.B. 656; *The Jassy* [1906] P. 270; *Statham v. Statham* [1912] P. 92; *Duff Development Co. v. Government of Kelantan* [1924] A.C. 797; *Banco de Bilbao v. Rey* [1938] 2 K.B. (C.A.) 176; *Spain (Republic) v. Arantzazu Mendi* [1939] A.C. 256; *The El Condado* (1939) 63 Ll.L.Rep. 83, 380; *The Abodi Mendi* [1939] P. (C.A.) 178. Cf. *Haile Selassie v. Cable and Wireless Co.* [1938] Ch. 839 (No. 2) [1939] Ch. 182, in which case recognition of the claims of the King of Italy to be *de jure* Emperor of Abyssinia meant that the court upheld the King's claim to State property in preference to that of the deposed Emperor of Abyssinia.

⁹ *The Parlement Belge* (1880) 5 P.D. (C.A.) 197. Does the privilege of a sovereign, not to be sued for acts done in his private capacity whilst a sovereign, continue after he has ceased, e.g., by abdication, to be a sovereign? Presumably not.

¹⁰ [1938] A.C. 485, 490-491.

governmental commercial vessels and cargoes should be subject to all liabilities like privately owned vessels, and that non-commercial vessels and cargoes should also be liable but only in the national courts and not in foreign courts. Great Britain has signed but not yet ratified this Convention, though the principle which was approved as regards vessels of governments in the Empire by the Imperial Conference of 1923 should presumably be accepted and ultimately embodied in legislation.

The immunity of a foreign sovereign extends not merely to matters affecting such a sovereign in his personal capacity (if any), but to other suits of whatever nature. Moreover, the immunity is not affected by the fact that the foreign sovereign acts through an agent, even if that agent has in his hands funds belonging to the sovereign against which execution could issue in the event of judgment being given against the agent in respect of the transaction in which he has acted on behalf of the sovereign.¹¹ Nor can jurisdiction be exercised against a sovereign by the service of a writ upon an ambassador.¹²

The immunity, moreover, applies to the property of the sovereign, but four cases may be distinguished. In the first place, the property may actually be in the hands of the representatives of the foreign sovereign, and to assert a claim to it may necessitate what is virtually a suit against that sovereign, though the proceedings are formally *in rem*. In this case an action will not lie.¹³ In the second place, the property may be in the hands of some third party against whom an action *prima facie* lies. But even in this case it will be immune to the fullest extent provided that the property is shown to belong to the sovereign¹⁴; and not to be subject to any assignment or trust in favour of other persons

¹¹ See *Morgan v. Larivière* (1875) L.R. 7 H.L. 423; *Twycross v. Dreyfus* (1877) 5 Ch.D. (C.A.) 605, 616-618; *Duff Development Co. v. Government of Kelantan* [1924] A.C. 797; a garnishee order on Crown Agents set aside. Compare Rule 25, p. 168, *post*; but see *Saorstat and Continental Steamship Co. Ltd. v. de las Morenas* [1945] Ir.R. 291 (S.C.) As to position of commission agent acting for a foreign principal, who might be a sovereign, *v. post*, note 14.

¹² *Stewart v. Bank of England* [1876] W.N. 263; compare *Gladstone v. Musurus Bey* (1862) 1 H. & M. 495; *Sloman v. Governor and Government of New Zealand* (1876) 1 C.P.D. (C.A.) 563, where an analogous doctrine is applied to the Crown in its right of New Zealand as regards its representative in London.

¹³ See *The Jupiter* [1924] P. (C.A.) 236, especially 243, *per* Scrutton, L.J. The exact nature of proceedings *in rem* is explained in *The Gemma* [1899] P. 285; *The Dictator* [1892] P. 304.

¹⁴ In *Vavasseur v. Krupp* (1878) 9 Ch.D. (C.A.) 351, it was held that the Mikado of Japan was entitled to remove from England shells manufactured in Germany which were in England pending their removal to Japan, and which were alleged to have been manufactured by a process which, if used in England, would have violated the plaintiff's patent rights. Compare *Luther v. James Sagor & Co.* [1921] 3 K.B. (C.A.) 532, 555, 556, *per* Scrutton, L.J.; see *The Jupiter* (No. 3) [1927] P. 122, 133-141, *per* Hill, J., followed in *Government of the Republic of Spain v. National Bank of Scotland* [1939] S.C. 413; *v. also The Jupiter* (No. 2) [1925] P. 69, 78, *per* Atkin, L.J.

within the jurisdiction of the court.¹⁵ In the third place, as Lord Maugham observed in *The Cristina*,¹⁶ Rule 19 does not mean that an action against property claimed by a sovereign is beyond the jurisdiction of the courts: 'There is no authority for the view that if he wrongfully obtained possession of valuable jewellery in this country, and it was in the hands of a third person, he could claim to stay proceedings by the rightful owner against that person to recover possession of the jewellery merely by stating that he claimed it. To come within Professor Dicey's rule he would in my opinion be bound to prove his title'. In the fourth place, the courts, whilst they will not forcibly dispossess a sovereign, will discountenance any attempt by him to take advantage of the forcible seizure of a ship in the custody of the Admiralty Marshal.¹⁷

(2) *An ambassador, etc.*—An ambassador or other diplomatic agent duly accredited by a foreign State cannot, at any rate without his sovereign's consent, be made defendant here in an action either for breach of contract or, it would seem, for tort, nor can his property be seized. This rule is part of the 'Law of Nations', or international law, taken over by the common law.¹⁸

The court, however, has jurisdiction over an ambassador or diplomatic agent of a foreign sovereign who is not accredited to the Crown or the Foreign Office in the United Kingdom, but is in England.¹⁹

¹⁵ Compare *Morgan v Larivière* (1875) L.R. 7 H.L. 423, 430, *per* Lord Cairns; *Gladstone v. Musurus Bey* (1862) 1 H. & M. 495; see also *Foreign Bondholders Corporation v. Pastor* (1874) 23 W.R. 107. Contrast *Gladstone v. Ottoman Bank* (1863) 1 H. & M. 505, *Steam Saw Mills Co., Ltd v. Baring Brothers* [1922] 1 Ch. (C.A.) 244; *Smith v. Wuehlin* (1869) L.R. 8 Eq. 198; *Twyecross v. Dreyfus* (1877) 5 Ch.D. 605; *Marshall v. Grunbaum* (1921) 37 T.L.R. 913.

¹⁶ [1938] A.C. 485, 517; *v.* also 54 L.Q.R. 339, 2 Mod.L.R. 57; 19 B.Y.B.I.L. 243-247 and Wortley, 67 Rec. des Cours, de l'Académie de Droit International, the Hague, 1939, pp. 345-425, *Les problèmes soulevés par l'expropriation*, Chap. IV.

¹⁷ *The Abodi Mendu* [1939] P. (C.A.) 178; in *Cā Española de Navegacion Maritima v. The Navemar*, 303 U.S. 68, it was said that possession acquired as a result of the forcible seizure of a ship would not be deemed sufficient to found a claim for immunity.

¹⁸ *Engelke v. Musmann* [1928] A.C. 433. Compare *Taylor v. Best* (1854) 14 C.B. 487, 521, 522, judgment of Jervis, C.J., and 423-425, judgment of Maule, J., with *Magdalena Co. v. Martin* (1859) 2 E. & E. 94, 113, 114, judgment of court commenting upon *Taylor v. Best*. See *Re Republic of Bolivia Exploration Syndicate, Ltd.* [1914] 1 Ch. 139, in which case the privilege of a diplomatic agent is extended to the utmost degree. How far it can be waived is discussed in *Suarez v. Suarez* [1918] 1 Ch. (C.A.) 176. The privilege does not extend to exempt from legacy duty bequests by a diplomatic agent who dies domiciled in England. *Att. Gen. v. Kent* (1862) 31 L.J.Ex. 391.

¹⁹ But see an opposite opinion expressed, Nelson, p. 403, and compare *New Chile Co. v. Blanco* (1888) 4 T.L.R. 346. This case only decides that as a matter of discretion the court will not allow service of a writ out of England on the representative of a foreign State accredited to a foreign State. This, however, will not be acted on if the diplomat concerned is a co-respondent in a divorce suit; see *Rush v. Rush and Bailey and Pimenta* [1920] P. (C.A.) 242, where one co-respondent seems to have been still in the United States diplomatic service. But as he was not represented, the point of jurisdiction was not raised; and see Oppenheim (*op. cit.*) Vol. I, p. 720.

(3) *Members of suite, etc.*—The privilege of the ambassador or diplomatic agent extends to ‘all persons associated in the performance of the duties of an embassy or legation . . . And if it be once ascertained that the person was treated at the embassy or legation as a member of the same, and employed from time to time in the work of the legation, the Court will not curiously measure the quantum of the services either required from or rendered by him. But the service must be *bona fide*’.²⁰

Thus a *chargé d'affaires* or a special agent to settle claims, acting under the ambassador's orders,²¹ a secretary,²² an assistant military attaché,²³ a chorister *bona fide* employed in the chapel of an embassy,²⁴ or the wife of the ambassador²⁵ is privileged. But the privilege is that of the ambassador or diplomatic agent and can therefore be waived.²⁶

There is no authority to extend this immunity to the suite or family of a monarch, but presumably it might apply. Members of their families, of course, when in England apart from the sovereign, can have no privilege.

The court is bound to take judicial cognisance of the status not only of an ambassador or *chargé d'affaires*, but also of members of his staff. Normally, a list of the staff is submitted to the Secretary of State for Foreign Affairs, who may refuse recognition to any person either because his claim to diplomatic status is dubious or the number of persons for whom status is claimed is excessive. If recognition is accorded, a statement by the Secretary of State is binding on the court, as it is a necessary part of the royal prerogative to accord or refuse recognition. Immunity attaches to a person thus recognised, subject to Exceptions 1 and 2, until it is shown that his duties have ceased. Apart, however,

²⁰ Nelson, p. 400. See *Parkinson v. Potter* (1885) 16 Q.B.D. 152; *Postier v. Croza* (1749) 1 W.Bl. 48.

²¹ *Taylor v. Best* (1854) 14 C.B. 487; *Service v. Castaneda* (1845) 2 Coll. 56, where it was held that the agent was immune by common law if not by statute.

²² *Hopkins v. De Robeck* (1789) 3 T.R. 79.

²³ *The Amazons* [1940] P. 40 (C.A.).

²⁴ *Fisher v. Begrez* (1832) 1 Cr. & M. 117; *Novello v. Toogood* (1823) 1 B. & C. 554.

²⁵ Compare *Macnaghten v. Coverdidas* (Horridge, J., February 2, 1911; Annual Practice, note to Ord. IX, r. 2); contrast *English v. Caballero* (1823) 3 D. & R. 25, where a secretary's wife was denied (*semble*) privilege. For other cases of refusal, see *Lockwood v. Coysgarne* (1765) 3 Burr. 1676; *Heathfield v. Chilton* (1767) 4 Burr. 2016; *Malachi Carolino's Case* (1743) 1 Wils. 78 (interpreter); *Darling v. Atkins* (1769) 3 Wils. 38 (naval employment); *Seacom v. Bowlney* (1743) 1 Wils. 20 (honorary chaplain); *Re Cloete* (1891) 65 L.T. (C.A.) 102 (honorary attaché to Persian legation obtaining post merely to defeat proceedings, and never recognised by British Government). Note that, though the Dominions were members of the League of Nations, and all except Ceylon are members of UNO, the High Commissioners possess no immunity as such, *Isaacs & Sons v. Cook* [1925] 2 K.B. 391. It is no objection that the envoy is a British subject. *Macartney v. Garbutt* (1890) 24 Q.B.D. 368.

²⁶ *R. v. Kent* [1941] 1 K.B. 454, and Exception 1, *post*.

from this normal course of procedure,²⁷ status may be proved *aliunde*, and formerly proof by affidavit was normal.²⁸ Diplomatic status will not be presumed nor will diplomatic immunity be conceded merely because orders are given to transfer a bank balance to the account of a body enjoying diplomatic immunity.²⁹

(4) *Persons and organisations protected by statute*.—There is strong authority for saying that the Diplomatic Privileges Act, 1708, merely restates international law as embodied in common law.³⁰ The Diplomatic Privileges (Extension) Acts of 1941, 1944 and 1946 may for convenience be treated here under a special head, distinct from that which sets out the common law.

(a) *The Diplomatic Privileges (Extension) Act, 1941*,³¹ was passed at that stage of the war when many exiled Governments and National Committees sought refuge in London. Section 1 (2) of the Act made provision for the compilation and revision of lists of those persons to whom diplomatic privileges and immunities were to be extended by the Act. Section 2 gave diplomatic privileges and immunities to envoys accredited to exiled powers or provisional governments.

(b) *The Diplomatic Privileges (Extension) Acts, 1944 and 1946*,³² which are to be construed together,³³ are more far-reaching in character than the Act of 1941. Section 1 of the Act of 1944, as amended, enables certain diplomatic privileges and immunities set out in Part 1 of the schedule³⁴ to be extended by Order in Council to certain international organisations and their staffs, and recognises the corporate capacities of such organisations. The most important organisations envisaged by the Act of 1944³⁵ were those set up since the war to deal with various forms of relief and reparations: the Act of 1946 extends the privileges and immunities to the United Nations and the International Court of Justice.³⁶

Provision is also made by section 3 for diplomatic immunities for representatives of foreign sovereigns attending international conferences. Lists of persons benefiting by the Act are to be

²⁷ *Engelke v. Musmann* [1928] A.C. 433.

²⁸ *Seacomb v. Bowlney* (1743) 1 Wils. 20; *Triquet v. Bath* (1764) 3 Burr. 1478.

²⁹ *Rekstin v. Severo Sibirsko Gosudarstvennoe* [1938] 1 K.B. (C.A.) 47, attempt to avoid garnishee proceedings by transfer of account to that of U.S.S.R. Trade Delegation.

³⁰ Cheshire, p. 137, remarks that the Act 'is declaratory though not exhaustive of the common law'; see also Oppenheim, Vol. 1, p. 708.

³¹ Amended by s. 5 of the Act of 1944.

³² See Oppenheim, Vol. 1, pp. 734-744; C. Parry: 'International Government' 10 Mod.L.R. 97 (1947): for the various orders made, see Butterworth's Emergency Legislation.

³³ Section 3 of the Act of 1946.

³⁴ The schedule is divided into four parts each containing a detailed list of immunities and privileges in a descending gradation of importance, relating to, (1) Organisations, (2) High Officers, persons on missions and Government Representatives, (3) other officers and servants, and (4) Representatives' staff and High Officers' families.

³⁵ *Jenks* 22 B.Y.B.I.L., p. 249 (1945); *Schweib* 3 Mod.L.R. 50 (1945).

³⁶ Section 2 of the Act of 1946.

compiled and published in the London, Edinburgh and Belfast Gazettes,³⁷ and revised from time to time.

Illustrations

1. X is a foreign sovereign. X, while on a visit to England, incurs debts. The court has no jurisdiction to entertain an action for recovery of the debts.³⁸

2. X is a foreign sovereign. He is living in England incognito under the name of Y. Whilst in England, and passing as a British subject, he makes a promise of marriage to A, an Englishwoman, who has no knowledge that X is a foreign sovereign. X breaks his promise of marriage. A brings an action against X, who pleads that he is a sovereign. The court has no jurisdiction to entertain the action.³⁹

3. An unarmed packet-boat belonging to the King of Belgium, and in the hands of officers employed by him, carries the mails from Belgium to England. The ship also carries merchandise. She negligently runs down an English boat in Dover Harbour. The court has no jurisdiction to entertain an action against the ship, or to give any redress whatever.⁴⁰

4. During the Civil War in Spain the Spanish Republican Government requisitions a ship registered at Bilbao whilst she is on the high seas. The ship arrives in England and the Spanish consul goes on board, states she has been requisitioned, and dismisses the Nationalist master, putting a Republican master in charge. The owners issue a writ *in rem* claiming possession of the ship. The Spanish Republican Government enters a conditional appearance and moves to set aside the writ on the grounds that it impleads a foreign sovereign admitted by H.M. Government to be recognised as such. The court will not allow the arrest of the ship in *de facto* possession of the sovereign after requisition for public purposes.⁴¹

5. During the Spanish Civil War the Republican crew of a ship in the custody of the English Admiralty Marshal forcibly exclude the Nationalist master, appointed by the owners, from the ship. The release of the ship to the Spanish Republican Government will not be ordered until the production to the registrar of an affidavit that the master has been permitted to return on board.⁴²

6. X is the ambassador accredited to the Crown by a foreign State. X is indebted to an English company for a call due on shares. The court has no jurisdiction to entertain an action for the amount of the call.⁴³

7. X is a British subject. He is accredited to the Crown as secretary to the Chinese Embassy. His household furniture in London cannot be seized for the non-payment of parochial rates.⁴⁴

8. X is the attaché of a foreign embassy. He is the lessee of a dwelling-

³⁷ Sections 1 (3) (4), and 3. British subjects may be included therein.

³⁸ See *Duke of Brunswick v. King of Hanover* (1848) 2 H.L.C. 1; *Wadsworth v. Queen of Spain* (1851) 17 Q.B. 171. Compare *Munden v. Duke of Brunswick* (1847) 10 Q.B. 656.

³⁹ *Mighell v. The Sultan of Johore* [1894] 1 Q.B. (C.A.) 149; compare *Statham v. Statham* [1912] P. 92.

⁴⁰ *The Parlement Belge* (1880) 5 P.D. (C.A.) 197. See *The Constitution* (1879) 4 P.D. 39; *Young v. S.S. Scotia* [1903] A.C. 501; *The Porto Alexandre* [1920] P. (C.A.) 30. These cases overrule *The Charkieh* (1873) L.R. 4 A. & E. 59, 120.

⁴¹ *The Cristina* [1938] A.C. (H.L.) 485.

⁴² *The Abodi Mendis* [1939] P. (C.A.) 178.

⁴³ *Magdalena Co. v. Martin* (1859) 2 E. & E. 94; *Taylor v. Best* (1854) 14 C.B. 487. The principle applies to the chief of the mail department in the United States Embassy: *Assurantie Compagnie Excelsior v. Smith* (1923) 40 T.L.R. (C.A.) 105.

⁴⁴ *Macartney v. Garbutt* (1890) 24 Q.B.D. 368. Contrast *Re Cloete* (1891) 65 L.T. (C.A.) 102.

house in London. An action is brought against him by the lessor for the non-payment of rent. The court has no jurisdiction.⁴⁵

9. X is ambassador from the Republic of Italy to the French Republic. He visits England and incurs debts here, for which an action is brought. *Semble*, the court has jurisdiction.

10. X is the representative of Russia in London under the trade agreement of March 16, 1921, which does not give him ambassadorial status. The court has jurisdiction.⁴⁶

Exception 1.—The court has jurisdiction to entertain an action against a foreign sovereign, or an ambassador, diplomatic agent, or other person or organisation coming within the terms of Rule 19 (2), (3) and (4), if such defendant, duly authorised when necessary, appears before the court, voluntarily waives any privilege and submits to the jurisdiction of the court, but such submission does not confer on the court the power to enforce any decree made by execution in any form.⁴⁷

Comment

A foreign sovereign can submit to the jurisdiction of the court.

'Suppose', asks Maule, J., 'a foreign sovereign in this country were desirous to have some question decided by the courts of this Kingdom, could he not do so?'.⁴⁸ This question must clearly be answered in the affirmative, subject to the restrictions on classes of matters on which the court has jurisdiction (see especially Rule 22).

⁴⁵ See *Parkinson v. Potter* (1885) 16 Q.B.D. 152; which, though it only decides that the *attaché* is not liable to pay rates in respect of the house which he occupies, lays down his exemption from the civil jurisdiction of the courts in the widest terms. Compare *Musurus Bey v. Gaddan* [1894] 1 Q.B. 533; and *Engelke v. Musmann* [1928] A.C. 433.

⁴⁶ See *Fenton Textile Association v. Krassin* (1922) 38 T.L.R. 259. When in this Digest, or in any Illustration, it is stated that the court 'has jurisdiction' or 'has no jurisdiction', what is meant is that the court has jurisdiction or has no jurisdiction (as the case may be) in respect of the matter, (*e.g.*, to entertain an action) to which the particular Rule, Exception or Illustration refers.

⁴⁷ See *Mighell v. Sultan of Johore* [1894] 1 Q.B. (C.A.) 149, 157, 160, judgments of Esher, M.R., and of Lopes, L.J.; *Parkinson v. Potter* (1885) 16 Q.B.D. 152. But cf. *Musurus Bey v. Gaddan* [1894] 1 Q.B. 533, judgment of Wright, J. This, of course, is an application of Rule 24, p. 166, *post*, but is more conveniently treated of with special reference to Rule 19, p. 131, *ante*. See on the whole topic, *Suarez v. Suarez* [1917] 2 Ch. 131; [1918] 1 Ch. (C.A.) 176. This case seems to decide that the result of an action against an ambassador, *e.g.*, seizure of his goods, cannot without his assent be enforced as long as he continues to hold that position. Compare *Duff Development Co. v. Government of Kelantan* [1924] A.C. 797; that in case of a submission execution might issue seems to have been the view of Lord Dunedin, p. 821, and certainly of Lord Carson, p. 833, but this appears to be against the weight of opinion.

⁴⁸ *Taylor v. Best* (1854) 23 L.J.C.P. 89, 93, *per* Maule, J. See Rules 22, 23 *post*.

This submission must be an unmistakable election to submit to the court's jurisdiction, and must take place at the time when the court is about, or is being asked, to exercise jurisdiction over him,⁴⁹ or as a result of section 13 of the Administration of Justice (Miscellaneous Provisions) Act, 1938, designed to permit English courts to entertain actions against foreign sovereigns who have entered into conventions for that purpose. Submission cannot be argued from an arbitration clause in a contract entered into by a government, incorporating the provisions of the Arbitration Act, 1889, nor even from an application to set aside an award made under the arbitration.⁵⁰

The principles applicable to submission by a sovereign to the jurisdiction of the court apply to the like submission by an ambassador,⁵¹ or other diplomatic agent accredited to the Crown, but the submission requires the assent of the sovereign,⁵² or of the official superior of the agent, on behalf of the sovereign,⁵³ to whom the privilege really appertains.

Question.—Has the court jurisdiction to entertain a counter-claim against a foreign sovereign or an ambassador?

The answer to our inquiry is this: A sovereign or ambassador who brings an action in the High Court undoubtedly submits himself to its jurisdiction in regard to that action,⁵⁴ but no further. This principle decides the extent to which the court has jurisdiction

⁴⁹ *Mghell v. Sultan of Johore* [1894] 1 Q.B. (C.A.) 149, 159, judgment of Esher, M.R.; *Dickinson v. Del Solar* [1930] 1 K.B. 376, 380.

⁵⁰ *Duff Development Co. v. Government of Kelantan* [1924] A.C. 797

⁵¹ It may, however, be argued that an action can under no circumstances be maintained in England against an ambassador, etc.; for the Diplomatic Privileges Act, 1708, 'prohibits and makes null and void the issue of any writ or process against an ambassador, and not merely writs or processes in the nature of writs of execution'. *Musurus Bey v. Gadban* [1894] 1 Q.B. 533, 542, *per curiam*, compared with *Magdalena Steam Co v. Martin* (1859) 2 E. & E. 94. The suggested argument is inconsistent with *Taylor v. Best* [1854] 14 C.B. 487. (Compare especially, *ibid.*, 522, 523, judgment of Jervis, C.J.) But it is strengthened by the language of the court in *Musurus Bey v. Gadban* [1894] 2 Q.B. (C.A.) 352, 357, judgment of A. L. Smith, L.J., and 360–362, judgment of Davey, L.J. See also *Re Republic of Bolivia Exploration Syndicate* [1914] 1 Ch. 139; *Suarez v. Suarez* [1917] 2 Ch. 131, 138, *per Eve, J.* But *Taylor v. Best* is approved in *Suarez v. Suarez* [1918] 1 Ch. (C.A.) 176, 191–194, *per Swinfen Eady, L.J.*; 195–198, *per Warrington, L.J.*

The Statute of Limitations does not run against a diplomatic agent who contracts a debt in England during his tenure of office, nor (*semble*) for a reasonable time after the end of such tenure. *Musurus Bey v. Gadban* [1894] 1 Q.B. 533; [1894] 2 Q.B. (C.A.) 352. The extension of the immunity from criminal jurisdiction for a reasonable period after the cesser of the office did not apply where the agent had been dismissed and the immunity waived. *R. v. A.B. (Kent)* [1941] 1 K.B. (C.C.A.) 454 and see 21 B.Y.B.I.L. 196–198 (1944).

⁵² *Re Republic of Bolivia Exploration Syndicate* [1914] 1 Ch. 139, 144–157; *Suarez v. Suarez* [1918] 1 Ch. (C.A.) 176, where consent was proved.

⁵³ *Dickinson v. Del Solar* [1930] 1 K.B. 376, 380, *per Lord Hewart*.

⁵⁴ *South African Republic v. La Compagnie Franco-Belge du Chemin de Fer du Nord* [1898] 1 Ch. 190, and [1897] 2 Ch. (C.A.) 487; *South African Republic v. Transvaal Northern Railway* [1898] 1 Ch. 190. Compare *Yorkshire Tannery*

to entertain a counterclaim against, *e.g.*, an ambassador who is plaintiff in an action. If the counterclaim is really a defence to the action, *i.e.*, is a set-off, or something in the nature of a set-off, the court has a right to entertain it. If the counterclaim is really a cross-action, and if the subject-matter would not sustain an action against the sovereign or ambassador, the court has no jurisdiction to entertain it.

Illustrations

1. X is a foreign sovereign. Whilst living incognito in England under the name of Y he incurs debts to A, who brings an action against X under his proper name and description. X accepts service of the writ, and defends the action on its merits. In the course of the evidence it is shown that X is a foreign sovereign. The court has jurisdiction.⁵⁵

2. T makes a will in which he gives the residue to the German Reich Government for the benefit of its soldiers disabled in the 1914-18 war. In 1931 A, his executor, takes out a summons to decide the validity of the bequest, and the German Reich submits to being made a defendant. The court has jurisdiction.⁵⁶

3. X, secretary to the Peruvian legation, causes injury to A by negligent driving of a motor car. A claims damages, and X, being forbidden by the Peruvian Minister to rely upon diplomatic immunity in view of the facts, enters appearance and is ordered to pay damages. X claims indemnity from an insurance company. The court has jurisdiction over X and the company must indemnify X.⁵⁷

4. A is the minister of the French Republic accredited to the Crown. A brings an action against X for a debt of £100. X, in his counterclaim, claims £100 due to him as a debt from A. The court (*semble*) has jurisdiction to entertain the counterclaim.

5. The circumstances are the same as in Illustration No. 4, except that X's counterclaim is a claim for damages against A in respect of a libel by A upon X. The court has no jurisdiction to entertain the counterclaim.⁵⁸

6. A is a foreign sovereign. He claims from X the restoration of certain governmental papers in his custody. X seeks to counterclaim in respect of costs incurred by him in respect of transactions wholly unconnected with the papers in question. The court has no jurisdiction.⁵⁹

7. X is the recognised *de facto* sovereign in possession of the territory of a foreign country and Y the dispossessed *de jure* sovereign. The English court will recognise the fact of possession if called upon to do so,⁶⁰ but such recognition will not necessarily extend to claims of the *de facto* sovereign to possess property situate here which is also claimed by the *de jure* sovereign.⁶¹

v. Eglinton Chemical Co. (1884) 54 L.J.Ch. 81, 83, judgment of Pearson, J. The same principle applies in any case where a person not otherwise subject to the jurisdiction of the court brings an action. See Rule 24, p. 166, *post*.

⁵⁵ Compare *Migheill v. Sultan of Johore* [1894] 1 Q.B. (C.A.) 149, 159, judgment of Esher, M.R. Contrast *Imperial Japanese Government v. P. & O. Co.* [1895] A.C. (P.C.) 644, which, however, turned on the limited jurisdiction of the Consular Court.

⁵⁶ *Re Robinson* [1931] 2 Ch. 122.

⁵⁷ *Dickinson v. Del Solar* [1930] 1 K.B. 376.

⁵⁸ See *South African Republic v. La Compagnie Franco-Belge du Chemin de Fer du Nord* [1898] 1 Ch. 190, and [1897] 2 Ch. (C.A.) 487; *Strousberg v. Republic of Costa Rica* (1880) 29 W.R. 125.

⁵⁹ *Union of Soviet Republics v. Belarew* (1925) 42 T.L.R. 21.

⁶⁰ *Bank of Ethiopia v. National Bank of Egypt* [1937] Ch. 513.

⁶¹ Cf. *Haile Selassie v. Cable and Wireless* [1938] Ch. 545 (C.A.) 839, and No. 2 [1939] Ch. (C.A.) 182.

Exception 2.—The court has jurisdiction to entertain an action against a person belonging to the suite of an ambassador or diplomatic agent, if such person engages in trade.

Comment

Under the Diplomatic Privileges Act, 1708, s. 5, it is provided that 'no merchant or other trader whatsoever, within the description of any of the statutes against bankrupts, who hath or shall put himself into the service of any such ambassador or public minister, shall have or take any benefit by this Act'; and apparently the result is that the privilege of exemption from being sued, which is possessed by the servant of an ambassador, is lost by the circumstance of trading.⁶²

(2) *In respect of Subject-Matter.*

RULE 20.⁶³—Subject to the Exceptions hereinafter mentioned, the court has no jurisdiction to entertain an action for

- (1) the determination of the title to, or the right to the possession of, any immovable situate out of England (foreign land); or
- (2) the recovery of damages for trespass to such immovable.

Comment

This Rule is now well established, but its precise scope is open to some doubt. Its origins have been traced to the ancient common law practice whereby juries were chosen from persons acquainted with the facts of a case, who therefore decided questions of fact from their own knowledge and not from the evidence of witnesses. In order that the right jury might be empanelled it was necessary that the venue should be laid with exactness. The consequence was that English courts had no jurisdiction to entertain actions where the facts had occurred abroad.

⁶² This section was not apparently cited in *Re Cloete* (1891) 65 L.T. (C.A.) 102. Compare *Novello v. Toogood* (1823) 1 B. & C. 554. Affidavits made by ambassadors' servants claiming protection have usually expressly negatived trading; *Hopkins v. De Robeck* (1789) 3 T.R. 79; *Viveash v. Becker* (1814) 3 M. & S. 284. An ambassador does not lose his privilege by trading, *Taylor v. Best* (1854) 23 L.J.C.P. 89, 93, *per Jervis, C.J.*

⁶³ *British South Africa Co. v. Companhia de Mocambique* [1893] A.C. 602; *Deschamps v. Miller* [1906] 1 Ch. 556; *Re Hawthorne* (1889) 23 Ch.D. 743; *Doulson v. Matthews* (1792) 4 T.R. 503; *Boyse v. Colclough* (1854) 1 K. & J. 124; *Pike v. Hoare* (1763) 2 Eden 182; *Skinner v. East India Co.* (1665) cited in *Mostyn v. Fabrigas* (1774) Cowp. 161, 167, 168; cf. Story, ss. 554, 555; Cheshire, pp. 715-721; Beale, pp. 1652-1659; Goodrich, s. 93; Read, pp. 186-198.

The inconvenience of this rule led to its evasion by the fiction of *videlicet*, *i.e.*, by the untraversable allegation that a foreign place was situated in, *e.g.*, the parish of St. Marylebone.⁶⁴ Unfortunately this relaxation only applied to transitory actions, that is actions where the facts might have occurred anywhere (*e.g.*, actions for breach of contract); it did not apply to local actions, that is actions where the facts could only have occurred in a particular place (*e.g.*, actions relating to foreign land).

This technical and somewhat arbitrary distinction between transitory and local actions did not appeal to Lord Mansfield, who on two occasions entertained actions for trespass to land in Nova Scotia and Labrador, on the ground that there were no local courts and therefore the plaintiff would otherwise have been without a remedy.⁶⁵ Unfortunately Lord Mansfield's liberal view was overruled in *Doulson v. Matthews*,⁶⁶ where Buller, J., said, 'It is now too late for us to inquire whether it were wise or politic to make a distinction between transitory or local actions: it is sufficient for the courts that the law has settled the distinction, and that an action *quare clausum fregit* is local'.

The Judicature Act, 1873, and Rules of Court made thereunder abolished local venues, and accordingly it was arguable that there was no longer any reason why English courts should not decide questions of title to foreign land or at least grant damages in personam for trespass thereto.⁶⁷ But in *British South Africa Co., Ltd. v. Companhia de Mocambique*⁶⁸ the House of Lords decided that 'the grounds upon which the courts have hitherto refused to exercise jurisdiction in actions of trespass to lands situate abroad were substantial and not technical, and that the rules of procedure under the Judicature Acts have not conferred a jurisdiction which did not exist before.'⁶⁹

The principle of effectiveness⁷⁰ amply justifies, though it does not historically account for, the refusal of English judges to adjudicate upon the title to, or the right to possession of, foreign land. But doubt may legitimately be entertained whether the principle of effectiveness justifies the refusal of English judges to entertain actions for such injuries to foreign land as admit of compensation in damages. In the *Mocambique Case* the plaintiffs claimed, in addition to damages for trespass, a declaration that they were lawfully in possession of the land and an injunction restraining the defendants from asserting any title thereto; and though on appeal the claim for the declaration and injunction was abandoned,

⁶⁴ Holdsworth, *H.E.L.*, Vol. 5, pp. 140-142.

⁶⁵ Cited in *Mostyn v. Fabrigas* (1774) Cowp. 161.

⁶⁶ (1792) 4 T.R. 503.

⁶⁷ See *Whitaker v. Forbes* (1875) 1 C.P.D. 51.

⁶⁸ [1893] A.C. 602.

⁶⁹ *Ibid.* p. 629, per Lord Herschell.

⁷⁰ Introduction, *General Principles*, No. 8, p. 22, *ante*.

the case remained to some extent implicated with questions of title. Accordingly Scott, L.J., has expressed the opinion that the House of Lords (but not the Court of Appeal) might be free to distinguish the *Mocambique Case* and grant damages for trespass if no questions of title were involved. 'I recognise', he said,⁷¹ 'that in a case where the action is brought by a party in possession of land and structures, suing merely for damages for negligence, or even, it may be, for trespass quare clausum fregit, and the plaintiff relies solely on his possession as the foundation for his action, the House of Lords might hereafter distinguish the *Mocambique Case*. But I do not think that it would be right for this court [the Court of Appeal] to attempt that distinction, as I am satisfied that, with regard to common law actions, no such distinction was then in the mind of the House.' But this opinion was not necessary for the decision of the case, was not concurred in by the other Lords Justices, and (whatever its intrinsic reasonableness) seems difficult to reconcile with the speeches of the House of Lords in the *Mocambique Case*. It is submitted, however, that there are solid practical reasons which would justify the House in re-examining the matter. The plaintiff may in fact be without a remedy if there are no local courts in the place where the land is situated, or if the defendant is not personally present in that place, and has no assets there. Moreover, it seems arbitrary to deny a remedy for trespass or negligence to the plaintiff's land if the same act of trespass or negligence causes damage to the plaintiff's chattels or to the plaintiff personally. And it would be strange if, in an action for assault and personal injuries, the defendant could neither plead that he was justifiably preventing a trespass nor counterclaim for damages therefor.⁷²

It has been held in Canada that the *Mocambique* rule prevents the courts from entertaining not only actions for trespass to foreign land, but also actions for trespass on the case for negligent injury to foreign land.⁷³

The rule does not, however, prevent the court from entertaining an action for a breach of contract, whether express or implied, with regard to foreign land, for example an action for rent due under a lease⁷⁴ or an action for breach of covenants for title.⁷⁵

⁷¹ *The Tolten* [1946] P. 135, 141-142; contrast pp. 163-164, per Somervell, L.J.; 168-169, per Cohen, L.J.; cf. *St. Pierre v. South American Stores, Ltd.* [1936] 1 K.B. 382, 396-7, per Scott, L.J.

⁷² See *Companhia de Mocambique v. British South Africa Co.* [1892] 2 Q.B. 358, 413-414, per Fry, L.J.; cf. *The Tolten* [1946] P. 135, 146-147, per Scott, L.J.

⁷³ *Brereton v. Canadian Pacific Ry.* (1894) 29 O.R. 57; *Albert v. Fraser Companies* [1937] 1 D.L.R. 39; criticised Willis, 15 Can.Bar Rev. 112; contrast *Malo and Bertrand v. Clement* [1943] 4 D.L.R. 773, where the action was entertained although title was in issue; cf. *The Tolten* [1946] P. 135.

⁷⁴ *St. Pierre v. South American Stores, Ltd.* [1936] 1 K.B. 382; *Pelepah Valley (Johore) Rubber Estates, Ltd. v. Sungei Besi Mines, Ltd.* (1944) 170 L.T. 338; cf. *Buenos Ayres Co. v. Northern Ry.* (1877) 2 Q.B.D. 210.

⁷⁵ *Findlay v. Rose* [1938] 2 D.L.R. 334.

The common law rule is subject to three not very well defined exceptions, two of which are derived from the practice of Courts of Equity and the third from the practice of Courts of Admiralty.

Illustrations

1. A brings an action to obtain possession of lands in Canada. The court has no jurisdiction.⁷⁶

2. The title to a house at Dresden is in dispute between X and A. X sells the house, receives part of the purchase-money, and takes a mortgage for the balance. X and A are both in England. A brings an action against X to make him account for the purchase-money. The court has no jurisdiction.⁷⁷

3. Action by A, a foreigner, against X, a foreigner, and against Y & Co., an English company formed for working a Russian mine, to restrain the English company from paying to X part of the profits of the mine which A claims by way of commission. The court has no jurisdiction.⁷⁸

4. A files a bill for discovery to obtain inspection of documents in X's possession in England in aid of proceedings about to be taken for recovery of land in India. The court has no jurisdiction.⁷⁹

5. H and W, domiciled in France, marry in France. A marriage contract provides that the community regime shall apply to their after-acquired property. H acquires land in India, goes through a ceremony of marriage with S, and settles the land on trusts for the benefit of S and her children. A, the only son of H and W, brings an action against X and Y, the trustees of the settlement, claiming a share in the land in India. The court has no jurisdiction.⁸⁰

6. A & Co., a Portuguese company, bring an action against X & Co., an English company, claiming (1) damages for trespass to lands in South Africa; (2) a declaration that A & Co. are lawfully in possession of the lands; (3) an injunction restraining X & Co. from asserting any title to the lands. The court has no jurisdiction, even if A & Co. abandon claims (2) and (3).⁸¹

7. The circumstances are the same as in Illustration 6, except that A & Co.'s claim is limited to damages for trespass. The High Court and the Court of Appeal have no jurisdiction, but (*semble*) the House of Lords might order the action to be heard.⁸²

8. X negligently allows a fire to spread from his land so that A's house is destroyed. X's land and A's house are situated out of England. The court has (*semble*) no jurisdiction.⁸³

⁷⁶ *Doulson v. Matthews* (1792) 4 T.R. 503; *Roberdeau v. Rouse* (1738) 1 Atk. 543; *Re Holmes* (1861) 2 J. & H. 527 (petition of right); *Doss v. Secretary of State for India* (1875) L.R. 19 Eq. 509, 535, *per* Malins, V.-C.; *Murray v. Secretary of State for India* [1931] W.N. 91; *cf.* *Potter v. Broken Hill Proprietary Co.* (1906) 3 C.L.R. 479; *Commonwealth v. Woodhill* (1917) 23 C.L.R. 482.

⁷⁷ *Re Hawthorne* (1888) 23 Ch.D. 743. *Cf.* *White v. Hall* (1806) 12 Ves. 321; *Ross v. Ross* (1892) 23 O.R. 43; *Purdum v. Pavey* (1896) 26 Can.S.C.R. 412; *Gunn v. Harper* (1901) 2 O.L.R. 611.

⁷⁸ *Matthai v. Galitzin* (1874) L.R. 18 Eq. 340; *cf.* *Blake v. Blake* (1870) 18 W.R. 944.

⁷⁹ *Reimer v. Marquis of Salisbury* (1876) 2 Ch.D. 378; *cf.* *Norton v. Florence Land Co.* (1877) 7 Ch.D. 332; *Moor v. Anglo-Italian Bank* (1879) 10 Ch.D. 681.

⁸⁰ *Deschamps v. Muller* [1908] 1 Ch. 856.

⁸¹ *British South Africa Co. v. Companhia de Mocambique* [1893] A.C. 602.

⁸² *Cf.* *The Tolten* [1946] P. 135, 141-142, *per* Scott, L.J.; *contrast* pp. 163-164, *per* Somervell, L.J.; pp. 168-169, *per* Cohen, L.J.; *cf.* *St. Pierre v. South American Stores, Ltd.* [1936] 1 K.B. 382, 396-7, *per* Scott, L.J.

⁸³ *Brereton v. Canadian Pacific Ry.* (1894) 29 O.R. 57; *Albert v. Fraser Companies* [1937] 1 D.L.R. 39; *contrast* *Malo and Bertrand v. Clement* [1943] 4 D.L.R. 773; *The Tolten* [1946] P. 135; *see* Willis, 15 Can.Bar Rev. 112.

*Exception 1.*⁸⁴—Where the court has jurisdiction to entertain an action against a person under either Rule 27,⁸⁵ or under any of the Exceptions to Rule 28,⁸⁶ the court has jurisdiction to entertain an action against such person respecting an immovable situate out of England (foreign land), on the ground of either—

- (a) a contract between the parties to the action ;
 - or
 - (b) an equity between such parties⁸⁷ ;
- with reference to such immovable.

Comment

The principle on which this Exception, originally derived from the practice of the Court of Chancery, rests is that, though the court has no jurisdiction to determine rights over foreign land, yet, where the court has jurisdiction over a person *from his presence in England*, or now from the court having jurisdiction to serve him with a writ or notice thereof, though he is out of England,⁸⁸ the court has jurisdiction to compel him to dispose of, or otherwise deal with, his interest in foreign land so as to give effect to obligations which he has incurred with regard to the land. The principle has been thus explained : ‘ Courts of Equity have from the time of Lord Hardwicke’s decision in *Penn v. Baltimore*⁸⁹ exercised jurisdiction in personam with respect to foreign land against persons locally within the jurisdiction of the English court in cases of contract, fraud and trust ’.⁹⁰

The obligations which the court will thus enforce are not easily brought under one definite head. ‘ They all depend ’, said Parker, J.,⁹¹ ‘ upon the existence between the parties to the suit

⁸⁴ Westlake, 224–229; Foote, 224–236; Cheshire, 746–760; Falconbridge, 528–542; Goodrich, s. 147; Beale, 437–441, 953–965; *Penn v. Lord Baltimore* (1750) 1 Ves.Sen. 444; *Ewing v. Orr-Ewing* (1883) 9 App.Cas. 34; (1885) 10 App.Cas. 453 (administration action); *Re Clinton* (1903) 88 L.T. 17; *Deschamps v. Miller* [1908] 1 Ch. 856; 863–864, *per* Parker, J.

⁸⁵ *Post*, p. 171.

⁸⁶ *Post*, p. 180.

⁸⁷ See *Re Smith* [1916] 2 Ch. 206. As to what constitutes an equity, see illustrations, pp. 147, 148, *post*, and contrast *Hicks v. Powell* (1869) L.R. 4 Ch. 741, and *Harrison v. Harrison* (1873) L.R. 8 Ch. 342.

⁸⁸ *Jenney v. Mackintosh* (1886) 33 Ch.D. 595; *Duder v. Amsterdamsch Trustees Kantoor* [1902] 2 Ch. 132; *Bawtree v. Great North-West Central Ry.* (1898) 14 T.L.R. 448; *British Controlled Oilfields v. Stagg* (1921) 127 L.T. 209; see Rule 28, Exceptions 3 and 8, *post*, pp. 186, 194.

⁸⁹ (1750) 1 Ves.Sen. 444.

⁹⁰ *Companhia de Mocambique v. British South Africa Co.* [1892] 2 Q.B. 358, 364, *per* Wright, J.; compare *Lord Portarlington v. Soulby* (1834) 3 My. & K. 104, 108, *per* Lord Brougham; *Ewing v. Orr-Ewing* (1883) 9 App.Cas. 34, 40, *per* Lord Selborne.

⁹¹ *Deschamps v. Miller* [1908] 1 Ch. 856, 863.

of some personal obligation arising out of contract or implied contract, fiduciary relationship or fraud, or other conduct which, in the view of the Court of Equity in this country, would be unconscionable, and do not depend for their existence on the law of the locus of the immovable property.'

This indefinite jurisdiction is exceptional, though it is freely exercised within these limits, and is substantially confined to cases in which there is either a contract or an equity between the parties. The decisions have emphasised the following salient points.

(1) The jurisdiction cannot be exercised if the *lex situs* would prohibit the enforcement of the decree. 'If, indeed', said Lord Cottenham,⁹² 'the law of the country where the land is situate should not permit or not enable, the defendant to do what the court might otherwise think it right to decree, it would be useless and unjust to direct him to do the act.' It is, however, difficult to determine what constitutes a prohibition by the *lex situs* sufficiently stringent to prevent the English court from granting a decree. In the very same sentence Lord Cottenham went on to say: 'But when there is no impediment, the courts of this country, in the exercise of their jurisdiction over contracts made here, or in administering equities between parties residing here, act upon their own rules, and are not influenced by any consideration of what the effect of such contracts might be in the country where the lands are situate, or of the manner in which the courts of such countries might deal with such equities.' And in the case in which Lord Cottenham was speaking, a mortgagee by deposit of title deeds was held entitled to priority over the mortgagor's unsecured creditors, although by the *lex situs* of the land the deposit gave him no lien or equitable mortgage over the land at all.⁹³

(2) The jurisdiction cannot be exercised against strangers to the equity unless they have become personally affected thereby. Here again it is difficult to determine what degree of privity prevents a defendant from being a stranger to the equity. If A agrees to sell land to B, and instead conveys the land to C who has notice of the contract, C is a stranger to the equity, and the jurisdiction cannot be invoked against him.⁹⁴ But if a company creates an equitable charge on land in favour of debenture-holders, and sells the land to a purchaser 'subject to the mortgage lien or charge now subsisting', the court has jurisdiction to entertain an action by the debenture-holders against the purchaser to enforce their

⁹² *Ex p. Pollard* (1840) Mont. & Ch. 239, 250.

⁹³ *Ex p. Pollard* (1840) Mont. & Ch. 239, criticised Falconbridge, 529-531; cf. *Re Scheibler* (1874) L.R. 9 Ch. 622; *Coote v. Jecks* (1872) 13 Eq. 579; *Waterhouse v. Stansfield* (1852) 10 Hare 254; *Ex p. Borrodale, re Rucker* (1835) 2 Mont. & Ayr. 398; *Hicks v. Powell* (1869) L.R. 4 Ch. 741; *Martin v. Martin* (1831) 2 Russ. & My. 507; *Re Anchor Line (Henderson Bros.), Ltd.* [1937] Ch. 483; *Burns v. Davidson* (1891) 21 O.R. 547; *Purdum v. Pacey & Co.* (1896) 26 S.C.R. 412; *Northern Trusts v. McLean* [1926] 3 D.L.R. 93.

⁹⁴ *Norris v. Chambers* (1861) 29 Beav. 246; 3 De G. F. & J. 583; cf. *Martin v. Martin* (1831) 2 Russ. & My. 507.

security.⁹⁵ The distinction between buying land with notice of a contract and buying land subject to a charge appears to be a tenuous one, not easily reconcilable with equitable doctrines of constructive notice.

(3) The jurisdiction cannot be exercised if the court cannot effectively supervise the execution of its decree. For this reason the court will not order a sale of foreign land.⁹⁶

(4) The jurisdiction cannot be exercised unless there is some personal equity running from the plaintiff to the defendant. 'There must be some personal element, something more than a naked question of title to foreign land.'⁹⁷

The equitable jurisdiction is anomalous and, as Lord Esher said,⁹⁸ 'seems to be open to the strong objection that the Court is doing indirectly what it dare not do directly'. In the early cases in which the jurisdiction was invoked, the land was situated within British territory, and the exercise of jurisdiction was justifiable because, if there were any courts in the countries then being colonised by Englishmen, the decisions of those courts could not command the same respect as those of the courts in England. In modern times, however, the jurisdiction is much less easy to justify, especially when the land is situated in a country which is politically as well as legally foreign.⁹⁹ A modern judge could hardly say, as Shadwell, V.-C., once said,¹ 'I consider that in the contemplation of the Court of Chancery every foreign court is an inferior court'. In the last resort only the courts of the situs can control the land and the rights of the parties thereto. The exercise of jurisdiction may easily lead to embarrassing conflicts with the courts of the situs.² This aspect of the matter becomes obvious when we consider what effect English courts might be expected to give to foreign equitable decrees purporting to affect English land.³

Illustrations

1. X, who is in England, has executed articles of agreement with A in England with reference to land in Canada. A brings an action against X for specific performance. The court has jurisdiction.⁴

⁹⁵ *Mercantile Investment Co. v. River Plate Co.* [1892] 2 Ch. 303.

⁹⁶ *Grey v. Manitoba Co.* [1897] A.C. 254; *Strange v. Bedford* (1887) 15 O.R. 145; *Chadwick v. Hunter* (1884) 1 Man.L.R. 363.

⁹⁷ *Cheshire*, p. 753; cf. *Re Hawthorne* (1883) 23 Ch.D. 743; *Deschamps v. Miller* [1908] 1 Ch. 856; *Henderson v. Bank of Hamilton* (1893) 23 Can.S.C.R. 716.

⁹⁸ *Companhia de Mocambique v. British South Africa Co.* [1892] 2 Q.B. 385, 404-5.

⁹⁹ *Hanbury, Modern Equity*, p. 65, even suggests that the principle is limited to cases where the land is within British territory. But this goes too far.

¹ *Bent v. Young* (1898) 9 Sim. 180, 191.

² See *Falconbridge*, p. 538; *Corry*, 11 Can.Bar Rev. 211 (1933).

³ *Post*, pp. 348-350.

⁴ See *Penn v. Baltimore* (1750) 1 Ves.Sen. 444; *Tulloch v. Hartley* (1841) 1 Y. & Coll. C.O. 114; *Black Point Syndicate v. Eastern Concessions, Ltd.* (1898) 79 L.T. 758; *British South Africa Co. v. De Beers Consolidated Mines, Ltd.* [1910] 2 Ch. 502; [1912] A.C. 52; *British Controlled Oilfields v. Stagg* (1921) 127 L.T. 209; *Montgomery v. Ruppensburg* (1899) 31 O.R. 433; *Burley v. Knappen* (1910) 13 W.L.R. 715.

2. A is the owner of an estate in St. Christopher, West Indies. X, a creditor of A's, by unfair use of process in local courts, causes A's estate to be sold, and purchases it for much less than its value. X is in England. The court has jurisdiction to decree reconveyance of the estate.⁵

3. A decree is made in the court directing an inquiry to ascertain the amount of the mortgage debt due on lands in a West Indian Island in proceedings for redemption, all parties being in this country. The court has jurisdiction to grant an injunction restraining the mortgagee of the estate from proceeding on a bill of foreclosure in the colonial court.⁶

4. X mortgages land in one of the colonies to A. X is in England. The court has jurisdiction to make a foreclosure decree against X.⁷

5. The court has jurisdiction to take accounts between A and X, tenants of foreign land. A and X are in England.⁸

6. A brings an action against X, who is in England, to be relieved of a charge on A's land in Ireland, which charge has been obtained by fraud. *Semble*, the court has jurisdiction.⁹

7. A brings an action against X, Y and Z to enforce against real estate in Trinidad the trusts of a creditor's deed. X, Y and Z are the persons in whom the legal estate is outstanding. X and Y reside in England, and Z resides in Trinidad. The court has jurisdiction to entertain the action against X and Y, and also against Z, *i.e.*, he may be served with a writ in Trinidad.¹⁰

8. A brings an action against X, who, though out of England, is domiciled or ordinarily resident in England, to be relieved of a charge on A's land in Ireland, which charge has been obtained by fraud. *Semble*, the court has jurisdiction.¹¹

9. A agrees to buy land in Prussia from B, and pays a deposit. A commits suicide, and B sells the land to X, who has notice of the contract. X is in England. A's administrator claims a lien for the deposit against X. The court has no jurisdiction.¹²

10. X and Co., an American company, create an equitable charge on land in Mexico in favour of A, B and C, English debenture-holders in the company. The charge is void by Mexican law for want of registration. X and Co. sell the land to Y and Co., an English company, subject to the charge. The court has jurisdiction in an action by A, B and C against Y and Co. to enforce their security.¹³

11. Action to recover rent due under a lease of premises in Chile. The court has jurisdiction.¹⁴

⁵ *Cranston v. Johnston* (1796) 3 Ves. 170; (1800) 5 Ves. 277. See *Good v. Good* (1863) 33 L.J.Ch. 273; *Jackson v. Petrie* (1804) 10 Ves. 164; contrast *White v. Hall* (1806) 12 Ves. 321.

⁶ *Beckford v. Kemble* (1822) 1 S. & St. 7. See *Booth v. Leycester* (1837) 1 Keen 579; *Bunbury v. Bunbury* (1839) 1 Beav. 318; *Hope v. Carnegie* (1866) L.R. 1 Ch. 320; *Bushby v. Munday* (1821) 5 Madd. 297; *Bent v. Young* (1838) 9 Sim. 180.

⁷ *Toller v. Carteret* (1705) 2 Vern. 494; *Paget v. Ede* (1874) 18 Eq. 118.

⁸ *Scott v. Nesbitt* (1808) 14 Ves. 438. Compare *Carteret v. Petty* (1676) 2 Swanst. 323 (n), where the defendant was out of England.

⁹ *Arglasse v. Muschamp* (1682) 1 Vern. 75. See *Kildare v. Eustace* (1686) 1 Vern. 419; *Angus v. Angus* (1737) West t. Hard. 23.

¹⁰ *Jenney v. Mackintosh* (1886) 33 Ch.D. 595; *Duder v. Amsterdamsch Trustees Kantoor* [1902] 2 Ch. 132; see *Harrison v. Gurney* (1821) 2 Jac. & W. 563.

¹¹ See *Duder v. Amsterdamsch Trustees Kantoor* [1902] 2 Ch. 132; *Bawtree v. Great North-West Central Ry.* (1898) 14 T.L.R. 448; Exception 3 to Rule 28, post, p. 186.

¹² *Norris v. Chambres* (1861) 29 Beav. 246; 3 De G.F. & J. 583; cf. *Martin v. Martin* (1831) 2 Russ. & My. 507.

¹³ *Mercantile Investment Co. v. River Plate Co.* [1892] 2 Ch. 303.

¹⁴ *St. Pierre v. South American Stores, Ltd.* [1936] 1 K.B. 382; cf. *Pelepah Valley (Johore) Rubber Estates, Ltd. v. Sungei Besi Mines, Ltd.* (1944) 170 L.T. 338; *Buenos Ayres Co. v. Northern Ry.* (1877) 2 Q.B.D. 210 (concession royalties); *Findlay v. Rose* [1938] 2 D.L.R. 334 (covenants for title).

*Exception 2.*¹⁵—Where the court has jurisdiction to administer an estate or a trust, and the property includes movables or immovables situated in England and immovables situated abroad, the court has jurisdiction to determine questions of title to the foreign immovables for the purposes of the administration.

Comment

This Exception has never been precisely formulated by judges or text-writers, but its existence can scarcely be doubted. The cases which have been cited in support of it cannot be referred to the first Exception, because there was no contract, no fiduciary relationship and no equity between the parties, nothing but a naked question of title to foreign land. They cannot be explained on the ground that the jurisdictional objection was waived, because the better opinion is that this is not permissible,¹⁶ and in any event it is difficult to see how waiver could be allowed in cases where infants are parties.¹⁷ They may perhaps be justified on the ground that the court can make its adjudication effective indirectly through its control of the trustees or of the other assets situated in England.

Illustrations

1. The King of the Two Sicilies grants land in Sicily to Admiral Nelson for himself and the heirs of his body, with power to appoint a successor. By his will, which also deals with property in England, the admiral devises the land to trustees upon trust for his brother W for life with remainders over. After the admiral's death, and in the lifetime of W, a law is passed in Sicily abolishing entails and making the persons lawfully in possession of estates the absolute owners thereof. W devises the Sicilian land to his daughter B. N claims the land as remainderman under the admiral's will. The court has jurisdiction.¹⁸

2. T devises and bequeaths all his real and personal estate to trustees upon trust to sell and hold the proceeds of sale upon trust for his children during their lives with remainders to their issue. T's property includes land in Sardinia. By Italian law, testamentary trusts are forbidden. The court has jurisdiction to determine who is entitled to the Sardinian land.¹⁹

3. Title to land in Scotland is in dispute between A, who claims as tenant in tail in remainder under a will, and B, the tenant in possession, whose

¹⁵ *Nelson v. Bridport* (1846) 8 Beav. 547; *Bunbury v. Bunbury* (1839) 1 Beav. 318; *Hope v. Carnegie* (1866) L.R. 1 Ch. 320; *Re Clinton* (1903) 88 L.T. 17; *Re Piercy* [1895] 1 Ch. 83; *Re Moses* [1908] 2 Ch. 235; *Re Stirling* [1908] 2 Ch. 344; *Re Pearce's Settlement* [1909] 1 Ch. 305; *Re Hoyles* [1911] 1 Ch. 179; *Re Ross* [1930] 1 Ch. 377; *Re Duke of Wellington* [1948] Ch. 118; see 64 L.Q.R. 265.

¹⁶ *The Tolten* [1946] P. 135, 166, per Somervell, L.J.; Cheshire, p. 721; Beale, p. 1655; contrast *The Mary Mozham* (1876) 1 P.D. 107, 109, per James, L.J., a case which Dicey (5th ed. p. 204, note (c)) said cannot now be regarded as an authority; cf. *Re Duke of Wellington* [1948] Ch. 118, where waiver seems to have been allowed: *sed quaere*.

¹⁷ *E.g.*, *Re Moses* [1908] 2 Ch. 235; *Re Pearce's Settlement* [1909] 1 Ch. 305.

¹⁸ *Nelson v. Bridport* (1846) 8 Beav. 547.

¹⁹ *Re Piercy* [1895] 1 Ch. 83.

legitimacy is challenged by A. The will also deals with property in England. The court has jurisdiction.²⁰

4. By an English marriage settlement W covenants to settle after-acquired property. She subsequently becomes entitled to land in Jersey. By the law of Jersey no trusts of land are permitted and all transfers thereof must be for value. The court has jurisdiction to determine whether the land in Jersey is caught by the covenant to settle.²¹

5. T, a British subject domiciled in Italy, by her English will gives all the residue of her property in England and elsewhere (except property in Italy) to her niece, and by her Italian will gives all her property in Italy to her grand-nephew subject to a usufruct in favour of her niece. The bulk of T's property in Italy consists of land. T's eldest son claims that by Italian law he is entitled to one moiety of her property notwithstanding her testamentary dispositions. The court has jurisdiction.²²

6. W, a British subject domiciled in England, by his Spanish will gives lands in Spain to the person who on his death would become Duke of Wellington and Duke of Ciudad Rodrigo, and by his English will gives all the rest of his property to the person who on his death would become Duke of Wellington. On the death of W, his uncle A becomes Duke of Wellington, his sister B becomes Duchess of Ciudad Rodrigo, and his mother C is his heiress by Spanish law, according to which he can only dispose of half the lands in Spain.²³ The court has jurisdiction to determine whether the Spanish lands pass to A, B or C.²⁴

Exception 3.—The court has jurisdiction to entertain an action *in rem* against a ship to enforce a maritime lien on the ship for damage done to an immovable situate out of England, and perhaps has jurisdiction to entertain any Admiralty action in respect of foreign land, whether *in rem* or *in personam*.

Comment

The narrower proposition laid down in this Exception was in substance the decision of the Court of Appeal in *The Tolten*.²⁵ The wider proposition rests on expressions of opinion by Scott and Somervell, L.JJ., in the same case.²⁶ Scott, L.J., pointed out that the *Mocambique* rule is a conception wholly foreign to the essential nature of Admiralty jurisdiction as shown by its history, judicial and Parliamentary.²⁷ 'Suppose', he said,²⁸ 'ship A, by one and the same act of negligent navigation at Lagos, to have caused injury to (1) the plaintiff's wharf, (2) merchandise on the wharf, (3) people on the wharf, (4) ship B lying near the wharf. On those assumed facts, the injured parties Nos. 2, 3 and 4 can conduct a suit *in rem*

²⁰ *Re Stirling* [1908] 2 Ch. 344.

²¹ *Re Pearce's Settlement* [1909] 1 Ch. 305.

²² *Re Ross* [1930] 1 Ch. 377.

²³ This important fact is omitted from the report but has been supplied by one of the counsel engaged in the case.

²⁴ *Re Duke of Wellington* [1948] Ch. 118.

²⁵ [1946] P. 135.

²⁶ *Ibid.*, p. 147, *per* Scott, L.J.; p. 167, *per* Somervell, L.J.

²⁷ *Ibid.*, p. 154.

²⁸ *Ibid.*, pp. 146-147.

in the Admiralty Court, but if the *Mocambique* rule is applied, No. 1 is barred. Can anything more contrary to common sense be imagined? This argument undoubtedly justifies the Exception, and perhaps throws doubt on the reasonableness of the *Mocambique* rule itself.²⁹

Illustration

A is the owner and occupier of a wharf at Lagos, Nigeria. The wharf is damaged by the negligent navigation of a ship belonging to B. The court has jurisdiction to enforce a maritime lien against the ship.³⁰

RULE 21.³¹—The court has no jurisdiction to administer a foreign charity under the supervision of the court or to settle a scheme for such a charity.

Comment

It is perfectly clear that the court cannot effectively control trustees who will probably have to hold property outside England, and, if it appointed for a charity trustees both within and without England, the former would have difficulty in controlling their co-trustees outside the jurisdiction. In these circumstances the court, in the case of a charitable bequest for foreign beneficiaries, will consider if the purpose is one which can legally be carried out in the foreign country indicated, and, if it is legal, will order payment to the trustees indicated.³² It will not normally settle a scheme for the administration of such a charity, though it may authorise application to a suitable foreign court to frame such a scheme.³³ On the other hand, if the charitable trust is English in the sense that the testator was domiciled in England, the trustees are English and the funds are situated and administered in England, then if the foreign objects of the trust fail, the court has jurisdiction to direct an application of the trust funds cy-pres.³⁴

Illustrations

1. T, by will, gives certain funds to the President of the United States to build a college in Pennsylvania. The trustee disclaims. The court has no jurisdiction to settle a scheme for the administration of the trust.³⁵

²⁹ Cf. the similar illustration given by Fry, L.J., in *Companhia de Mocambique v. British South Africa Co.* [1892] 2 Q.B. 358, 414.

³⁰ *The Tolten* [1946] P. 135.

³¹ Compare *Provost of Edinburgh v. Aubrey* (1754) Ambler 256; *Oliphant v. Hendrie* (1784) 1 Bro. C.C. 571; *Att.-Gen. v. London* (1790) 3 Bro. C.C. 171; *Att.-Gen. v. Lepine* (1818) 2 Swanst. 181; 1 Wils. Ch. 465; *Emery v. Hill* (1826) 1 Russ. 112; *Mayor of Lyons v. East India Co.* (1836) 1 Moo. P.C. 175; *Att.-Gen. v. Sturge* (1854) 19 Beav. 597; *New v. Bonaker* (1867) L.R. 4 Eq. 655; *Re Robinson* [1931] 2 Ch. 122; *Re Marr's Will Trusts* [1936] Ch. 671; *Re Lipton's Trustees* [1943] S.C. 521; *Neech's Executors* [1947] S.C. 119.

³² *Re Robinson* [1931] 2 Ch. 122 (bequest to German Reich for benefit of disabled German soldiers).

³³ *Re Fraser* (1883) 22 Ch.D. 827; *Re Marr's Will Trusts* [1936] Ch. 671; *Re Lipton's Trustees* [1943] S.C. 521; *Neech's Executors* [1947] S.C. 119.

³⁴ *Re Colonial Bishoprics Fund* [1935] Ch. 148.

³⁵ *New v. Bonaker* (1867) L.R. 4 Eq. 655.

2. T, domiciled in England, by will gives certain funds to trustees to establish educational charities in Troon, Scotland, for the benefit of the inhabitants thereof. The trustees build a college at Troon and thereafter have a large surplus in their hands. The court gives liberty to the trustees to carry into effect a scheme for the administration of the surplus funds, such scheme to be settled by the Court of Session.³⁶

RULE 22.—The court has no jurisdiction at common law to entertain an action—

- (1) for the enforcement, either directly or indirectly, of a penal,³⁷ revenue,³⁸ or political³⁹ law of a foreign State; or
- (2) where the grounds of the action involve an act of State.⁴⁰

Comment

Penal laws.—‘The common law considers crimes as altogether local, and cognisable and punishable exclusively in the country

³⁶ *Re Marr's Will Trusts* [1936] Ch. 671, compare *Re Lipton's Trustees* [1943] S.C. 521, where on similar facts the Court of Session, having examined the trustees' proposed scheme, referred it to the High Court for approval; *Neesch's Executors* [1947] S.C. 119, where the testator was domiciled in Scotland and the charitable objects were in England, and the Court of Session found that the trustees' proposed scheme was in accordance with Scots law before referring it to the High Court for approval.

³⁷ Story, ss. 620–622; Piggott, p. 88; Minor, s. 10; Goodrich, ss. 8–9, Beale, Vol. 2, p. 879; *Le Louis* (1817) 2 Dod. 210; Cheshire, p. 174–196; Wolff, ss. 158–177; Wortley, 67 Recueil des cours de l'académie de droit international (1939) 1, pp. 345–425, Problèmes soulevés en droit international par la législation sur l'expropriation; *Follott v. Ogden* (1789) 1 H.Bl. 123; *Wolf v. Osholm* (1817) 6 M. & S. 92; *Huntington v. Attrill* [1893] A.C. 150; *Lynch v. Provisional Government of Paraguay* (1871) L.R. 2 P. & D. 268, 272; *Lecouturier v. Rey* [1910] A.C. 262; *Re Fried Krupp Aktiengesellschaft* [1917] 2 Ch. 188; *Raulm v. Fischer* [1911] 2 K.B. 93; *Banco de Vizcaya v. Don Alfonso* [1935] 1 K.B. 140. Compare Intro., p. 17, ante, and Rule 111, p. 465, post.

³⁸ *Att-Gen. for Canada v. Schulze* (1901) 9 Sc.L.T. 4; *Municipal Council of Sydney v. Bull* [1909] 1 K.B. 7; *City of Regina v. McVey* (1922) 23 O.W.N. 32; *Re Visser* [1928] Ch. 877, 882; Goodrich, s. 64; Beale, Vol. 3, 1635; *Milwaukee County v. M. F. White Co.* (1935) 56 S. Ct. 225. Compare *Cotton v. R.* [1914] A.C. 176, 195, per curiam, *Indian & General Investment Trust, Ltd. v. Borax Consolidated, Ltd.* [1920] 1 K.B. 539, 550; *Emperor of Austria v. Day* (1861) 3 De G.F. & J. 217, 241; *Spiller v. Turner* [1897] 1 Ch. 911.

³⁹ *Emperor of Austria v. Day* (1861) 3 De G.F. & J. 217. But proprietary rights are freely recognised; *Hullet v. King of Spain* (1828) 1 D. & C. 169; *Nabob of Arcot v. East India Co.* (1798) 3 B.C.C. 291; 4 B.C.C. 180; *Emperor of Brazil v. Robinson* (1838) 1 Dowl. P.C. 522; *King of Two Sicilies v. Willcox* (1851) 1 Sim. (n.s.) 301; *King of Italy v. De Medici* (1918) 34 T.L.R. 632; *Haile Selassie v. Cable and Wireless Co.* [1938] Ch. 545, 889, ib. No. 2 [1939] Ch. 182; *United States v. Prioleau* (1865) 2 H. & M. 559; proceeds of taxes in agent's hands; *United States v. McRae* (1867) L.R. 4 Eq. 327; 3 Ch. 79.

⁴⁰ *Doss v. Secretary of State for India* (1875) L.R. 19 Eq. 509; *Buron v. Denman* (1848) 2 Ex. 167; *West Rand Gold Mining Co. v. R.* [1905] 2 K.B. (G.A.) 561; compare *Secretary of State for India v. Kamachee Boye Saheba* (1859) 13 Moo. P.C. 22; *Elphinstone v. Bedreeshund* (1830) 1 Knapp 316; *Duke of Brunswick v. King of Hanover* (1844) 6 Beav. 1; *Johnstone v. Pedlar* [1921] 2 A.C. 262; *Walker v. Barré* [1892] A.C. 491.

where they are committed. . . . The same doctrine has been frequently recognised in America. . . . Chief Justice Marshall, in delivering the opinion of the Supreme Court, said: "The Courts of no country execute the penal laws of another".⁴¹ They do not even execute such laws indirectly on property rights here. For example in *Folliott v. Ogden*⁴² it was held after the War of Secession, that the plaintiff's right to sue on a bond in an English Court was not affected by a confiscation of property imposed by the New York Legislature. Lord Loughborough said: 'A right to recover any other specific property such as plate or jewels in this country, would not be taken away by the criminal laws of another. The penal laws of foreign countries are strictly local, and affect nothing more than they can reach and can be seized by virtue of their authority; a fugitive who comes hither, comes with all his transitory rights; he may recover money held for his use, stock, obligations and the like—and cannot be affected in this country by proceedings against him in that which he has left beyond the limits of which proceedings do not extend'. In *Wolff v. Oxholm*,⁴³ Lord Ellenborough held that payment to the Danish Government of a debt due to an Englishman, by virtue of a Danish order of sequestration, did not operate to discharge the Danish debtor from the claim of the English creditor. The maxim *odiosa sunt restringenda* goes back to the Bartolists.

'The rule that the courts of no country execute the penal laws of another applies not only to prosecutions and sentences for crimes and misdemeanours, but to all suits in favour of the State for the recovery of pecuniary penalties for any violation of statutes for the protection of its revenue, or other municipal laws, and to all judgments for such penalties. If this were not so, all that would be necessary to give ubiquitous effect to a penal law would be to put the claim for a penalty into the shape of a judgment'.⁴⁴

Hence the High Court cannot entertain either an action for the recovery of a penalty due under the law of a foreign country, or an action on a foreign judgment for such penalty,⁴⁵ unless of course an English statute expressly authorises the recognition of the foreign penal law.⁴⁶

⁴¹ See Story, ss. 620, 621, citing *The Antelope*, 10 Wheat, 66, 123.

⁴² *Folliott v. Ogden* (1789) 1 H.Bl. 123; *Ogden v. Folliott* (1790) 3 T.R. 726; *Rafael v. Verelst* (1775) 2 W.Bl. 983.

⁴³ (1817) 6 M. & S. 92.

⁴⁴ *Wisconsin v. Pelican Co.* (1888) 127 U.S. 265, 290, *per curiam*. The passage is cited with approval not only by the Supreme Court in *Huntington v. Attrill* (1892) 146 U.S. 657, 671, but also by the Privy Council in *Huntington v. Attrill* [1893] A.C. 150, 157.

⁴⁵ As to effect of foreign judgments, see Chap. 16, *post*, and especially Exception 1 to Rule 86, *post*.

⁴⁶ *Re Amand* (No. 1) [1941] 2 K.B. 239; (No. 2) [1942] 1 K.B. 445; appeals dismissed on other grounds, [1942] 2 K.B. 26; [1943] A.C. 147, is explained by the existence of the Allied Forces Act, 1940, s. 1 (3) and the Order in Council thereunder relating to the apprehension and punishment of deserters from the Netherlands forces.

Question.—What is penal law? The application of Rule 22 raises the difficult question, When is a law to be considered a penal law? or, what is really the same inquiry under another form, When is an action to be considered a penal action?

These inquiries are to be answered as follows: A 'penal law' is strictly and properly a law which imposes punishment for an offence against the State; and a 'penal action' is a proceeding for the recovery, in favour of the State, of a penalty due under a penal law.⁴⁷ A law, on the other hand, is not a penal law merely because it imposes an extraordinary liability on a wrongdoer, in favour of the person wronged, which is not limited to the damages suffered by him; and an action for enforcing such liability, by the recovery of the penalty due to the person wronged, is not a penal action: the essential characteristic, in short, of a penal action is that it should be an action on behalf of the Government or the community, and not an action for remedying a wrong done to an individual.⁴⁸ A proceeding, then, in order to come within Rule 22, must be in the nature of a suit in favour of the State whose law has been infringed.

Revenue laws.—While refusal to enforce penal laws is easily understood, it is at first sight more difficult to justify the refusal of English courts to enforce the revenue laws of foreign States. Not only can no action be brought to recover a revenue demand of a foreign Government, whether embodied in a judgment or not,⁴⁹ but statutory authority exists under which negotiable instruments which are not duly stamped according to the law of their place of issue are nevertheless held valid in England.⁵⁰ The refusal may, however, be justified on grounds of public policy. Revenue legislation by foreign States might be definitely injurious to British interests, or it might be aimed at foreigners under circumstances, e.g., in the case of political refugees, in which enforcement in England would be held to be contrary to public policy. Inasmuch as the application of this principle and consequent differentiation between foreign revenue demands might prove a source of political embarrassment, the courts, in refusing, as a matter of principle, to enforce any revenue legislation, may be deemed to be observing a doctrine of public importance. The Court of Appeals of New York has referred to the 'well-settled principle of private international law which precludes one State from acting as a collector of taxes for a sister State and from enforcing its penal or revenue laws as such. The rule is universally recognised that the revenue laws of

⁴⁷ *Huntington v. Attrill* (1892) 146 U.S. 657, 667, opinion of Supreme Court; *Huntington v. Attrill* [1893] A.C. 150, 156, 157, judgment of Privy Council.

⁴⁸ *Ibid.*

⁴⁹ *The Eva* [1921] P. 454.

⁵⁰ Bills of Exchange Act, 1882, s. 72, sub-s. (1) (a): see Rule 153, *post*, and see Finance Act, 1938, s. 42.

one State have no force in another'.⁵² Indeed the modern tendency is for States to enter into conventions to limit cases where otherwise a man might be taxed twice on the same income.

Political laws.—No court can be expected to afford aid to a foreign sovereign in enforcing matters of sovereignty.

The operation of the legislative, executive or judicial acts of a sovereign is territorial: such acts are enforced by the virtue of the sovereign's territorial authority. Each sovereign therefore possesses exclusive control over his own immovables, though of course this may be subject to claims based on treaty or public international law. Claims by a sovereign to movable property outside the territory of that sovereign, when such property has not been reduced to possession, will not usually be enforced by foreign courts where the sovereign's claim is based solely on his unilateral legislative, executive or judicial act, and not on international law, when such act operates to the detriment of an owner outside the sovereign's territory. The following points may be made about foreign 'political laws':—

(a) There is no analogy between the international recognition of the claims of a trustee in bankruptcy and the claims of a State or State representative based on a confiscation for political purposes; in the words of Buller, J., in *Folliott v. Ogden*,⁵³ 'The instance put at the bar of an assignment by the commissioners of a bankrupt, which divests the property of the bankrupt without actual seizure, bears no analogy to this case. For there is a wide distinction between questions arising on the law of attainder between the Crown and a subject. And I shall never agree in extending the same rule of construction, which obtains in the former instance, to the latter case. It would be attended with peculiarly serious consequences in the present state of Europe; since then the property of foreigners, who are daily resorting for refuge to this country, from confiscations at home, would not be protected against the designs of artful men who could gain possession of it by any means . . .'.⁵⁴

(b) There is a marked tendency, by no means confined to the courts of England, to construe foreign legislation of a political and confiscatory character as restrictively as possible, for example, by construing it as operating only within the territory of the sovereign. The decision of the House of Lords in *Lecouturier v. Rey*,⁵⁴ restricting the claims of the French Government to the trade marks of the Chartreux in France, was paralleled in most other countries dealing with these claims.⁵⁵

⁵² *State of Colorado v. Harbeck* (1921) 232 N.Y.71. Cf. *Frankman v. Anglo Prague Bank* [1948] 1 K.B. 730; reversed [1948] 2 All E.R. 1025.

⁵³ (1789) 1 H.Bl. 123, pp. 744-745 in K.B. in error, affirmed by the House of Lords. See on the subject of penal and political legislation generally, Rowson: 'Some Private International Law Problems arising out of European Racial Legislation, 1938-45', 10 Mod.L.R. 345 (1947).

⁵⁴ [1910] A.C. 262; cf. *Frankfurter v. W. L. Essner, Ltd.* [1947] Ch. 629.

⁵⁵ The decisions are collected in '*Mélanges Pillet*', Vol. 2, Paris.

(c) The *personal fortune* of a deposed sovereign situated in a foreign country cannot be attacked by the legislation of those succeeding him in power.⁵⁶

(d) English courts will construe the claims of a foreign government to *public property* situated here, in accordance with the principles of the 'Law of Nations', i.e., 'international law',⁵⁷ and will allow a new *de jure* sovereign to succeed to public property of the State situated here.⁵⁸ It should be noted, however, that, as we have seen, a mere claim of a foreign government to private property (whether of a sovereign or a private individual) in this country is not in itself a legal justification for such claim⁵⁹: nor does the passing of legislation by the claimant state in its own legislature in any way strengthen that claim. There is no magic in legislation of a State which will justify a claim to confiscate property outside the territory of the State making the legislation.⁶⁰

The claim of a *de facto* sovereign to any property situate abroad will not prevail against the rights of the *de jure* sovereign⁶¹ or the owner.⁶²

(e) The fact that the claim of the foreign State is based on general legislation designed to extinguish the economic life of a particular race,⁶³ or class, which has not been convicted of crime, will not give any extra efficacy to extra-territorial claims based on confiscatory legislation⁶⁴; indeed it will be an added cause for an English court to disregard it, since English courts try to refrain from giving effect to a foreign penal status.⁶⁵

(f) If, however, a foreign sovereign has taken possession of a movable within his territory, then so long as the decision of the Court of Appeal in *Princess Paley Olga v. Weisz*⁶⁶ stands unreversed, the title of those who buy the property from the sovereign within his territory will be recognised when the property is brought here. But this view does not find general acceptance abroad, and should the chattel (confiscated without indemnity and not under the criminal law) be taken to another jurisdiction than the English, the

⁵⁶ *Banco de Vizcaya v. Don Alfonso de Borbon* [1935] 1 K.B. 140.

⁵⁷ Lauterpacht, Grotius Society, 25 (1939) pp. 52-67, 77-84; Oppenheim, Vol. 1, pp. 37-39; *v* also *Emperor of Austria v. Day and Kossuth* (1861) 2 Giff 628, 678-699, 'A public right recognised by the Law of Nations is part of the Common Law of England', *per* Stuart, V.-C.

⁵⁸ *Haile Selassie v. Cable and Wireless* (No. 2) [1939] Ch. (C.A.) 182; Wortley, 67 Rec. des cours 1, *op. cit.*, pp. 388-403, and *Frankfurter v. W. L. Exner, Ltd.* [1947] Ch 629.

⁵⁹ *Ante*, p. 134.

⁶⁰ *Tallma Laevauhisus A/S v. Estonian State S.S. Line* (1947) 80 Ll.L.Rep (C.A.) 99; *Zarine v. Ramava (Owners)* [1942] Ir.R. 148.

⁶¹ *Haile Selassie v. Cable and Wireless* [1938] Ch. 839.

⁶² *Tallma Laevauhisus A/S v. Tallmyn Co., Ltd.* (1946) 175 L.T. 285.

⁶³ *Frankfurter v. W. L. Exner, Ltd.* [1947] Ch. 629 (Nazi anti-Jewish confiscation); *Lowenthal v. Att.-Gen.* [1948] 1 All E.R. 295.

⁶⁴ *Ibid.*, and see Wortley, 67 Rec. des cours 1, *op. cit.*, p. 393.

⁶⁵ Though *Paley's Case* was in effect approved *obiter* by Romer, J., in *Frankfurter v. W. L. Exner, Ltd.* [1947] Ch. 629 at p. 643.

⁶⁶ [1929] 1 K.B. 718.

claims of such a purchaser may well be disregarded in such other jurisdictions.⁶⁷

The litigation in Europe in connection with the cargoes of expropriated Mexican petrol bear out the views expressed here. It may well be that the House of Lords will at some future date reconsider the decision in *Princess Paley Olga v. Weisz*⁶⁸ in the light of international law and foreign practice in the matter of confiscations.

(g) Requisition against indemnity, or confiscation in accordance with international law will of course be recognised by our courts, e.g., the confiscation of the ship or goods of a pirate.⁶⁹

(h) The results of legislation on expropriation which provides an indemnity, may also be recognised in England, even if the legislation be designed to have extra-territorial effect, provided it be made by a recognised Government and for a legitimate motive, e.g., as an economic measure, to further the conduct of a legitimate war.⁷⁰

(i) The State which creates, may also dissolve, a foreign corporation, and thus provide a ground for the winding up of an English branch.⁷¹ But this will not give the dissolving State a title to the assets of the corporation outside its control.⁷²

(j) A foreign judgment, of any kind, whether confiscatory or not, given against the principles of natural justice is not entitled to recognition in England⁷³: similarly a judgment purporting to put into effect 'racial'⁷⁴ or similar discriminatory laws will be disregarded in English courts.⁷⁵

Act of State.—Although English courts assert a wide jurisdiction in respect of actions by governmental officials within British territory, they do not claim to apply municipal law to the actions of the British Government or the Government of any British possession towards foreigners⁷⁶ outside British territory. Acts done in the course of the annexation of a foreign country are properly remediable (if at all) by diplomatic or other methods of international law and not by action in an English court.⁷⁷ But the doctrine is strictly limited, and it is extremely doubtful whether act of State can ever be pleaded as a defence in respect of a tort committed on British territory. Though an enemy alien may be interned or

⁶⁷ V. cases collected, Wortley, *op. cit.* Chap 4.

⁶⁸ [1929] 1 K.B. 718; Wortley, *op. cit.* p. 425.

⁶⁹ 1 Oppenheim, p. 566, and see Smith, 23 B.Y.B.I.L. 227 (Booty of War).

⁷⁰ *Lorentzen v. Lydden & Co., Ltd.* [1942] 2 K.B. 202.

⁷¹ *Lazard Brothers v. Midland Bank* [1933] A.C. 289.

⁷² Wortley: 14 B.Y.B.I.L. (1933), p. 1. The Dissolution of Foreign Corporations. Sack: 1938 N.Y. Law Q., p. 506, and 1939 *ibid.*, p. 253; Schaeftel 1938 *Clunet*, p. 452.

⁷³ *Post*, p. 396.

⁷⁴ Wolff, p. 174.

⁷⁵ V. *ante*, p. 18, and *Oppenheimer v. Rosenthal* [1937] 1 All E.R. 23.

⁷⁶ Even British subjects cannot claim against the British or colonial Government if the claim arises out of such an Act of State; see *Cook v. Sprigg* [1899] A.C. 572; *Salaman v. Secretary of State for India* [1906] 1 K.B. (C.A.) 613.

⁷⁷ *The Rajah of Coorg v. East India Co.* (1861) 29 Beav. 300; 7 Moore Ind.App. 476, 531.

expelled as an act of State,⁷⁸ a British subject who had lost his nationality by naturalisation during war in a neutral country, and who had returned to Ireland and there was engaged in illegal drilling of persons disaffected to the Crown, could nevertheless maintain successfully an action in respect of the seizure and detention of cash and a cheque found in his possession when arrested.⁷⁹

As regards acts of State authorised by foreign Governments, the courts in England would doubtless apply the same principle.⁸⁰ Warlike operations undertaken by order of a foreign Government against British territory, and the counter-measures of the British Government, create no ground at common law for civil claims to be enforced in English courts.⁸¹ As the killing of British subjects by foreign invaders, or their killing by British soldiers, is not an offence against English criminal law, so injury to property or person on either side is *prima facie* no ground of civil proceedings, though a treaty of peace may impose such a liability. An act of State, to acquire this character, must either be expressly authorised by the sovereign power of any country or must be ratified. Thus the Jameson incursion into the Transvaal in 1895, by not receiving ratification by the British Government, remained a mere illegality, justifying full jurisdiction over the participants by the courts of the South African Republic.

Illustrations

(1) Penal laws.

1. X incurs a penalty of £100 for the infringement of the law of a foreign country prohibiting the sale of spirits. The penalty is recoverable in the courts of the foreign country in an action for debt brought by an official of the foreign Government. X is in England. The proper official brings an action in the High Court for the recovery of the £100. The court has no jurisdiction.⁸²

2. The circumstances are the same as in Illustration 1, except that the penalty is recoverable under the law of the foreign country by an informer, and A, the informer, brings an action for the recovery of the £100 due from X. The court has no jurisdiction.⁸⁴

⁷⁸ *Netz v. Ede* [1946] Ch. 224; *R. v. Bottrill* [1947] K.B. 41 (C.A.).

⁷⁹ *Johnstone v. Pedlar* [1921] 2 A.C. 262. For the general principle of the right of the court to investigate any action taken by officers of the Crown to decide whether it is within prerogative or statutory power: see *Re Ferdinand, ex-Tsar of Bulgaria* [1921] 1 Ch. 107. For the right of an alien to habeas corpus, see *Hottentot Venus' Case* (1810) 13 East 195; *Re Besset* (1844) 14 L.J.M.C. 17; *Folkain v. Critico* (1811) 13 East 457: a prisoner of war is naturally not so entitled; *R. v. Schiener* (1759) 2 Burr. 765; *Three Spanish Sailors' Case* (1779) 2 W.Bl. 1324; Nelson, p. 72; McNair, *Legal Effects of War*, 2nd ed.; Holdsworth, *History of Acts of State in English Law*, 41 Col.L.R. 1313 (1941).

⁸⁰ See 59 L.Q.R. 42, 155 (1943) Mann, 'The Sacrosanctity of the Foreign Act of State'; *post*, p. 347.

⁸¹ The matter was regulated by the War Damage Act, 1943, and Personal Injuries (Emergency Provisions) Act, 1939.

⁸² Compare *Huntington v. Attrill* [1893] A.C. 150.

⁸⁴ *Semble*, that this is so, even though the penalty goes wholly to the informer; for the object of the action is not to remedy a wrong done to the plaintiff, but to punish the defendant for violating the law of the foreign State. Compare *Robinson v. Currey* (1881) 7 Q.B.D. (C.A.) 465, and *Saunders v. Wiel* [1892] 2 Q.B. (C.A.) 321.

3 Under the law of an American State, X, the treasurer of an insurance company in the State, incurs a penalty, amounting in English money to £100, for not making certain returns in respect of the business of the company. The penalty is, under the law of the State, recoverable by a State official. Half the penalty, when recovered, is to be paid by him into the State treasury, and half is to be retained for himself. A, the State official, obtains judgment against X in the court of the American State for the £100. X is in England. A brings an action on the judgment against X. The court has no jurisdiction.⁸⁵

4. Under the law of New York, the director of a trading corporation, who signs certain certificates with regard to the affairs of the corporation knowing such certificates to be false, becomes liable for the debts of the corporation. Under this law X, a director of a New York company, becomes liable to A, a creditor, for a debt due from the company. X is in England. A brings an action against X for the debt. *Semble*, the court is not, under Rule 22, deprived of jurisdiction.⁸⁶

5. The circumstances are the same as in Illustration 4, except that A has recovered judgment in the court of New York for the penalty, and brings an action against X in England on the judgment. *Semble*, the court is not, under Rule 22, deprived of jurisdiction.⁸⁷

(ii) *Revenue laws.*

6. Under an Act of the Parliament of New South Wales the municipality of Sydney is authorised to carry out improvements in the city and to charge the cost to the owners of the property affected. X, an owner of property affected by the improvement scheme, is resident in England. The council of the municipality brings an action against X for the sum due from him under the New South Wales Act. The court has no jurisdiction.⁸⁸

7. X, resident in England, owns property in Canada. A suit is brought against him there to recover taxes due to the Government in respect of his property, and judgment is given against him for the amount of the taxes due and costs. Execution is levied on the property, but the amount realised is insufficient to meet the amount of the judgment and costs. An action is brought against X in England to recover the amount of costs awarded by the Canadian judgment. The court has no jurisdiction.⁸⁹

8. X, resident in England, owns land in Australia, and is assessed to income tax in respect of that land. An action is brought against him in England to recover the amount. The court has no jurisdiction.⁹⁰

9. X is the legal personal representative in England of a Dutch national domiciled at his death in Holland. Under Dutch law duties are payable in respect of his estate. An action is brought by the Queen of Holland against X to recover the sum due. The court has no jurisdiction.⁹¹

(iii) *Political laws.*

10. A, a Jew residing in Austria, is appointed agent of B, an English company, to sell B's goods in Austria on commission, the property remaining in B till sale. After the position of Jews in Austria begins to get difficult,

⁸⁵ See *Wisconsin v. Pelican Co.* (1888) 127 U.S. 265.

⁸⁶ *Huntington v. Attrill* [1893] A.C. 150. It is, of course, possible that the jurisdiction of the court may be excluded under some other Rule in this Digest.

⁸⁷ *Huntington v. Attrill* [1893] A.C. 150.

⁸⁸ *Municipal Council of Sydney v. Bull* [1909] 1 K.B. 7.

⁸⁹ Compare *Att.-Gen. for Canada v. Schulze* (1901) 9 Sc.L.T. 4, Ct. of Sess., a case in which imported goods had been confiscated under the Customs Act.

⁹⁰ Compare *City of Regina v. McVey* (1922) 23 Ont.W.N. 32, following *Municipal Council of Sydney v. Bull* [1909] 1 K.B. 7.

⁹¹ *Re Visser* [1928] Ch. 877.

A starts to remit funds to B in England on account of goods consigned to him but not yet sold. In April, 1938, a decree of the new Nazi Government in Austria appoints a commissar to run A's business and A is imprisoned. A then has a credit of £2,200 with B. The commissar continues to sell B's goods but does not remit the proceeds; B debits A's credits with the price. A is entitled to recover since the commissar's action was confiscatory, and as such could affect property in Austria, but not property in England, even though intended to have extra-territorial effect⁹²

11. The King of Spain deposits securities with the Westminster Bank in London to the order of a Spanish bank as his agents. In 1931 by a decree of the Spanish Republic all private property of the King of Spain is seized and bankers who have such property in deposit are ordered to deliver it up to the Spanish Treasury. A later decree by the Constituent Cortes of Spain in 1931 declares the ex-King to be guilty of high treason and an outlaw and that all the properties, rights and grounds of action belonging to him in Spain are to be seized for its own benefit by the Spanish State. The decrees are penal and will not affect the securities deposited in England⁹³

12. The Norwegian Government makes a decree in May, 1940 (shortly before leaving Norway), by which all ships registered in Norway and situated outside German-occupied Norway, and owned (inter alia) by a company carrying on business in that area, are requisitioned against compensation, to enable the Allies to prosecute the war against Germany, and a Minister is appointed curator and as such entitled to collect claims belonging to the owners, compensation to be given. An Oslo company affected by the decree is owed a debt due from a London firm. The decree vests the debt in the Minister.⁹⁴

13. A ship belonging to A & Co, an Estonian shipping company, is lost near the Scilly Isles in July, 1940, and A claims the insurance money in England. In June, 1940, a pro-Russian government is set up in Esthonia and H.M. Government recognises the *de facto* but not *de jure* entry of Esthonia into the U.S.S.R. Subsequently the Esthonian Government decides that all Esthonian shipping companies are to be nationalised and their property confiscated and vested in B. Before the German occupation of Esthonia the control of A & Co. is shifted to Stockholm. A & Co. is entitled to the insurance money.⁹⁵

(iv) *Acts of State.*

14. X, an officer of the British Crown, duly authorised, destroys property of a Portuguese subject on the West Coast of Africa. Portugal and the United Kingdom are at peace, and the action done is tortious by the law of the place where it is committed. The action taken is an act of State, and the court has no jurisdiction to entertain an action by the person aggrieved against X.⁹⁶

15. X, an alien enemy in charge of hostile forces, lands in England and in the course of legitimate military operations destroys A's property. X revisits England after peace has been declared. A brings an action against X to recover damages for the injury done by X to his property. The court has no jurisdiction.

⁹² *Frankfurter v. W. L. Ezner, Ltd.* [1947] Ch. 629.

⁹³ *Banco de Vizcaya v. Don Alfonso de Borbon y Austria* [1935] 1 K.B. 140.

⁹⁴ *Lorentzen v. Lydden & Co., Ltd.*, [1942] 2 K.B. 202.

⁹⁵ *Tallina Laevauhisus A/S v. Tallinn Co., Ltd.* (1946) 175 L.T. 285.

⁹⁶ *Buron v. Denman* (1848) 2 Ex. 167. *Conf. Poll v. Lord Advocate* (1899) 1 F. 823. See Crown Proceedings Act, 1947, ss. 2, 11; Rules 173 and 174, *post*.

2. WHERE JURISDICTION EXISTS

(1) *In respect of Persons.*

RULE 23.⁹⁷—Subject to Rule 19, and to the Exception hereinafter mentioned, no class of persons is, as such, excluded or exempt from the jurisdiction of the court, *i.e.*, any person may be a party to an action or other legal proceeding in the court.

Comment

The High Court, subject to the very slight limitations referred to in our Rule, is open to persons of every description. No one is, on account of his mere position or status, precluded from being plaintiff in an action, or from taking legal proceedings in the court. Nor, again, is anyone, on account of his mere position or status, exempt from the liability to be made defendant in an action, or, speaking generally, to have legal proceedings taken against him in the High Court. In this matter, a British subject and an alien,⁹⁸ a natural person and a corporation,⁹⁹ an infant, a married woman, a peer, and (subject of course, to the effect of Rule 19) a foreign sovereign or State recognised¹ by the British Crown,² stand in exactly the same position. No foreigner is, as such, required even to give security for costs.³

⁹⁷ *Phillips v Eyre* (1870) L.R. 6 Q.B. 1, 28, judgment of court delivered by Willes, J. Compare, especially, Illustrations to Rule 27, *post*.

⁹⁸ *De la Vega v. Vianna* (1830) 1 B. & Ad. 284; *Melan v. Duke de Fitzjames* (1797) 1 B. & P. 138; *Worms v. De Valdor* (1880) 49 L.J.Ch. 261.

⁹⁹ *Magdalena Co. v. Martin* (1859) 2 E. & E. 94, *Carron Co. v. MacLaren* (1855) 5 H.L.C. 416; *Westman v. Aktiebolaget, etc.* (1876) 1 Ex.D. 237

¹ See p. 13, note 22, *ante*

² *King of Spain v. Hullet* (1833) 1 Cl. & F. 333; *United States v. Wagner* (1867) L.R. 2 Ch. (C.A.) 532; *Republic of Liberia v. Imperial Bank* (1873) L.R. 16 Eq. 179; *Republic of Costa Rica v. Erlanger* (1876) 3 Ch.D. (C.A.) 62; *French Government v. Owners of S.S. Tsurushima Maru* (1921) 37 T.L.R. (C.A.) 961; *Emperor of Austria v. Day* (1861) 3 De G.F. & J. 217; *United States v. Prioleau* (1865) 2 H. & M. 559; *Republic of Peru v. Weguelin* (1875) L.R. 7 C.P. 352; *Republic of Peru v. Dreyfus* (1888) 38 Ch.D. 348; *Haile Selassie v. Cable and Wireless Co.* [1938] Ch. 839; *Republica de Guatemala v. Nunez* [1927] 1 K.B. (C.A.) 669. For recognition, see p. 13, note 22, *ante*. *Semble*, an action on a contract made in a foreign country with a foreign Government can be brought on behalf of that Government by any person with whom the contract is made under the law of such foreign country: *Yzquerdo v. Clydebank Engineering, etc. Co.* [1902] A.C. 524; [1905] A.C. 6.

³ The court can, it is true, in its discretion compel a plaintiff (even a foreign sovereign: *Republic of Costa Rica v. Erlanger* (1876) 3 Ch.D. (C.A.) 62; *Re Duff Development Co. and Government of Kelantan's Arbitration* (1925) 41 T.L.R. 375; *The Newbottle* (1885) 10 P.D. (C.A.) 33), who is permanently residing out of England, to give security for costs, but this can be done in the case of a British subject no less than in that of an alien. See *Naamlooze Venootschapp Beleggings Cie Uranus v. Bank of England* [1948] 1 All E.R. 304. Compare *New Fenix Compagnie, etc. de Madrid v. General Accident, etc. Co.* [1911] 2 K.B. (C.A.) 619. Security is now ordered from a plaintiff resident in Eire, the Judgments Extension Act, 1868, no longer applying to Eire: *Wakely v. Triumph Cycle Co.* [1924] 1 K.B. (C.A.) 214. It will be ordered when a foreign plaintiff asks for the appointment of an arbitrator

An alien enemy is liable to be sued in England to the same extent as if he were an ordinary defendant,⁴ and is entitled to all such privileges enjoyed by ordinary defendants (*e.g.*, discovery or amendment of a patent specification) which are necessary for effective defence, and which would not necessitate his acting in effect as plaintiff.⁵ Thus an alien enemy may not counterclaim, but may plead a set-off⁶; he cannot take third party proceedings⁷ nor execute a judgment for costs.⁸

Exception.—The Court has no jurisdiction during the continuance of war to entertain an action brought by an alien enemy, unless he is living here under the licence or protection of the Crown,⁹ and the cause of action is personal to himself.

The term 'alien enemy' includes any British subject or citizen of an allied or neutral State voluntarily residing during a war with Great Britain in an enemy or enemy-occupied country.¹⁰

under a contract including a reference to the Arbitration Act, 1889: *Re Bjornstad and Ouse Shipping Co.* [1924] 2 K.B. 673. It is normally required from a plaintiff usually resident out of England: *Crozat v. Brogden* [1894] 2 Q.B. 30; *Whelan v. Irwin* [1905] 1 Ir.R. 294. But not if there is a co-plaintiff resident in England: *D'Hormussee v. Grey* (1882) 10 Q.B.D. 13, unless he is merely nominal and joined to evade giving security: *Jones v. Gurney* [1913] W.N. 72. Nor if the plaintiff has substantial property in England: *Redfern v. Redfern* (1890) 63 L.T. 780; *Re Apollinaris Co.'s Trade Marks* [1891] 1 Ch. 1. Nor if the subject-matter is to be detained in England pending decision and is worth more than the costs: *Kevorkian v. Burney* [1937] 4 All E.R. (C.A.) 468. As regards counterclaims which are virtually cross-actions security will be ordered: *Sykes v. Sacerdoti* (1885) 15 Q.B.D. 423; *The Newbattle* (1885) 10 P.D. 33, but not if it is a virtual defence: *Neck v. Taylor* [1893] 1 Q.B. 560; nor where the resident abroad is virtually a defendant: *Re La Société Anonyme des Verreries de l'Etoile* [1893] W.N. 119; *Fondsenbeitz v. Shell Transport Co.* [1923] 2 K.B. (C.A.) 166. Costs may be awarded to a foreign sovereign: *Monaco v. Monaco* (1937) 157 L.T. 231.

⁴ *Robinson & Co. v. Continental Insurance Co. of Mannheim* [1915] 1 K.B. 155.

⁵ *Porter v. Freudenberg* [1915] 1 K.B. (C.A.) 857, 883.

⁶ *Re Stahlwerk* [1917] 2 Ch. 272.

⁷ *Halsey v. Lowenfeld* [1916] 2 K.B. (C.A.) 707; *Schering v. Stockholms Enskilda Bank A/B* [1946] A.C. 219; *Kohnstamm v. Ludwig Krumm (London), Ltd.* [1940] 2 K.B. 259.

⁸ *Robinson v. Continental Ins. Co.* [1915] 1 K.B. 155.

⁹ *Wells v. Williams* (1697) 1 Salk. 46; *Le Bret v. Papillon* (1804) 4 East 502; *Alcinous v. Nigreu* (1854) 4 E. & B. 217; *Antoine v. Morshead* (1815) 6 Taunt. 237; *Daubuz v. Morshead* (1815) 6 Taunt. 332. But the court has jurisdiction after the restoration of peace to entertain an action by an alien who was an enemy during the war in respect of a contract made before the commencement of the war: *Janson v. Driefontein Consolidated Mines, Ltd.* [1902] A.C. 484.

After a war, peace treaties usually regulate the disposal of claims. See C. Parry, 'The Status of Germany and German Internees', 10 Mod.L.R. 408 (1947).

¹⁰ See McNair, *Legal Effects of War*; Schmitthoff, 64 L.Q.R. 484, esp. pp. 490 ff. (1948).

Comment

The fundamental principle on this head is laid down in the following words of Sir W. Scott: 'No man can sue [in British courts] who is a subject of the enemy, unless under particular circumstances that *pro hac vice* discharge him from the character of an enemy; such as his coming under a flag of truce, a cartel, a pass, or some other act of public authority that puts him in the King's peace *pro hac vice*, but otherwise he is totally *ex lea*'¹¹ This enumeration of excepted cases is not exhaustive; it rests on the doctrine that no alien enemy may sue unless he is in the King's peace and suits were therefore allowed in respect of any trade for which licences had been issued by the Crown,¹² and in 1797 it was even admitted that a prisoner of war was in a sense in the King's peace, and could bring an action, *e.g.*, on a contractual obligation entered into by him after his captivity while on parole.¹³ A fortiori a British soldier in an enemy prisoner of war camp is not an 'enemy' by virtue of his enforced residence there.¹⁴

In accordance with these principles it has been held that an alien who was resident in England at the time of the outbreak of war, and who thereafter registered as an alien as required by English law, might sue as regards personal claims in the English courts.¹⁵ Nor does it make any difference as regards this right that the alien has been interned as a matter of precaution, but in none of the decided cases does it appear that the alien had been interned as a result of proved hostility to the Government.¹⁶ Where an enemy alien is deported, an injunction will not lie for the Home Secretary's 'act of State'.¹⁷ The right to sue includes the right to be granted letters of administration,¹⁸ and to petition for

¹¹ *The Hoop* (1799) 1 C. Robb. 195, 201. Compare *Wells v. Williams* (1697) 1 Ld. Raym. 282; *Sylvester's Case* (1702) 7 Mod. 150; *George v. Powel* (1717) Fort 221; *Re Wilson* (1915) 84 L.J.K.B. 1893 (petition in bankruptcy); *Le Bret v. Papillon* (1804) 4 East 502; *Netherlands South African Railway Co. v. Fisher* (1902) 18 T.L.R. 116; *Alcinous v. Nigreu* (1854) 4 E. & B. 212; *Gwinger v. Swiss Bank Corporation; Creditanstalt v. Gwinger* [1940] 1 All E.R. 406.

¹² See *Usparicha v. Noble* (1811) 13 East 332; *Kensington v. Inglis* (1807) 8 East 273; *Fleendt v. Scott* (1814) 5 Taunt. 674; *The Maria Theresa* (1813) 1 Dods. 303; *Direction der Disconto Gesellschaft v. A. H. Brandt & Co.* (1915) 31 T.L.R. 586; *Continho & Co. v. Vermont & Co.* [1917] 2 K.B. 587.

¹³ *Sparenburgh v. Bannatyne* (1797) 1 Bos. & P. 163. Compare *Maria v. Hall* (1800), cited in 1 Taunt. 38.

¹⁴ *Vandyke v. Adams* [1942] Ch. 155, a case under the Trading with the Enemy Act, 1939; contrast *Re Hatch* [1948] Ch. 592.

¹⁵ *Princess Thurn and Taxis v. Moffitt* [1915] 1 Ch. 58. Compare *Volkl v. Rotunda Hospital* [1914] 2 Ir.R. 549; *Schulze v. Bank of Scotland* [1916] 2 Sc.L.T. 207; *Nordman v. Rayner and Sturges* (1916) 33 T.L.R. 87.

¹⁶ *Schaffenius v. Goldberg* [1916] 1 K.B. (C.A.) 284; *Nordman v. Rayner* (1916) 33 T.L.R. 87. An interned alien (*The Three Spanish Sailors* (1799) 2 W.B. 1324); *R. v. Bottrill* [1947] K.B. 41 (C.A.); *Netz v. Ede* [1946] Ch. 224; is not entitled to the benefits of a habeas corpus. See *Ex p. Weber* [1916] 1 K.B. (C.A.) 280; [1916] 1 A.C. 421; *Ex p. Liebmann* [1916] 1 K.B. 268; *Ex p. Freyberger* [1917] 2 K.B. (C.A.) 129.

¹⁷ *Netz v. Ede* [1946] Ch. 224, *supra*.

¹⁸ *Re Schulze* [1917] S.C. 400; *Schaffenius v. Goldberg* [1916] 1 K.B. 284, 291.

divorce,¹⁹ but, although on such a petition a divorce had been granted with the custody of the children of the marriage, the court did not authorise the removal of the children to Germany during the continuance of the war.²⁰ Further, if an alien enemy when lawfully resident in England, being exempt from internment, gives a power of attorney irrevocable for twelve months to a solicitor to sell leasehold premises, the power remains valid although the alien enemy is repatriated, and thus ceases to be in the King's peace.²¹

Moreover, an alien enemy, though not registered nor interned, can be joined as a plaintiff in an action brought by the English members of a partnership in the firm-name in respect of a debt contracted before the war,²² and he may appear in the Prize Court to claim any protection, privilege, or relief under the Hague Convention of 1907 to which he may be entitled.²³ A reduction of the capital of an English company may be confirmed even though it be illegal to approach shareholders in enemy territory.²⁴ The fact that an enemy concern is a bare trustee for an English company will not prevent the English court from making a vesting order in favour of the English company.²⁵

¹⁹ *Krauss v Krauss* (1919) 35 T.L.R. 637; *Weiss v Weiss* [1940] Sc.L.T. 447. For a petition by the wife of a repatriated enemy alien, see *Thiele v. Thiele* (1920) 150 L.T.Jo. 387.

²⁰ *Uhlig v. Uhlig* (1916) 33 T.L.R. 63.

²¹ *Tingley v. Müller* [1917] 2 Ch. (C.A.) 144. Contrast *Re White* (1915) 15 S.R. (N.S.W.) 217.

²² *Rodriguez v. Speyer Bros.* [1919] A.C. 59. As to the dissolution (not suspension, *R. v. Kupfer* [1915] 2 K.B. (C.C.A.) 321) of a partnership with alien enemies on war, see *Hugh Stevenson & Sons v. Aktiengesellschaft für Cartonmagen-Industrie* [1918] A.C. 239: if the English partner in a business of a dissolved firm continues the business, he may not take the enemy partner's share at a valuation, but must account for the profits made with the aid of the partner's capital after the dissolution. See also *Rombach v. Gent* (1915) 31 T.L.R. 492. Contrast *Actiengesellschaft für Anilin Co. v. Levinstein* (1915) 112 L.T. (C.A.) 963; *Candilis & Sons v. Victor & Co.* (1916) 33 T.L.R. 20.

²³ *The Möwe* [1915] P. 1, 15

²⁴ *Re Anglo-International Bank Ltd.* [1943] Ch. 733

²⁵ *Re Farbenindustrie A.G.'s Agreement* [1941] Ch. 147. Statutes of limitation (*semble*) run against an alien enemy, subject to the terms of any Peace Treaty, see *De Wahl v. Braune* (1856) 25 L.J.Ex. 343, with which, however, contrast *Public Trustee v. Davidson* [1925] S.C. 451, a fact which adds importance to the decision arrived at, though not unanimously, by the House of Lords in *Rodriguez v. Speyer Bros.* [1919] A.C. 59, that an alien enemy partner may be joined as a formal co-plaintiff in an action brought during the war for the purposes of winding up the firm's affairs. An alien shareholder cannot vote, even by proxy: *Robson v. Premier Oil & Pipe Line Co., Ltd.* [1915] 2 Ch. 133; nor can an agent sue on an insurance policy, for his behalf: *Brandon v. Nesbitt* (1794) 6 T.R. 23. Where two co-owners own a patent, and one only has by agreement power to sue for infringement he, if a British subject, can do so, though his co-owner is an alien enemy: *Mercedes Daimler Motor Co. v. Maudslay Motor Co.* (1915) 31 T.L.R. 178. It is suggested that an alien enemy, who is an executor or administrator, may sue in his representative capacity: *Richfield v. Udell* (1867) Carter 191; *Villa v. Dimook* (1894) Skin. 370; *Rodriguez v. Speyer Bros.* [1919] A.C. 59, 70, per Lord Finlay; *Eichengruen v. Mond* [1940] Ch. (C.A.) 785: claim commenced before the war struck out as vexatious, notice of motion to solicitors upheld.

As an alien enemy permitted to reside in England is not at common law debarred from legal proceedings, so an alien enemy resident and carrying on business in an allied or neutral country which is not in enemy occupation is not debarred from suing.²⁶ But his property may well be subject to the claim of the Custodian of Enemy Property appointed under section 7 of the Trading with the Enemy Act, 1939.²⁷ The Court of Appeal has laid it down that 'for the purpose of determining civil rights a British subject or the subject of a neutral State who is voluntarily resident or who is carrying on business in hostile territory is to be regarded and treated as an alien enemy',²⁸ and a man may be held to be voluntarily resident, though he is subject to a measure of detention not amounting to actual captivity.²⁹ The House of Lords have held that residence (otherwise than as a prisoner of war) in occupied territory prevents the bringing of suit, unless of course by licence; whether territory is enemy occupied or not is a question of fact provable by a certificate from the Secretary of State.³⁰

As regards corporations, it is now laid down by a majority of the judges in the House of Lords,³¹ that a company registered in England may nevertheless assume enemy character, and therefore be incapable of suing 'if its agents or the persons in *de facto* control of its affairs are resident in an enemy country or, wherever resident, are adhering to the enemy or taking instructions from or acting under the control of enemies', although 'the character of individual shareholders cannot of itself affect the character of the company'. This was supplemented by the Trading With the Enemy Act, 1939, s. 2 (c) for the purpose of that Act, as amended by S. R. & O. The application of this principle is not without difficulty. A company registered in England whose property was situate in a German colony, in which its business was wholly carried on, was nevertheless entitled to prove in the bankruptcy of a German subject interned in

²⁶ *Re Mary, Duchess of Sutherland* (1915) 31 T.L.R. 394. Compare *Janson v Driefontein Consolidated Mines* [1902] A.C. 484; *Re Grimthorpe's Settlement* [1918] W. N. 16; *Re Schulze* [1917] S.C. 400.

²⁷ *E.g., Re Ring Springs Ltd. Patent* [1944] Ch. 180; *Re Forster's Settlement* [1942] Ch. 199, *Fraenkel v. Whitty* [1947] 2 All E.R. 646; 64 L.Q.R. 492 (Mann).

²⁸ *Porter v. Freudenberg* [1915] 1 K.B. (C.A.) 857, 869. See *McConnell v. Hector* (1892) 3 B. & P. 113, 114, *per* Alvanley, C.J.

²⁹ *Scotland v. South African Territories, Ltd.* (1917) 33 T.L.R. 255.

³⁰ *Soefracht V/o v. van Udens Scheepvaart en Agentuur Maatschappij N.V. Gebr* [1943] A.C. (H.L.) 203, distinguished in *The Pamia* (1943) 112 L.J.P. 34, where the head office of a Belgian concern had been transferred to the U.S.A. before the enemy occupation; in *Fibrosa v. Fairbairn, Ltd.* [1943] A.C. 36, a Board of Trade licence to proceed was obtained by the appellants a Polish company registered in German-occupied Poland; cf. *Anglo-Czecho Slovak and Prague Credit Bank v. Janssen* [1943] V.L.R. 185.

³¹ *Daimler Co. v. Continental Tyre and Rubber Co.* [1916] 2 A.C. 307, 345, *per* Lord Parker, a view concurred in by Lords Mersey, Kinnear and Sumner; for a criticism, see Holdsworth, *Hist.* ix. 71, 103, 104. *The Polzeath* [1916] P. 117 (C.A.) 241. See also *Armorduct Manufacturing Co. v. Defries & Co.* (1914) 31 T.L.R. 69; *Continental Tyre and Rubber Co. v. Tilling* [1915] 1 K.B. 893; *The Poona* (1915) 112 L.T. 782.

England, because the directors and the majority of shareholders, both in number and value, were resident in England, whence the business was controlled.³²

By section 2 (2) of the Trading with the Enemy Act, 1939, the Board of Trade might by order direct that any person specified in such order should be deemed an enemy for the purposes of that Act while so specified. Thus a person blacklisted in this way might be deemed to be an enemy within the Act, though as we have seen, this did not necessarily mean that such a person could never sue in the courts.

RULE 24.³³—The court has jurisdiction in an action³⁴ over any person who has by his conduct precluded himself from objecting to the jurisdiction of the court.

Comment

A person who would not otherwise be subject to the jurisdiction of the court may preclude himself by his own conduct from objecting to its jurisdiction, and thus give the court an authority over him which, but for his submission, it would not possess.³⁵

This submission may take place in various ways. A defendant in an action, who appears even if merely to take objection to the jurisdiction of the court, without defending his case upon the merits, submits to its authority. So, again, does a person who, though he would not be otherwise liable to the court's jurisdiction, has made it part of a contract that questions arising under the contract shall be decided by the court. A person, further, who comes before the court as a plaintiff in general gives the court jurisdiction to entertain a counterclaim, or, in other words, a cross-action, against him,³⁶

³² *Re Hilkes* [1917] 1 K.B. (C.A.) 48. The English branch of an enemy registered company may be wound up here under the Defence (Trading with the Enemy) Regulations 1940, such a winding-up creates a new entity under the control of the Board of Trade for the purposes of winding-up, *Re Banca Commerciale Italiana* [1943] 1 All E.R. (C.A.) 480.

³³ This Rule is manifestly a mere application of General Principle No. 4, p. 24, *ante*. See *Boyle v. Sacker* (1888) 39 Ch.D. (C.A.) 249; *Tharsus Sulphur Co. v. La Société des Métaux* (1889) 58 L.J.Q.B. 435 (action *in personam*). See further, p. 168, note 43 *post*; *Limerick Corporation v. Crompton* [1910] 2 Ir.R. 416.

³⁴ The word 'action' does not include a suit for divorce. See Rule 32, *post*. Nor does it include bankruptcy proceedings, for the court cannot adjudge a debtor bankrupt unless he falls within the terms of Rule 40 (2), *post*. Note that the court must take judicial notice of its own incapacity; see as to the principle, *Wellesley v. Withers* (1855) 4 Ell. & B. 750; *Caledonian Railway v. Ogilvy* (1856) 2 Macq. 229; *R. v. Dennis* [1924] 1 K.B. (C.C.A.) 887; *British Wagon Co. v. Gray* [1896] 1 Q.B. 35.

³⁵ See Intro., General Principle No. 4, p. 24, *ante*; and compare, for an example of such submission, Exception 1 to Rule 19, p. 133, *ante*.

³⁶ See *Yorkshire Tannery v. Eglinton Co.* (1884) 54 L.J.Ch. 81, 83, judgment of Pearson, J.

but not an action on an independent ground.³⁷ Whether a person has or has not submitted to the jurisdiction of the court depends upon the circumstances of the case; but the court, as regards its own jurisdiction, though not invariably³⁸ as regards the jurisdiction of foreign courts, maintains the principle that submission gives jurisdiction.

In the application of this principle two things must be borne in mind. The first is that the principle is applicable only to actions or to proceedings which are strictly of the nature of an action. The second is that submission can give the court jurisdiction only to the extent of removing objections thereto which are purely personal to the party submitting, as, for example, the objection, in the case of a defendant, that he has not been duly served with a writ, or that service of a writ outside England has been allowed in a case not within the letter or the spirit of Ord. XI, r. 1; submission cannot give the court jurisdiction to entertain an action or other proceeding which in itself lies beyond the competence or authority of the court.³⁹ Hence the principle does not apply to a suit for divorce.⁴⁰

Illustrations

1. A brings an action against X, who has not been duly served with a writ. X takes no objection to the jurisdiction of the court on account of want of due service, but defends himself on the merits of his case. The court has jurisdiction to entertain an action against X.

2. A brings an action against X, who makes a counterclaim against A in respect of damages due from A to X for breach of a contract made between A and X in France, and to be performed wholly in France. A is a French subject domiciled in France and has never been in England. If X had brought an action against A for the breach of contract, A might have objected to the jurisdiction of the court. A's submission (*semble*) gives the court jurisdiction to entertain the counterclaim.⁴¹

3. X is a French company incorporated according to French law and carrying on business in Paris, where is the company's principal office. X has no place of business in the United Kingdom. A is a copper company with registered office in Glasgow, carrying on business at Newcastle-on-Tyne. There is a contract between A and X whereby A agrees to sell, and X agree to purchase, copper. It is part of the contract that it should be construed

³⁷ *Factories Insurance Co. v. Anglo-Scottish General Commercial Insurance Co., Ltd.* (1913) 29 T.L.R. 312, following *South African Republic v. La Compagnie Franco-Belge du Chemin de Fer du Nord* [1897] 2 Ch. (C.A.) 487, 492. Mere appearance as claimant in interpleader proceedings does not subject the claimant to jurisdiction: see *Eschger & Co. v. Morrison, Kekewich & Co.* (1890) 6 T.L.R. (C.A.) 145.

³⁸ *Harris v. Taylor* [1915] 2 K.B. (C.A.) 580, which widely extends the effect of submission to a foreign court.

³⁹ Light is thrown, as to the limits within which consent or submission can give jurisdiction, by cases on prohibition, such as *Farquharson v. Morgan* [1894] 1 Q.B. (C.A.) 552; *Mayor of London v. Cox* (1867) L.R. 2 H.L. 239; *Broad v. Perkins* (1888) 21 Q.B.D. (C.A.) 533; *Buggin v. Bennett* (1767) 4 Burr. 2035.

⁴⁰ Compare *Armitage v. Att.-Gen.* [1906] P. 135, 140, judgment of Sir J. Gorell Barnes, which in effect, and rightly, it is clear, overrules *Zycklinski v. Zycklinski* (1862) 2 Sw. & Tr. 420.

⁴¹ See *Yorkshire Tannery v. Eglington Co.* (1884) 54 L.J.Ch. 81.

according to English law, and that N of London should be agent of X, 'on whom any writ or other legal process arising out of the contract might be served' X refuses to accept copper, or to pay for the same. A brings an action for breach of contract Writ served on N. The court has jurisdiction.⁴²

4 X is a Russian subject, residing at Odessa, but carrying on business in London An action is brought by A and B, a London firm, for the delivery of certain goods to A and B by X, and for an injunction to restrain X from dealing with goods X is not in England. Leave is obtained ex parte for service of writ on N, X's solicitor. X appears by counsel and files affidavits, and the case is argued on its merits; objection is then taken against the order allowing substituted service The court has jurisdiction.⁴³

5 Action by A and B, owners of British ship *The Kildona*, against *The Gemma*, a foreign ship, of which X and Y are owners, for damages caused by collision in the Thames between *The Gemma* and *The Kildona*. X and Y enter appearance, and *The Gemma* is released on bail. Judgment against X and Y. Having appeared, they are personally liable to pay the amount of judgment.⁴⁴

6. W, a wife, petitions for divorce from H, her husband. Neither W nor H is domiciled in England. H appears absolutely and not under protest, and obtains further time to make an answer. The court has no jurisdiction to grant a divorce.⁴⁵

(2) *In respect of Subject-Matter.*

RULE 25.⁴⁶—The court has jurisdiction to entertain proceedings for the determination of any right over, or in respect of,

- (1) any immovable,
 - (2) any movable,
- situate in England.

This Rule must be read subject to the Rules governing the jurisdiction of the court in particular kinds of action or proceedings.

⁴² *Tharsis Sulphur Co. v. La Société des Métaux* (1889) 58 L.J.Q.B. 435. Note that the jurisdiction arises from the contract, and is independent of the Rules of Court contained in Ord. XI, r. 1. Contrast *British Wagon Co. v. Gray* [1896] 1 Q.B. (C.A.) 35, and see Ord. XI, r. 2a, Rule 28, Exception 11, p. 199, *post*.

⁴³ *Boyle v. Sacker* (1888) 39 Ch.D. (C.A.) 249. The ground of jurisdiction is that the defendant, having appeared and argued the case on the merits, cannot then take objection to the service. See *Western National Bank of New York v. Perez* [1891] 1 Q.B. (C.A.) 304; *Re Orr-Ewing* (1883) 22 Ch.D. 456; *Manitoba, etc. Corporation v. Allan* [1893] 3 Ch. 342.

⁴⁴ *The Gemma* [1899] P. (C.A.) 285, followed in *The Dupleix* [1912] P. 8; compare *The Dictator* [1892] P. 304. See also *The Broadmayne* [1916] P. (C.A.) 64, 68, 69, *per* Swinfen Eady, L.J.; 74, *per* Pickford, L.J.; 76, 77, *per* Bankes, L.J. See p. 206, *post*.

⁴⁵ *Armitage v. Att.-Gen.* [1906] P. 135; *Sinclair's Divorce Bill* [1897] A.C. 469. Cf. as to nullity, *De Reneville v. De Reneville* [1948] P. 100, 118, *per* Lord Greene, M.R., and *post*, pp. 255-256.

⁴⁶ Territorial jurisdiction 'exists always as to land within the territory, and it may be exercised over movables within the territory'. *Sirdar Gurdial Singh v. Rajah of Faridkote* [1894] A.C. 670, 683, *per curiam*.

Comment

This Rule is of the most general description. All that it asserts is the jurisdiction of the court in respect of all property, whether immovable or movable, situate in England. How far, if at all, the exercise of this authority is restricted by the Rules governing the jurisdiction of the court in any particular kind of action, *e.g.*, an action *in personam* or an action *in rem*, must be gathered from such Rules.⁴⁷

The jurisdiction of the court as regards English immovables, *e.g.*, land or houses, is, as contrasted with the jurisdiction of any foreign⁴⁸ court, exclusive.⁴⁹ Our Rule applies (*inter alia*) to any question as to the title to English land, whether it be freehold or leasehold (and therefore personal property⁵⁰), under a will or under an intestacy: such a question must be determinable by the High Court, and cannot be determined by any foreign court.

The jurisdiction of the court as regards movables, *i.e.*, goods or choses in action, in England, is, as compared with the jurisdiction of foreign courts, not necessarily exclusive. There are many cases in which the title to movables, even when situate in England, may be decided either by the High Court or by a foreign court; thus the right to succeed to the movables in England of a person who has died domiciled in France may be decided either by the High Court or by the French courts. The decision, indeed, belongs preferably to the French courts, and when given by a French court will in general be held conclusive by our courts.⁵¹ On the other hand, the English court alone can deal with such property as a registered trade mark, patent, or copyright, or trade name.⁵²

Illustrations

1. T, a Frenchman domiciled in France, dies intestate leaving leasehold property in England. The court has exclusive jurisdiction to determine whether A, T's heir under the law of France, is or is not entitled to succeed to the leaseholds.⁵³

⁴⁷ See Chaps 4-8, Rules 27-51, *post*.

⁴⁸ The Rules in this Digest have, it must constantly be borne in mind, nothing to do with the relative jurisdiction of the High Court and other English courts.

⁴⁹ See, as to Principle of Effectiveness, Intro., General Principle No. 3, p. 22, *ante*. How far jurisdiction as to land is subject to the restrictions in Rule 19, p. 131, *ante*, is not clear. Compare Westlake, s. 191. As to jurisdiction in regard to trust funds in which foreign governments are interested, compare *Duke of Brunswick v. King of Hanover* (1844) 6 Beav. 39, *per* Lord Langdale; *Strousberg v. Republic of Costa Rica* (1880) 29 W.R. 125; *Gladstone v. Musurus Bey* (1862) 1 H. & M. 495, with *Smith v. Wedgell* (1869) L.R. 8 Eq. 198; *Larivière v. Morgan* (1875) L.R. 7 H.L. 423; *Twycross v. Dreyfus* (1877) 5 Ch.D. (C.A.) 605, in all of which cases no trust was proved. Compare Rule 19, p. 131, *ante*.

⁵⁰ As to real property and personal property, see pp. 45, 46, *ante*.

⁵¹ See Rules 51 and 75, *post*, and *Ewing v. Orr-Ewing* (1885) 10 App.Cas. 453, 502, 503, language of Lord Selborne; *Dogliotti v. Crispin* (1866) L.R. 1 H.L. 301.

⁵² *Lecouturier v. Rey* [1910] A.C. 262; *Re Drummond* (1890) 43 Ch.D. 80. See *Potter v. Brokenhill Proprietary Co., Ltd.* (1906) 3 C.L.R. 479.

⁵³ See Rule 127, *post*, as to the question being determinable by the *lex situs*.

2 T, a British subject domiciled in France, dies intestate leaving money and stock-in-trade in England. The court has jurisdiction to determine whether A, T's son, is or is not entitled to succeed to money and stock-in-trade.⁵⁴ But the French courts have also jurisdiction to decide the matter.⁵⁵

3. X, a foreigner, sells a ship at Hamburg to A. It is brought into an English port, but is not handed over as required by the contract of sale to A. The court has jurisdiction to grant an injunction forbidding the removal of the ship from England, and to admit a bill for specific performance of the contract of sale.⁵⁶

4. X, a foreigner, rents a house in London from A. He furnishes the house, and goes to Paris, failing to pay the rent. A can levy distress on his goods, and the court will afford him the necessary facilities if his right is challenged.

5. B, a foreigner, is indebted to A. X & Co., an English bank, have in their hands sums deposited by B. These sums can be made the subject of garnishment in favour of A, and the court's judgment determines in rem the ownership of the funds.⁵⁷

RULE 26.—Subject to Rules 19 to 22, the court exercises—

- (1) Jurisdiction in actions *in personam* ⁵⁸;
- (2) Admiralty jurisdiction ⁵⁹;
- (3) Jurisdiction in relation to marriage, guardianship and legitimacy ⁶⁰;
- (4) Jurisdiction in bankruptcy and winding-up ⁶¹;
- (5) Jurisdiction in matters of administration and succession ⁶²;

to the extent, and subject to the limitations, hereinafter stated in the Rules ⁶³ having reference to each kind of jurisdiction.

⁵⁴ *Enoch v Wylie* (1862) 10 H.L.C. 1

⁵⁵ See Rules 75, 94 and 177, *post*, as to the decision being governed by the *lex domicilii* of T, *i.e.*, by the law of France.

⁵⁶ See *Hart v. Herwig* (1873) L.R. 8 Ch. 860. Substituted service on the master was permitted.

⁵⁷ See *Employers' Liability Assurance Corporation v. Sedgwick, Collins & Co.* [1927] A.C. 95; *Swiss Bank Corporation v. Böhmsche Industrial Bank* [1923] 1 K.B. 673. The debt is in an intangible movable situate in England. For garnishment proceedings against judgment debtors, see Ord. XLV, and see *post*, p. 577.

⁵⁸ See Chap. 4, Rules 27, 28, *post*.

⁵⁹ See Chap. 5, Rules 29, 30, *post*.

⁶⁰ See Chap. 6, Rules 31 to 39, *post*.

⁶¹ See Chap. 7, Rules 40 to 47, *post*.

⁶² See Chap. 8, Rules 48 to 51, *post*.

⁶³ Including, of course, the Exceptions thereto.

JURISDICTION IN ACTIONS *IN PERSONAM*

RULE 27.¹—When the defendant in an action *in personam* is, at the time for the service of the writ, in England,² the court has jurisdiction in respect of any cause of action, in whatever country such cause of action arises, subject however in the case of actions under the Carriage by Air Act, 1932, to the limitations therein contained.

Comment

That this Rule may apply, three conditions must be fulfilled.

(1) The action must be an action in personam.

An action *in personam* may be defined positively, though perhaps for the purpose of this Digest a little too narrowly, as an action against a person with a view to enforce the doing by him of some particular thing, *e.g.*, the payment of damages for a breach of contract or for a tort; under this head come (*inter alia*) every common-law action, whether on contract or for tort, and also every equitable proceeding, the object of which is to compel the doing or the not doing of a particular thing, as *e.g.*, the specific performance of a contract. An action *in personam* may be negatively, and, for the purpose of this Digest, somewhat more extensively described as any action which is not an Admiralty action *in rem*, a probate action, or an administration action.³

It may be well, though hardly necessary, to add that an action *in personam* does not include any proceeding which is not in strictness an 'action' at all, such as a proceeding for divorce, judicial separation, restitution of conjugal rights, or for a declaration of nullity of marriage or of legitimacy, or a proceeding in bankruptcy or lunacy or regarding the custody of infants, or motions to set aside arbitral awards.

(2) At the time for the service of the writ, the defendant must be in England.

¹ Westlake, ss. 180-189; Story, Chap. 14; Foote, pp. 367-375, 560-568; Cheshire, pp. 139-160; Wolff, ss. 59-69. *Ex p. Pascall* (1876) 1 Ch.D. (C.A.) 509, 510; *Jackson v. Spittall* (1870) L.R. 5 C.P. 542, 549; *Fry v. Moore* (1889) 23 Q.B.D. (C.A.) 395. As to power of court to stay an action, see *post*, Ch. 9. Common law courts had originally no jurisdiction over contracts made or torts committed abroad.

² See as to meaning of 'England', p. 43, *ante*.

³ Compare Rule 51 and comment thereon, *post*.

Every action in the High Court now commences with the issue of a writ of summons,⁴ which is in effect a written command from the Crown to the defendant to enter an appearance in the action⁵ and the service of the writ, or something equivalent thereto,⁶ is absolutely essential as the foundation of the court's jurisdiction. Where a writ cannot legally be served upon a defendant, the court can exercise no jurisdiction over him. In an action *in personam* the converse of this statement holds good, and wherever a defendant can be legally served with a writ, there the court, on service being effected, has jurisdiction to entertain an action against him. Hence, in an action *in personam*, the rules as to the legal service of a writ define the limits of the court's jurisdiction.⁶ Now, a defendant who is in England can always, on the plaintiff's taking proper steps, be legally served with a writ. The service should be personal, but if personal service cannot be effected, the court may allow substituted or other service.⁷ In other words, the court has jurisdiction to entertain an action *in personam* against any defendant who is in England at the time for the service of the writ. Moreover this jurisdiction remains operative even if the defendant leaves the country, so far as the original cause of litigation is concerned, but not as to a different action not being an essential concomitant of the original suit.⁸

This principle applies to any defendant who is in England at the time for the service of the writ, but the application differs according as the defendant be, as he usually is, a natural person, or a corporation, *i.e.*, a person created by law.

Where the defendant is a natural person.—Every such person is liable when in England to be served with a writ in an action *in personam*, and this is so however short may be the period for which he is present in England, whether his presence there is voluntary or involuntary (*e.g.*, as a prisoner of war), and whatever his nationality (*e.g.*, even if he is an alien enemy interned as a precautionary measure).

Thus a Frenchman who has crossed from Boulogne to Dover and intends to return next day, or even on the evening of the same day, is liable to be served with a writ by a plaintiff in an action

⁴ See Ord. I, r. 1.

⁵ *E.g.*, an undertaking in writing to accept service by defendant's solicitor, and the entering of an appearance under Ord. IX, r. 1, which is itself a mere illustration of Rule 24, p. 166, *ante*, as to the effect of submission. See further, as to service of writ, Ords. IX, X, and XI.

⁶ See *Heinemann v. Hale* [1891] 2 Q.B. 88, 86, 87, judgment of Cave, J. This is not so in all actions. In a proceeding for divorce, which, though not an action, partakes in some respects of the nature of an action, service of a petition or citation out of England which is always possible by leave of the court, is not decisive of the court's jurisdiction, which depends at bottom on the domicile of the parties. See Rules 31, 32, *post*.

⁷ See Ord. IX, r. 2, and p. 180, note 46, *post*.

⁸ *Michigan Trust Co. v. Ferry* (1913) 228 U.S. 346, *per* Holmes, J.; *New York Life Ins. Co. v. Dunleavy* (1916) 241 U.S. 518.

brought to recover a debt due to the plaintiff incurred by the Frenchman and payable in Paris. Doubt has been cast on the doctrine,⁹ and it has been contended that a writ cannot rightly be served on a foreigner who is not strictly speaking resident in England. There is, however, no decided case which determines what is the sort of residence required to render a foreigner, present in England for however short a period, liable to an action for a debt incurred by him either in England or elsewhere, and the view expressed above has the support of weighty dicta by Lord Russell of Killowen.¹⁰ The history of English procedure bears out this view; the right of an English court to entertain an action depended originally upon a defendant being served in England with the King's writ, and this again was only part of the general doctrine that any person whilst in England owed at least temporary allegiance to the King.

Where the defendant is a corporation.—In this case also presence in England at the time of service of the writ is essential. This principle applies easily enough where the defendant is a natural person, since the question whether a man is at a given moment in England presents no special difficulty in its ascertainment, but when the defendant is a corporate body, some difficulty may arise in determining whether the corporation can be treated as residing or being present in England.

In the case of an English company registered under the Companies Act, 1948, or any other Act, no difficulty arises. Even if the company is formed to carry on business abroad, and its business is so exclusively conducted there that it is not liable to the British Income Tax Acts, nevertheless the company by virtue of its incorporation is present in England, and service of a writ can always be effected by leaving it at, or sending it by post to, the registered office of the company in England.¹¹

In the case of foreign corporations more difficulty may arise. The simplest case is that of a company incorporated outside Great Britain (including companies incorporated in Northern Ireland and Eire), which establishes a place of business in England, and as required by the Companies Act, 1948, s. 407 (1) (c) files with the Registrar of Companies the name of a person authorised to accept service of process on behalf of the company; in that case service can be effected as in the case of an English company. Moreover, under the Companies Act, 1948, s. 412, if the company fails to

⁹ See Foote, pp. 367–370; Read, pp. 149–151; Cheshire, pp. 144–145.

¹⁰ See *Carrick v. Hancock* (1895) 12 T.L.R. 59, 60. The decision is referred to with approval in *Harris v. Taylor* [1915] 2 K.B. (C.A.) 580, 592, *per* Bankes, L.J. See also *Forbes v. Simmons* (1914) 20 D.L.R. 100 (Alberta). Should, indeed, a foreigner be enticed within the jurisdiction, that may be a good reason for setting aside the service of the writ; see *Watkins v. North American Lands, etc. Co.* (1904) 20 T.L.R. 534.

¹¹ See Ord. IX, r. 8; Companies Act, 1948, s. 437 (1).

register the name of such a person, or he is dead or no longer resident in England or declines to accept process, or for any reason cannot be served, the writ can be left at or sent by post to any place of business established by the company in Great Britain. The ground of this rule is that establishment of business means submission to English jurisdiction, and a company has no right to evade it by withdrawing the name of a representative to accept process.¹²

Apart, however, from cases such as this, a corporation can be treated as being present in England for the purpose of serving a writ upon it when the company carries on business in England. The question whether a corporation is carrying on business here is one of fact not always easy to determine. A foreign railway company, for example, may perform part of its business, say the selling of tickets in London, without necessarily carrying on business there. The answer to the question whether it does or does not carry on business in England depends upon whether or not the agent who sells the tickets makes a contract for the foreign company, or merely sells the tickets as part of his own business.¹³ This is substantially a question as to the relation of the agent towards the foreign company. In order, further, that a foreign corporation may be treated as being in England, the requirements of Ord. IX, r. 8, as to the service of a writ in England on a corporate body, must be complied with. Thus the agent on whom the service is made must have some fixed office in England where he acts on behalf of the corporation as head officer within the meaning of the Order.¹⁴

¹² *Employers Liability Assurance Corp. v. Sedgwick, Collins & Co* [1927] A.C. 95, 104, per Lord Cave; 107, per Lord Sumner; 114 per Lord Parmoor; *Sabatier v. The Trading Co.* [1927] 1 Ch. 495; *The Madrid* [1937] P. 40.

¹³ *Thames & Mersey Marine Insurance Co. v. Societ  di Navigazione* (1914) 114 L.T. (C.A.) 97, judgment of Buckley, L.J., pp. 98, 99. Compare *Dunlop Pneumatic Tyre Co. v. Actien Gesellschaft, etc.* [1902] 1 K.B. (C.A.) 342; *Haggin v. Comptoir d'Escompte de Paris* (1889) 23 Q.B.D. (C.A.) 519; *Saccharin Corporation, Ltd. v. Chemische Fabrik von Heyden* [1911] 2 K.B. (C.A.) 516; *Okura & Co., Ltd. v. Forsbacka Jernverks Actiebolag* [1914] 1 K.B. (C.A.) 715; *Aktieselskabet Dampskib Hercules v. Grand Trunk Pacific Ry.* [1912] 1 K.B. (C.A.) 222; *Newby v. Von Oppen etc., Co.* (1872) L.R. 7 Q.B. 293; *Lhoneux Limon et Cie v. Hong Kong Banking Corporation* (1886) 33 Ch.D. 446; *La Bourgogne* [1899] A.C. 431; *The Lalandia* [1933] P. 56; *The Holstein* (1936) 155 L.T. 466; *Donovan v. North German Lloyd S.S. Co.* [1933] Ir.R. 33.

¹⁴ *Garron Co. v. Maclaren* (1855) 5 H.L. 416, and *Mackereth v. Glasgow and South Western Ry.* (1873) L.R. 8 Ex. 149, are cases in which service was held to be bad on the ground that the extent of the business in England and the status of the officer served were insufficient to bring the cases within the terms of the order. See also *The Princess Clementine* [1897] P. 18; *Allison v. Independent Press Cable Association of Australasia* (1911) 28 T.L.R. (C.A.) 128; *Badcock v. Cumberland Gap Co.* [1898] 1 Ch. 362; *Nutter v. Messageries Co.* (1885) 1 T.L.R. 644; *Lazard Bros. v. Midland Bank* [1933] A.C. 289.

As Ord. IX, r. 8 applies only in the absence of any statutory provision regulating service of process, service cannot be effected under it on a Scottish company registered under the Companies Act, 1948, or any Act making such provision. Compare *Palmer v. Caledonian Ry.* [1892] 1 Q.B. (C.A.) 823, with

(3) *If the action is brought under the Carriage by Air Act, 1932, the limitations laid down in that Act must be observed.*

Under the Carriage by Air Act, 1932, passed as a result of the Warsaw Convention, the jurisdiction of the English courts as to actions arising therefrom is limited by Sched. 1, Art. 28 thereof which provides that an action for damages [under the Act] must be brought, at the option of the plaintiff, in the territory of one of the High Contracting Parties, either before the court having jurisdiction at the place of destination or before the court having jurisdiction where the carrier is ordinarily resident, or has his principal place of business, or has an establishment by which the contract has been made, so that the presence of the defendant is only sufficient to found jurisdiction when one of these conditions is fulfilled.

By section 2 of the Second Schedule of the same Act actions to enforce liability for the death of a passenger may be brought by the deceased's personal representative or by a person to benefit by the Act, but only one action shall be brought in the United Kingdom in respect of the death and every such action shall be for the benefit of all persons entitled as either are domiciled in the United Kingdom, or, not being domiciled there, express a desire to take the benefit of the action.

If the conditions laid down in Rule 27 are fulfilled, the court has the most extensive jurisdiction in respect of causes of action of every kind. Hence our tribunals have been said 'to be more open to admit actions founded upon foreign transactions than those of any other European country'.¹⁵ They in general exercise, as already pointed out, no jurisdiction with respect to matters relating to foreign land.¹⁶ But, 'so far as relates to the question of jurisdiction, we apprehend', it has been laid down 'that the superior courts of England did not decline *jurisdiction* in the case of *any transitory cause of action*, whether between British subjects or foreigners, resident at home or abroad, or whether any or every fact necessary to be proved, in order to establish either the plaintiff's or the defendant's case, arose at home or abroad. Though every fact arose abroad, and the dispute was between foreigners, yet the courts, we apprehend, would clearly entertain and determine

Logan v. Bank of Scotland [1904] 2 K.B. 495. Leave must be obtained under Ord. XI; see *Wood v. Anderston Foundry Co.* (1888) 4 T.L.R. 708. But under the Companies Act, 1948, s. 437 (2), where a company registered in Scotland carries on business in England, process may be served on it by leaving it at or sending it by post to the principal place of business of the company in England, addressed to the head officer there, while a copy of the process must be sent to the registered office (sub-s. 3). See Rule 52, *post*, as to stay of proceedings.

¹⁵ *Phillips v. Eyre* (1870) L.R. 6 Q.B. 1, 28, *per curiam*. Compare *Western Bank v. Perez* [1891] 1 Q.B. (C.A.) 304, 309, 311, judgment of Esher, M.R.; pp. 316, 317, judgment of Bowen, L.J.; *Australian Assets Co., Ltd. v. Higginson* (1897) 18 N.S.W.L.R. 189.

¹⁶ See Rule 20, p. 141, *ante*.

the cause, if in its nature transitory, and if the process of the court had been brought to bear against the defendant by service of a writ on him where present in England'¹⁷; and what was true of the Superior Courts in 1870 holds good now of the High Court.

The principle accepted by the English courts is laid down by Lord Parmoor.¹⁸ 'In the case of actions *in personam*, in which a writ has been regularly served on foreigners, or foreign corporations, when present in this country and a judgment has been obtained, it seems to be clear as a general rule, that under the obligations of that branch of international law which governs the application of foreign judgments, other countries, whose governments have been recognised *de facto* and *de iure* by the Government of this country, will accept the jurisdiction of the courts of this country and regard their judgments as valid.' There remains, however, with the court a certain measure of discretion in refusing to entertain an action if to do so might work injustice.¹⁹

It will be observed²⁰ that, speaking generally, though the principle is subject to several—very important—exceptions, the High Court has no jurisdiction to serve a writ, or the equivalent to a writ, in an action *in personam* on any defendant who is not in England, and hence, as expressed in this Digest, has no jurisdiction over such defendant. But under, at any rate, one Rule of Court a defendant who is not in England can, indirectly and through an agent who is in England, be served with a writ there, and thus come within the jurisdiction of the High Court. The Rule referred to is Ord. IX, r. 8a, and for the present purpose may be stated as follows :—

'The Court may assume jurisdiction where a contract has been entered into [in England²¹] by or through an agent residing or carrying on business in England on behalf of a principal residing or carrying on business out of England relating to or arising out of such contract'.²²

This result is obtained by the provision that in such an action a writ of summons may by leave of the court or a judge given before the determination of such agent's authority, or of his business relation to the principal, be served on such agent. Note that (i) the principal is in this case through the presence of his agent in England treated as though the principal were himself in England, though he may in fact be resident, *e.g.*, in Germany; (ii)

¹⁷ *Jackson v. Spittall* (1870) L.R. 5 C.P. 542, 549.

¹⁸ *Employers' Liability Assurance Corp. v. Sedgwick, Collins & Co.* [1927] A.C. 95, 114.

¹⁹ See Chap. 9, Rule 52, *post*

²⁰ See Rule 28, p. 180, *post*.

²¹ 'Within the jurisdiction'; as to jurisdiction to order service abroad in such a case, see *post*, p. 189.

²² See Ord. IX, r. 8a (July 14, 1920). The power is discretionary. See *Annual Practice* for the official memorandum hereon.

the writ cannot be served without the permission of the court, or a judge thereof, whereas a writ served upon a defendant actually in England is served as of right without any permission of the court; (iii) leave to serve a writ can be obtained only whilst the agent's authority, or his business relations with his principal, continue in existence. When leave to serve a writ has been obtained, a notice of the order giving leave and a copy thereof and of the writ of summons, must forthwith be sent by prepaid registered post letter to the defendant at his address out of England. These provisions, by which a defendant is treated as though he were in England because he is carrying on business there through an agent, are probably suggested by the principles as to the cases in which a foreign corporation may be treated as being resident in England because it carries on business there.²³ They will obviate cases in which, under the rules as to service on corporations, service is sometimes impossible through technical difficulties,²⁴ and also cases where it has proved impossible to serve a writ on a person residing out of England but trading in England in a firm name.²⁵ But the procedure is essentially discretionary, not normally to be resorted to when there is no difficulty in proceeding under Rule 28. It is more appropriate in a case where a foreign firm has regular agents here doing a large business for them than where a foreigner makes a single contract through a broker.

Illustrations

1. X²⁶ incurs a debt to A in France. A brings an action against X for the debt. The court has jurisdiction to entertain the action.²⁷

2. X executes at Calcutta a bond in favour of A. A brings an action against X on the bond. The court has jurisdiction.²⁸

3. X, a Frenchman, makes a contract in France with A for the delivery of goods by X to A in Paris. A brings an action against X for not delivering the goods. The court has jurisdiction.²⁹

4. X makes a contract with A in the U.S.A. to appear in A's films. A seeks an interim injunction to restrain X from entering into a competing engagement in England. The court has jurisdiction.³⁰

5. X assaults A in France. A brings an action against X for the assault. The court has jurisdiction.³¹

²³ See p. 127, *ante*. In *Montgomery, Jones & Co. v. Liebenenthal & Co.* [1898] 1 Q.B. 487, it was stated that in a case where service out of the jurisdiction could not be ordered, owing to the defendant being domiciled or ordinarily resident in Scotland, an agreement for service on an agent in England was none the less valid.

²⁴ Compare *Clokey v. London & North Western Ry.* [1905] 2 Ir.R. 251.

²⁵ Compare Rule 28, Exception 12, p. 201, *post*.

²⁶ In all these Illustrations to Rule 27, it is of course assumed that X is in England at the time for the service of the writ.

²⁷ *De la Vega v. Vianna* (1830) 1 B. & Ald. 284.

²⁸ *Alliance Bank of Sumla v. Carey* (1880) 5 C.P.D. 429.

²⁹ Compare *Roberts v. Knights*, 7 Allen (Mass.) 449.

³⁰ Compare *Warner Bros. Pictures Inc. v. Nelson* [1937] 1 K.B. 209.

³¹ *Scott v. Seymour* (1862) 1 H. & C. 219.

6. X in Jamaica wrongfully imprisons A. A brings an action for false imprisonment against X. The court has jurisdiction.³²

7. A & Co. are an English company owning a submarine telegraph between England and France. X is a Swedish subject, the owner of a Swedish ship. X's ship, through the negligence of the captain and sailors, strikes against and injures the telegraphic cable. The damage is done on the high seas, more than three miles from land. A & Co. bring an action against X to obtain compensation for the damage. The court has jurisdiction.³³

8. X and Y are Spanish subjects, the owners of a Spanish ship, which on the high seas comes into collision with a British ship belonging to A, a British subject. A brings an action against X and Y for damage caused to the ship. The court has jurisdiction.³⁴

9. X, an Italian subject carrying on business in England, is owner of an Italian ship. X's ship comes on the high seas into collision with a British ship, and causes the death of M, one of the crew of such ship. A, the representative of M, brings an action against X to recover damages for the death of M. The court has jurisdiction.³⁵

10. X and Y are British subjects, and the owners of a British ship. The ship, when on the high seas, comes into collision, through the negligence of her crew, with a Norwegian ship, and thereby causes the death of M, a Norwegian seaman, on board the Norwegian ship. A, the representative of M, brings an action, under the Fatal Accidents Acts, 1846 and 1864, against X and Y for damages. The court has jurisdiction.³⁶

11. The *Atjeh*, a Dutch ship, comes into collision on the high seas with the *Kroon-Prins*, another Dutch ship, through the negligence of the crew of the *Atjeh*. The owner of the *Atjeh*, X, is in England. A, the owner of the *Kroon-Prins*, brings an action against X for the damage done by the *Atjeh* to the *Kroon-Prins*. The court has jurisdiction.³⁷

12. A steamer belonging to A renders salvage services to a ship on the high seas belonging to X and Y. A brings an action in personam against X and Y for the services rendered. The court has jurisdiction.³⁸

13. A, an American citizen, brings an action against X, an American citizen, for a libel published by X of A in New York. The court has jurisdiction.³⁹

14. X & Co. are a French corporation residing in Paris where their business

³² *Phillips v. Eyre* (1869) L.R. 4 Q.B. 225; (1870) L.R. 6 Q.B. 1.

³³ *Submarine Telegraph Co. v. Dickson* (1864) 15 C.B.(N.S.) 759. Compare *The Golaa* [1926] P. 103; damage to pipe line at Tampico in Mexico.

³⁴ Compare *The Chartered Bank of India v. Netherlands Navigation Co.* (1888) 10 Q.B.D. (C.A.) 521; *The Leon* (1881) 6 P.D. 148; *The Tubantia* [1924] P. 78; *Re Smith* (1876) 1 P.D. 300. In the last case the action, it is true, could not be maintained, but this was owing to the impossibility of effecting service on the defendants in England.

³⁵ See *The Guldjaxe* (1868) L.R. 2 A. & E. 325; *The Beta* (1869) L.R. 2 P.C. 447; *The Explorer* (1870) L.R. 3 A. & E. 289; *The George and Richard* (1871) L.R. 3 A. & E. 466. Compare *The Franconia* (1877) 2 P.D. (C.A.) 163, with *Smith v. Brown* (1871) L.R. 6 Q.B. 729; *Harris v. Owners of Franconia* (1877) 2 C.P.D. 173, and *Seward v. Vera Cruz* (1884) 10 App.Cas. 59, which merely show that jurisdiction did not exist *in rem* under the Fatal Accidents Act, 1846; this restriction disappeared under the Maritime Conventions Act, 1911.

³⁶ *Davidsson v. Hul* [1901] 2 K.B. 606; *The Explorer* (1870) L.R. 3 A. & E. 289; *Adam v. British and Foreign Steamship Co.* [1898] 2 Q.B. 430, not followed.

³⁷ See *The Chartered Bank of India v. Netherlands Navigation Co.* (1888) 10 Q.B.D. (C.A.) 521, especially judgment of Brett, L.J., 536, 537; *The Leon* (1881) 6 P.D. 148.

³⁸ *The Elton* [1891] P. 265.

³⁹ See *Field v. Bennett* (1886) 56 L.J.Q.B. 89. In this case the defendant Bennett was not in England. If he had been, there would have been no difficulty in maintaining an action against him for a libel, whether published in England or the United States. See Rules 178, 174, *post*.

is carried on. They occupy for a little more than a week a stand at the Crystal Palace in London, where N, their agent, explains the working of the articles there offered for sale, recommends the purchase of the said articles, and takes orders for the purchase of the same, whereby he binds X & Co. X & Co. carry on business in England. They are, therefore, present in England, and the court has jurisdiction to entertain an action by A against X & Co. for delivery of goods.⁴⁰

15. X & Co., a French corporation formed under French law, have a head office in Paris and own steamers trading between French and English ports. X & Co. pay rent of office in London, where their name is printed up. N acts for X & Co. and for other companies as agent, and also does business on his own account. N secures freight and passage engagements for X & Co. N collects payments for freights and transmits them to X & Co. and forwards and delivers goods carried by X & Co. A collision takes place between *La Bourgogne*, a ship belonging to X & Co., and a ship of A. A brings an action in the Admiralty Division against X & Co. and serves a writ under Ord. IX, r. 8, on N as agent of X & Co. The court has jurisdiction.⁴¹

16. A, owners of a ship damaged by X's ship, sue X and serve a writ on X's English agents. X is a foreign corporation. The agents act as freight and passenger agents for X and other foreign shipping companies. They have no concern with the management of X. The court has no jurisdiction and the writ and service must be set aside.⁴²

17. X & Co. are an American corporation created under the law of New York for carrying on the business of an hotel there. The offices of X & Co. are in New York, and the business is managed by a board of directors resident there. The greater part of the capital is held by British shareholders. There is an agent of the company, N, in England, who performs some duties for the company in England. A brings an action to restrain X & Co. from carrying out certain resolutions for the reconstruction of the company. A writ is served on N, the agent, in England. The court has no jurisdiction.⁴³

18. X & Co. are a company formed under a British Act of Parliament for carrying on business at Calcutta. The whole business is there carried on by four of the directors of the company living in Calcutta, and the whole profits of the company are made there. A creditor of the company serves a writ on the company at its registered office in London. The court has jurisdiction.

19. A, residing in England, through N, X's agent carrying on business on behalf of X in London, supplies goods to X, who resides in Jersey. X is indebted to A for the price of the goods supplied. A, whilst N is still X's agent, obtains from the court leave to serve a writ in an action against X on N, X's agent. The court has jurisdiction.

20. The circumstances are the same as in the last illustration, except that before A applies for leave to serve a writ on N, N has ceased to be X's agent, and to have any business relations with X. The court has no jurisdiction.⁴⁴

21. The case is the same as Illustration 19, except that X, N's principal, resides and carries on business in Scotland. The court has jurisdiction.

⁴⁰ See *Dunlop Pneumatic Tyre Co. v. Actien Gesellschaft, etc.* [1902] 1 K.B. (C.A.) 842, and compare *La Bourgogne* [1899] A.C. 431.

⁴¹ *La Bourgogne* [1899] A.C. 431.

⁴² *The Lalandia* [1933] P. 56; *The Holstein* (1936) 155 L.T. 466; *Thames and Mersey Marine Ins. Co. v. Societa di Navigazione* (1914) 114 L.T. (C.A.) 97; *Donovan v. North German Lloyd* [1933] Ir.R. 33.

⁴³ *Semble*, N has no general authority to represent X & Co. See *Badcock v. Cumberland Gap Co.* [1893] 1 Ch. 362. Contrast *Haggin v. Comptoir d'Escompte de Paris* (1889) 23 Q.B.D. (C.A.) 519, where the agent in London of a French company had a general authority to represent the company.

⁴⁴ Jurisdiction may, however, be exercised under Exception 5 to Rule 28, i.e., under Ord. XI, r. 1. (e) (ii).

RULE 28.⁴⁵—When the defendant in an action *in personam* is, at the time for the service⁴⁶ of the writ, not in England, the court has (subject to the Exceptions hereinafter mentioned) no jurisdiction to entertain the action.

Comment

At common law⁴⁷ a writ could never be served on a defendant when out of England,⁴⁸ and in an action *in personam* this common-law doctrine is still (subject to definite though very wide exceptions) maintained; or, in other words, the court has, as a rule, no jurisdiction to entertain an action *in personam* against a defendant who, at the time for service of the writ, is in a foreign country.

This common-law principle has been modified by Rules of Court⁴⁹ made under statutory authority by the judges, and in very many actions service⁵⁰ can be effected on, *i.e.*, the court

⁴⁵ See, *e.g.* *Re Busfield* (1886) 32 Ch.D. (C.A.) 123, 131, judgment of Cotton, L.J.; *Jackson v. Spittall* (1870) L.R. 5 C.P. 542; Ord. XI, r. 1; *Re Eager* (1882) 22 Ch.D. (C.A.) 86; *Kilney Urban Council v. Kirkwood* [1917] 2 Ir.R. 614

⁴⁶ When a writ for service in England has been issued against a defendant, who (being a British subject) is, at the time of the *issue*, in England, and the defendant after the writ has come to his knowledge has, before due service of the writ, left England, though not, it may be for the purpose of avoiding service, the court may (*semble*) make an order for substituted service of the writ under Ord. IX, r. 2, provided that the circumstances of the case show that it would be just to make such an order. *Jay v. Budd* [1898] 1 Q.B. (C.A.) 12, 15, 18; and compare *Western Suburban and Notting Hill Building Society v. Rucklidge* [1905] 2 Ch. 472. If this be so, the court may, under the conditions mentioned, in effect exercise jurisdiction over a defendant who is in England at the time of the issue of the writ, as though he were in England at the time of the service of the writ. But the circumstances of *Jay v. Budd* are very peculiar, and the power to allow service on a defendant out of England otherwise than under Ord. XI, rr. 1, 2a, or Ord. XLVIII. r. 1, *i.e.*, under the Exceptions to Rule 28, is otherwise usually limited to the cases in which a defendant is keeping out of the jurisdiction to evade service. *Adler v. Benjamin* (1885) 1 T.L.R. 308; *Re Urquhart* (1890) 24 Q.B.D. 723; *Widling v. Bean* (1891) 1 Q.B. (C.A.) 100, 102; *Trent Cycle Co. v. Beattie* (1899) 15 T.L.R. 176; *Western, etc. Building Society v. Rucklidge* [1905] 2 Ch. 472. See also *Fry v. Moore* (1889) 23 Q.B.D. (C.A.) 395, 397, 399, judgments of Lindley and Lopes, L.J.J.; *Field v. Bennett* (1886) 56 L.J.Q.B. 89; *Hillyard v. Smith* (1887) 36 W.R. 7; *Porter v. Freudenberg* [1915] 1 K.B. (C.A.) 857, 889, where the discretion of the court as regards service of process on alien enemies was emphasised.

⁴⁷ See *Jackson v. Spittall* (1870) L.R. 5 C.P. 542; *Drummond v. Drummond* (1866) L.R. 2 Ch. 92; Holdsworth, *Hist.* ix. 252-256.

⁴⁸ See *Re Busfield* (1886) 32 Ch.D. (C.A.) 123, 131, judgment of Cotton, L.J.

⁴⁹ See especially, Ord. XI, rr. 1, 2a.

⁵⁰ The service may be service of the notice of a writ. 'When the defendant is neither a British subject nor in British dominions, notice of the writ, and not the writ itself, is to be served upon him': Ord. XI, r. 6. The British dominions included Eire: *Hume Pipe and Concrete Construction Co. Ltd. v. Moraore Ltd.* [1942] 1 K.B. 189 (C.A.). But for our present purpose service of notice is equivalent to service of a writ. Substituted service may be allowed at the discretion of the court either without or within England. *Ford v. Shephard* (1885) 34 W.R. 63; *Western, etc. Building Society v. Rucklidge* [1905] 2 Ch. 472. The mode of service of notice of writs abroad is regulated by Ord. XI, rr. 11-12a; there are numerous conventions. See *Annual Practice*

exerts jurisdiction over, a defendant irrespective of nationality, who is out of England. It is far from certain that all these extensions are justified, especially as recognition is still refused in some cases to the exercise under like conditions of jurisdiction by foreign courts,⁵¹ but the matter is one for the consideration of the authorities charged with legislative authority and not the courts in their judicial capacity.⁵² The Rule and the Exceptions, taken together, constitute, what has hitherto hardly existed, a body of principles defining in actions *in personam*, the extra-territorial jurisdiction of the court.

As to the general character of these Exceptions, the following points should be noted.

(1) They all arise under Rules of Court, and all but Exceptions 11 and 12 arise under Rules of Court, 1883, Ord. XI, r. 1, as amended.

(2) The Exceptions are exhaustive; they are intended to embody the effect on the jurisdiction of the court of all the Rules of Court having reference to service in an action *in personam* on a defendant who is out of England,⁵³ and such Rules of Court are themselves exhaustive, the practice of the courts, the jurisdiction whereof is transferred to the High Court, being, except where it is expressly kept alive,⁵⁴ obsolete.⁵⁵

(3) There is an essential difference between the jurisdiction exercised by the court when the defendant in an action is in England and the jurisdiction exercised by the court when the defendant is not in England, *i.e.*, when an action comes within the Exceptions to Rule 28. When the defendant is in England, the jurisdiction of the court is not discretionary; the plaintiff has a right to demand⁵⁶ that if it exist it shall be exercised. When the defendant is not in England, the jurisdiction of the court is to a certain extent

note to Ord. XXXVII, r. 6a. Service must be effected exactly where authorised; thus service in Hong Kong in lieu of Japan is a nullity: *Bonnell v. Preston* (1908) 24 T.L.R. (C.A.) 756.

⁵¹ See *Phillips v. Batho* [1913] 8 K.B. 25

⁵² See *Western National Bank of City of New York v. Perez* [1891] 1 Q.B. 304, 311; *McMullen v. Traders Bank of Canada* (1912) 26 O.L.R. 1; 6 D.L.R. 184.

⁵³ Compare, however, note 46, p. 180, *ante*, as to substituted service on defendant out of England, and note at end of this chapter, as to Third Party Procedure. During the war special arrangements were made for service on enemy subjects, see Trading with the Enemy Act, 1939, s. 2, and Ord. IX, r. 14b. Service out of England of originating summonses, petitions, or notices of motion in proceedings other than actions *in personam* are regulated by Ord. XI, r. 8A (July, 1920), under which a wide discretion is given to the court.

⁵⁴ See, *e.g.*, as to divorce, Ord. LXVIII, r. 1 (d) and the Matrimonial Causes Rules, 1947.

⁵⁵ *Re Busfield* (1886) 32 Ch.D. (C.A.) 123, 131, judgment of Cotton, L.J.; *Re Eager* (1882), 22 Ch.D. (C.A.) 86; *Cresswell v. Parker* (1879) 11 Ch.D. (C.A.) 601, 603, judgment of James, L.J.

⁵⁶ Subject, however, to the right of the court to stay or dismiss an action where not staying it would work injustice. See *Logan v. Bank of Scotland* (No. 2) [1906] 1 K.B. (C.A.) 141; *Egbert v. Short* [1907] 2 Ch. 205; and Chap. 9, *post*. *St. Pierre v. South American Stores, Ltd.* [1936] 1 K.B. 382, 386, *per* Scott, L.J. (No. 2) (1937) 42 Com.Cas. 364.

discretionary, for the court may, if it see fit, in general⁵⁷ decline to allow the service⁵⁸ or even the issue of the writ,⁵⁹ and thus decline to exercise its jurisdiction. It has now been definitely laid down by the Court of Appeal, firstly, that the court ought to be exceedingly careful before it allows a writ to be served on a foreigner out of England. Secondly, if there is any doubt in the construction of any of the sub-heads of Ord. XI, r. 1, that doubt ought to be resolved in favour of the foreigner. Thirdly, inasmuch as applications are made *ex parte*, a full and fair disclosure of all the facts of the case ought to be made. Fourthly, the court is entitled to refuse leave in any case in which the proceedings are within the letter but not in substance within the reason for permitting exercise of jurisdiction.⁶⁰

When leave is asked of the court to serve a writ in Scotland or in Northern Ireland, it is ordered that if it shall appear to the court or a judge that there may be a concurrent remedy in Scotland or in Northern Ireland,⁶¹ as the case may be, the court or judge shall have regard to the comparative cost and convenience of proceeding in England, or in the place of residence of the defendant or person sought to be served. The object of this Rule clearly is to protect persons living in Scotland or Northern Ireland from the inconvenience of an action which, though it might be brought in England, would cause useless cost to such Scottish and Northern Irish defendants.⁶²

⁵⁷ But note that the jurisdiction of the court is not discretionary in cases falling under Exceptions 11 and 12. See pp. 199, 201, *post*.

⁵⁸ Ord. XI, r. 1.

⁵⁹ Ord. II, r. 4. *Conf. The W. A. Sholten* (1887) 13 P.D. 8

⁶⁰ *Re Schintz* [1926] Ch. 710, *per* Lord Hanworth, M.R., citing *The Hagen* [1908] P. 189, 201, *per* Farwell, L.J.; *Johnson v. Taylor Brothers* [1920] A.C. 144; *Rosler v. Hilbery* [1925] Ch. 250. See *Great Australian Co. v. Martin* (1877) 5 Ch.D. (C.A.) 1 (decided under R. S. C., 1875); *Société Générale de Paris v. Dreyfus Bros.* (1885) 29 Ch.D. 239, 242, *per* Pearson, J.; (1887) 37 Ch.D. (C.A.) 215, especially judgment of Landley, L.J., pp. 224, 225; *Oppenheimer v. Louis Rosenthal & Co.* [1937] 1 All E.R. 23; *Monro v. American Cyanamid and Chemical Corporation* [1944] K.B. 432, 437, *per* Scott, L.J. On the other hand, the fact that the plaintiff will be deprived of a fair trial in the foreign country for political reasons may induce the court to exercise its discretion if the conditions are satisfied: *Oppenheimer v. Louis Rosenthal & Co.* [1937] 1 All E.R. 23 (C.A.). See for Ontario, *Richer v. Borden Farm Products Co.* (1921) 49 O.L.R. 172; *Gibbons v. Berliner Gramophone Co.* (1913) 28 O.L.R. 620; *Brenner v. American Metal Co.* (1921) 50 O.L.R. 25. Compare *Call v. Oppenheim* (1885) 1 T.L.R. 622.

⁶¹ 'Ireland' in Order XI now means Northern Ireland only: *Hume Pipe and Concrete Construction Co. v. Moracrete, Ltd.* [1942] 1 K.B. (C.A.) 189.

⁶² Ord. XI, r. 2; *Harris v. Fleming* (1879) 13 Ch.D. 208; *Woods v. McInnes* (1878) 4 C.P.D. 67; *Williams v. Cartwright* [1895] 1 Q.B. (C.A.) 142; *Ex p. McPhail* (1879) 12 Ch.D. 632; *Tottenham v. Barry* (1879) 12 Ch.D. 797; *Marshall v. Marshall* (1888) 38 Ch.D. (C.A.) 320; *Kinahan v. Kinahan* (1890) 45 Ch.D. 78; *Washburn, etc., Co. v. Cunard Co.* (1889) 5 T.L.R. 592; *Tozier v. Hawkins* (1885) 15 Q.B.D. 880; *O'Connor v. Star Newspaper Co.*, 30 L.R. Ir. 1; *Smith v. Lupton*, 26 Ir.L.T.R. 91; *Re Burland's Trade Mark* (1889) 41 Ch.D. 542; *Wood v. Middleton* [1897] 1 Ch. 151; *Re De Penny* [1891] 2 Ch. 63; *Lopez v. Chavarri* [1901] W.N. 115; *Joynt v. McCrum* [1899] 1 Ir.R. 217; *Watson, Ltd. v. The Daily Record* [1907] 1 K.B. 853; *Richardson v. Army,*

(4) An action may fall at the same time within more than one of these Exceptions.⁶³ Thus an action for the breach of a contract made or to be performed in England falls within Exception 5, but if the contract be a contract affecting land in England, the action falls also within Exception 2. This may be a matter of consequence, since under Exception 2 the jurisdiction of the court is not, whilst under Exception 5 the jurisdiction of the court is, in one case, affected by the Scottish or Northern Irish domicile or residence of the defendant.⁶⁴

Illustrations

1. A is assaulted in Boulogne by X, who is a French citizen, or by Y, who is a Jerseyman. Neither X nor Y is domiciled or is habitually resident in England. The court has no jurisdiction.

2. X, an Italian subject, domiciled and habitually resident in Italy, incurs a heavy debt to A, an Englishman, who is staying in Paris. It is agreed that the debt should be repaid at a Parisian bank within a month from the date when it was incurred. The court has no jurisdiction.

3. The facts of the case are the same as in Illustration 2, with the addition that X has a large amount of money deposited to his credit with a bank in England. The court has no jurisdiction.

4. X, an Englishman, once domiciled and ordinarily resident in England, has acquired a domicile and ordinary residence in France. He incurs at Paris a debt to A, payable in France, and also assaults A in Paris. X is in France. A brings an action against X for the debt and for the assault. The court has no jurisdiction.⁶⁵

Exception 1.⁶⁶—The court may assume jurisdiction to entertain an action against a defendant who is not in England, whenever the whole subject-matter of the action is land situate in England (with or without rents or profits), or the perpetuation of testimony relating to such land.⁶⁷

Comment and Illustrations

This Exception applies where the whole subject-matter of the action is land in England. Both it and Exception 2 are applications

etc., *Assurance Association* [1924] 2 Ir.R. 96. See also *Logan v. Bank of Scotland* [1906] 1 K.B. (C.A.) 141; *Egbert v. Short* [1907] 2 Ch. 205; *Re Norton's Settlement* [1908] 1 Ch. (C.A.) 471.

⁶³ *Tassell v. Hallen* [1892] 1 Q.B. 321, 323–325, judgment of Coleridge, C.J.

⁶⁴ The Rules of Court made since 1908, embodied in Exceptions 5 and 6, have greatly increased the number of the Exceptions to Rule 28, or, in other words, have extended the jurisdiction of the court in respect of any defendant who at the time of the service of a writ in an action is not in England.

⁶⁵ This case does not fall within Exception 3, as to which, see p. 186, *post*. The fact that X was once domiciled or ordinarily resident in England does not give the court jurisdiction.

⁶⁶ Ord. XI, r. 1 (a). The first ten Exceptions to this Rule correspond with, and with slight verbal alterations reproduce, the ten cases (a) to (i) in which, under Ord. XI, r. 1, 'service out of the jurisdiction [i.e., out of England] of a writ of summons, or notice of a writ of summons, may be allowed by the court or a judge'. Service under this Rule is, of course, discretionary.

⁶⁷ See, as an example of an action for perpetuation of testimony, *Slingsby v. Slingsby* [1912] 2 Ch. (C.A.) 21. Compare *West v. Sackville* [1903] 2 Ch. 378.

of the principle of Rule 25, which they extend to the grant of power to English courts to give judgments *in personam* and not merely judgments *in rem* in cases which the courts think fit to exercise the wider authority. The court has jurisdiction in these cases :—

1. A brings an action against X for the recovery of land in Middlesex (ejectment). X is in France.

2. A brings an action against X for the recovery of land in Middlesex, and for mesne profits.⁶⁸

3. A brings an action simply with a view of perpetuating evidence of the date and the legitimacy of his birth which would be necessary for supporting his claim to land situate in England.⁶⁹

*Exception 2.*⁷⁰—The court may assume jurisdiction⁷¹ whenever any act, deed, will,⁷² contract, obligation, or liability affecting land or hereditaments situate in England, is sought to be construed, rectified, set aside, or enforced in the action.

Comment

This Exception applies to any action in respect of any matter affecting English land. The terms, however, of the Exception give rise to more than one difficulty.

When, for example, does a contract, obligation, or liability 'affect land'? It has been held, on the one hand, that an action by an outgoing tenant of a farm in Yorkshire to recover from his landlord compensation for tenant right, according to the custom of the country, was an action in which a contract, obligation, or liability 'affecting' land was sought to be enforced, and that the action was therefore within Exception 2.⁷³ It has been held, on the other hand, that an action to recover rent due on a lease of land in England was not an action to enforce a contract, obligation, or liability 'affecting' land, and that the action, therefore, was not

⁶⁸ See *Agnew v. Usher* (1884) 14 Q.B.D. 78, 79, language of Lord Coleridge, C.J. Contrast *Clare County Co. v. Wilson* [1913] 2 Ir.R. (C.A.) 89; claim for expenses for excessive user of roads was not within the corresponding Exception in Ireland.

⁶⁹ Contrast *Slingsby v. Slingsby* [1912] 2 Ch. (C.A.) 21, which was decided before the provision as to the perpetuation of testimony was added to Ord. XI, r. 1 (a) and led to the addition being made (R. S. C. May, 1912).

⁷⁰ Ord. XI, r. 1 (b).

⁷¹ *Viz.*, to entertain an action against a defendant who is not in England. In the illustrations to all these Exceptions it is assumed that the defendant is not in England. If he were in England, Rule 28 would have no application. See Rule 27, p. 171, *ante*.

⁷² This apparently refers to an administration action. See Rule 49, *post*, and comment thereon. Compare Exception 4, p. 188, *post*.

⁷³ *Kaye v. Sutherland* (1887) 20 Q.B.D. 147.

within Exception 2,⁷⁴ but it has been said that the decision in this case amounted to no more 'than that the action was brought for money due, and should be brought as a personal action in the forum of the defendant',⁷⁵ and that 'the decision of the court only came to this, that an action against the assignee of a lease for rent due was not within'⁷⁶ Exception 2.

It is therefore impossible to lay down with any precision what are the cases in which land is 'affected' within the terms of Exception 2. Any contract or sale of lands, tenements, or hereditaments, or any interest in or concerning them, within section 40 of the Law of Property Act, 1925, it may be assumed, affects lands; and an action to enforce such contract or sale, assuming the land to be in England, comes within Exception 2.

What, again, is the exact meaning of the terms 'enforced in an action'? The suggestion has been made that they were intended to limit Exception 2 to actions for specific performance. 'As I read those words, "sought to be enforced in the action",' says A. L. Smith, J., 'they seem to mean "specifically performed".'⁷⁷ But this suggestion cannot, it is conceived, be accepted as sound. 'I should hesitate', it has been said by Charles, J., 'to narrow the operation of [Exception 2] by holding that it only applied where specific performance of some contract or obligation was sought.'⁷⁸

Illustrations

1. A is an outgoing tenant of a farm in Yorkshire, of which X is landlord. X resides in Scotland. A brings an action against X to recover compensation for tenant right, according to the custom of the country. The court has jurisdiction.⁷⁹

2. A brings an action against X for breach of contract to give up the possession of a house in London to A.⁸⁰ (*Semble*), the court has jurisdiction.

3. A brings an action against X for breach of a contract for sale of a business, as a brickyard, accompanied with possession of the premises where it is carried on.⁸¹ (*Semble*), the court has jurisdiction.

4. A brings an action against X for the breach of a contract for the sale of a growing crop of grass, being a natural and permanent crop not within the description of emblements or *fructus industriales*.⁸² (*Semble*), the court has jurisdiction.⁸³

⁷⁴ *Agnew v. Usher* (1884) 14 Q.B.D. 78. So held by Q.B.D.; but the judgment of the Q.B.D. setting aside the service of a writ on the defendant, though affirmed by the Court of Appeal, was affirmed on grounds which made it unnecessary to decide whether the contract or obligation affected land. See 51 L.T. (C.A.) 752.

⁷⁵ *Kaye v. Sutherland* (1887) 20 Q.B.D. 147, 151, judgment of Charles, J. See *Tassell v. Hallen* [1892] 1 Q.B. 321.

⁷⁶ *Ibid.* The Court of Appeal in *Agnew v. Usher* (1884) 14 Q.B.D. 78, seems to have held that the defendants had not been proved to be assignees.

⁷⁷ *Agnew v. Usher* (1884) 14 Q.B.D. 78, 81, judgment of A. L. Smith, J.

⁷⁸ *Kaye v. Sutherland* (1887) 20 Q.B.D. 147, 151.

⁷⁹ *Kaye v. Sutherland* (1887) 20 Q.B.D. 147, compared with *Agnew v. Usher* (1884) 14 Q.B.D. 78; 51 L.T. 576 (C.A.) 752.

⁸⁰ *Kelly v. Webster* (1852) 12 C.B. 283.

⁸¹ *Smart v. Harding* (1855) 15 C.B. 652.

⁸² *Crosby v. Wadsworth* (1805) 6 East 602; *Carrington v. Roots* (1837) 2 M. & W. 248.

⁸³ These last three illustrations are merely examples of actions on contracts

5. A brings an action against X to enforce specific performance of a contract for the sale by X to A, or for the lease by X to A of a house in London. The court has jurisdiction.

6. A brings an action against X for the rectification of a contract for the sale by A to X of land in Middlesex. The court has jurisdiction.

7. A brings an action against X, the assignee of a lease of a house in Middlesex, for breach of covenant to repair. X is resident in Scotland. The action is one in which a contract or liability affecting land in England is sought to be enforced. The court has jurisdiction.⁸⁴

8. A brings an action against X, domiciled in Scotland, for one quarter's rent of a house at Liverpool, held under a lease for ten years. A claims the rent from X as assignee of the lease. X alleges that the assignment was to secure a debt, and that he never signed or accepted the assignment, or entered into possession. The court has (*semble*) no jurisdiction under this Exception.⁸⁵

9. X in Ireland makes a statement, in the nature of slander of title, in respect of land owned by A in England. A brings an action against X. The court has no jurisdiction.⁸⁶

10. A claims against X a declaration that he is a trustee of certain lands in England, and damages for breach of trust. X is resident in Ireland. The court has jurisdiction.⁸⁷

Exception 3.⁸⁸—The court may assume jurisdiction whenever any relief is sought against any person domiciled or ordinarily resident in England.

Comment

The extent of this Exception depends upon the meaning of the term 'relief'. It might conceivably be used as meaning such relief, as, before the Judicature Act came into operation, was obtainable in a court of equity, and was not obtainable at common law. It is, however, apparently used in the widest sense, and includes the recovery of a debt, or of damages in an action for breach of contract or tort.⁸⁹ If this be so, the expression 'whenever any relief is sought' is almost equivalent to 'whenever any action is brought'. Hence domicile or ordinary residence in England is of itself a ground of jurisdiction against a defendant who might otherwise, on account of his absence from England, be exempt from the jurisdiction of the court.

The expression 'domiciled or ordinarily resident' recurs in Exception 5, and also, in a slightly different form, in Rule 42, *post*.

It is of importance, therefore, to note the distinction between

within the fourth section of the Statute of Frauds (see now Law of Property Act, 1925, s. 40), and therefore (it is submitted) within Exception 2.

⁸⁴ *Tassell v. Hallen* [1892] 1 Q.B. 321.

⁸⁵ *Agnew v. Usher* (1884) 14 Q.B.D. 78, affirmed 51 L.T. (C.A.) 752.

⁸⁶ *Casey v. Arnott* (1876) 2 C.P.D. 24. Where, under the Illustrations of a particular Exception, it is stated that 'the court has no jurisdiction', the meaning is that the court has not jurisdiction under that particular Exception.

⁸⁷ See *Att.-Gen. v. Draper's Co.* [1894] 1 Ir.R. (C.A.) 185.

⁸⁸ Ord. XI, r. 1 (o).

⁸⁹ See *Hadad v. Bruce* (1892) 8 T.L.R. 409, and the very wide meaning given to the term 'relief' in the Petitions of Right Act, 1860, s. 16.

'domicile'⁹² and 'residence'⁹³; and to bear in mind that the words 'domicile' and 'domiciled', when employed in a Rule of Court or an Act of Parliament, are to be taken in their strict technical sense.⁹⁴

A man's domicile is the country which is considered by law to be his permanent home.⁹⁵ What is a man's domicile is, therefore, a matter of law to be determined by strictly technical rules.⁹⁶ It may be either a domicile of choice⁹⁷ or a domicile of origin⁹⁸; hence, under conceivable circumstances, it may happen that the jurisdiction of the court under Exception 3, as under Exception 5, depends on the answer to the question whether the defendant's father was or was not domiciled in England at the time of the defendant's birth. A man's residence, on the other hand, is the place or country where he in fact is habitually present.⁹⁹ Where it is that a man is ordinarily resident is a matter with which legal rules have nothing to do, and which must be ascertained in the same way as any other physical fact. A man, again, may be domiciled in one country, *e.g.*, France, and may be ordinarily resident in another, *e.g.*, England. No man can be domiciled in more countries than one,¹ but there exists at any rate a possibility of a person having an ordinary residence in at least two countries. This would be so if a man were, as a regular habit, to pass half of every year in England and half in France.² 'Ordinary residence' means something more than mere temporary presence in England, though exactly what amount of presence in England amounts to 'ordinary residence' is a matter which scarcely admits of exact definition.³

Illustrations

1. T, a testator, dies domiciled in Ireland. X, T's executor, is domiciled in England, but is residing in Ireland. A, a legatee, brings an action against X in respect of the improper investment of money received under T's will. The court has jurisdiction.⁴

2. A brings an action against X for the rectification of a contract made between X and A. X is domiciled in England, but is in France. The court has jurisdiction.

3. X, an Englishman, domiciled or ordinarily resident in England, makes a promise of marriage to A, a Greek woman born in Syria. X goes abroad.

⁹² See Chap. 2, p. 77, *ante*.

⁹³ See p. 77, note 4, *ante*.

⁹⁴ *Ex p. Cunningham* (1884) 13 Q.B.D. (C.A.) 418; *Re Hecquard* (1889) 24 Q.B.D. (C.A.) 71; *Re Aktiebolaget Robertsfors, etc.* [1910] 2 K.B. 727.

⁹⁵ See definitions of 'domicile', pp. 40, 77, *ante*.

⁹⁶ See Rules 1-17, pp. 77-126, *ante*.

⁹⁷ See p. 89, *ante*.

⁹⁸ See p. 88, *ante*.

⁹⁹ See Chap. 2, p. 77, note 4, *ante*. An ambassador's wife is not ordinarily resident in England in this sense; *Ghikis v. Musurus* (1908) 25 T.L.R. 225.

¹ See Rule 3, p. 85, *ante*.

² See *Ex p. Hecquard* (1889) 24 Q.B.D. (C.A.) 71.

³ Compare *Ex p. Gutierrez* (1879) 11 Ch.D. (G.A.) 298; *Ex p. Hecquard* (1889) 24 Q.B.D. (C.A.) 71.

⁴ See *Harvey v. Dougherty* (1887) 56 L.T. 322.

A brings an action for breach of promise of marriage. The court has jurisdiction.⁵

4. X is domiciled in England. X enters into a contract with A, to be performed in France. A brings an action against X for breach of contract. The court has jurisdiction.⁶

5. X's domicile of origin, which he has never abandoned, is Scottish. He is ordinarily resident in England, where he has a house and carries on business. He is absent in France. He has incurred in England a debt to A of £1,000. A brings an action for the debt. The court (*semble*) has jurisdiction.

6. X, domiciled or ordinarily resident in England, assaults A in France. A brings an action for the assault. The court has jurisdiction.

7. H and W are British subjects domiciled and ordinarily resident in England. W takes the four infant children of the marriage to U.S.A. and keeps them there without the consent of H. H then makes a settlement on the four children, takes proceedings in the Chancery Division to enforce the trusts, and the children thereupon become wards of court. The court has jurisdiction to make an injunction restraining W from keeping the infants out of the jurisdiction.⁷

*Exception 4.*⁸—The court may assume jurisdiction when the action is [for the administration of the personal estate of any deceased person who at the time of his death was domiciled in England,⁹ or] for the execution (as to property situate in England) of the trusts of any written instrument, of which the person to be served with a writ (defendant) is a trustee, which ought to be executed according to the law of England.¹⁰

Comment

The property subject to the trusts, or some portion of it, must be situate in England at the time when leave to serve the writ is given, or at any rate at the time of service, or when an application to the Court to set aside the service is made. Therefore, where the only property subject to the trust consisted of consols which the defendant had sold, before leaving England, so that at the time of the leave being given to serve him there was no property subject to

⁵ *Hadad v. Bruce* (1892) 8 T.L.R. 409.

⁶ Compare *Jones v. Scottish Insurance Co.* (1886) 17 Q.B.D. 421. In that case the action could not be maintained, but the reason was that the defendant was held by the court not to be ordinarily resident or domiciled in England.

⁷ *Re Liddell's Settlement Trusts* [1936] Ch. (C.A.) 365.

⁸ Ord. XI, r. 1 (d). Compare *Bowling v. Cox* [1926] A.C. 571, for an analogous jurisdiction in British Honduras in proceedings against executor of decedent domiciled in the colony who was in America.

⁹ It is convenient to give the whole of this Exception, though the words in square brackets are best considered in the comment on Rule 49, p. 301, *post*, which refers to jurisdiction in respect of a grant of administration.

¹⁰ *Winter v. Winter* [1894] 1 Ch. 421. Compare *Wood v. Middleton* [1897] 1 Ch. 161. This provision covers the case where a person has died not domiciled in England but has created by will a trust in England. Note that the Exception has no application to a trust which ought to be executed according to the law of Scotland (Trusts (Scotland) Act, 1921, s. 10) or any other country than England.

the trust nor had there been since, service was set aside. It appears, however, that other property coming into England when an action had been properly commenced under this Exception could be dealt with in that action without the necessity of the issue of a fresh writ for the administration of the trusts affecting it.¹¹

Illustrations

1. N by deed conveys leasehold and freehold property in England to X and Y in trust, on the death of N to sell the same and pay the proceeds to A and B. A and B bring an action against X and Y to have the trust executed. The court has jurisdiction.

2. X is sole trustee of a settlement executed March, 1886. Under the trusts of the settlement, A is beneficially entitled to a sum of consols. Before May 1, 1893, X sells the consols and leaves England, and has not returned there. There is no other property in England which is subject to the trusts of the settlement. The Court has no jurisdiction¹² to entertain an action by A for execution of the trusts of settlement.

3. X is sole trustee of a settlement made in Scotland, and to be executed in accordance with the law of Scotland. A is, under the settlement, entitled to a share in money which is in England. X is in Scotland. The court has (*semble*) no jurisdiction to entertain an action by A for the execution of the trust.

*Exception 5.*¹²—The court may assume jurisdiction whenever the action is one brought against a defendant not domiciled or ordinarily resident in Scotland to enforce, rescind, dissolve, annul, or otherwise affect a contract, or to recover damages or other relief for or in respect of the breach of a contract [which either is]—

- (i) made in England; or
 - (ii) made by or through an agent trading or residing in England on behalf of a principal trading or residing out of England; or
 - (iii) by its terms or by implication is to be governed by English law,
- or is one brought against a defendant not domiciled or ordinarily resident in Scotland or [Northern] Ireland,¹³ in respect of a breach committed in

¹¹ *Winter v. Winter* [1894] 1 Ch. 421.

¹² See Ord. XI, r. 1 (e), as amended in 1921 by R.S.C., June 23; and *Wansborough Paper Co., Ltd. v. Laughland* [1920] W.N. 394; *Laughland v. Wansborough Paper Co., Ltd.* [1921] 1 Sc.L.T. 341, Ct. of Sess., decided before the rule was altered to exclude the case of a defendant domiciled or ordinarily resident in Scotland. The effect of this exclusion is extensive; *Sassoon & Co. v. Graham & Co. and Oriental Navigation Co.* (1925) 133 L.T. (C.A.) 805.

¹³ 'Ireland' in Ord. XI now means Northern Ireland: *Hume Pipe and Concrete Construction Co. v. Moracrete Ltd.* [1942] 1 K.B. 189 (C.A.).

England of a contract wherever made, even¹⁴ though such breach was preceded or accompanied by a breach out of England which rendered impossible the performance of the part of the contract which ought to have been performed in England.

Comment and Illustrations

This Exception is based upon Ord. XI, r. 1 (e). It will cover many of the cases where, by virtue of the Exchange Control Act, 1947, s. 24, a duty is imposed upon a creditor resident in the United Kingdom to collect certain foreign debts.

The Exception applies to four combinations of circumstances or cases.

(1) Where a contract is made in England.¹⁵

1. X makes a contract in London with A. X breaks the contract out of England. It makes no difference in this instance whether the contract is broken in England or in a foreign country, or whether X is a British subject or an alien, *e.g.*, a French citizen or a citizen of the United States. The court has jurisdiction.

2. A charterparty made in London between A, a German company, and X, an Englishman, provides that disputes shall be settled by arbitration in Hamburg. An award is made against X for £20,000, payment to be made in English currency. The award is not payable in England but the action on the award is to enforce a contract made in England. The court has jurisdiction.¹⁶

(2) Where a contract is made¹⁷ by or through an agent, N, trading or residing in England, on behalf of a principal trading or residing in a foreign country, *e.g.*, France or the United States, with any person trading or residing anywhere.

Thus Y, trading or residing in Jersey, makes a contract, through an agent, N, trading and residing in London, with A, who may be in or out of England. It is to be noted that while the agent whom X employs must, to come within this Case, be trading or residing in England, and the person who makes a contract through such agent must be trading or residing out of England, A, the other party to the contract, may make it wherever he happens to be. Thus, if N, the agent trading, etc., in London acting on behalf of X, residing, *e.g.*, in France, bargains by letter that X will supply goods of a certain value to A, who is then travelling for pleasure from Paris to Rome, and A receives X's offer when in Rome or Naples, the court has jurisdiction. Supposing, however,

¹⁴ The remainder of this exception renders *Johnson v. Taylor Bros.* [1920] A.C. 144, obsolete.

¹⁵ When there is correspondence between persons in different countries, the contract is concluded in the place of final acceptance by letter or telegram: *Benaim v. De Bono* [1924] A.C. 514; *Cowan v. O'Connor* (1888) 20 Q.B.D. 640; *Clarke v. Harper and Robinson* [1938] N.Ir. 162; see *post*, pp. 598-9. The contract must be actually made in England; it is not enough to provide in a contract signed at New York that it shall be held to be made and executed in London; but these terms are sufficient to bring the contract under head (iii), *i.e.*, 'by its terms or by implication' to be governed by English law: see *British Controlled Oilfields v. Stagg* [1921] W.N. 319.

¹⁶ *Bremer Oiltransport G.m.b.H. v. Drewry* [1933] 1 K.B. 753.

¹⁷ It may be concluded by, or merely through, an agent: *National Mortgage, etc. Co. v. Gosselin* (1922) 38 T.L.R. 882.

it turns out that X is at that moment when he employs N neither trading nor residing in a foreign country, but residing in England, the Court has not in this case any jurisdiction under this Exception

(3) Where the contract is by its terms or by implication to be governed by English law.¹⁸

1. A, an Englishman, and X, a French citizen, contract in writing that A shall provide a house in England for X at a certain rent, and that X shall pay the rent quarterly to A in England. A provides a house, but X does not pay the rent. The court has jurisdiction.

2. If there be no definite statement in the contract as to the country where the money is to be paid, it is implied by English law that the money must be paid by X to A in England. The court has jurisdiction.

3. A, a Scottish merchant, entered into an agreement with X, a Hong Kong merchant, for sugar to be shipped from Java to Bombay, one condition being that any dispute should be 'settled by arbitration of London brokers in the usual manner, and this submission may be made a rule of Court'. This condition contains an explicit agreement that the law which should regulate the decision is the law of England. The court has jurisdiction.¹⁹

In these three cases jurisdiction cannot, under the rule as altered in 1921, be exercised against a defendant domiciled or ordinarily resident in Scotland.

(4) Where an action is brought for the breach in England²⁰ of any contract²¹ against a defendant not domiciled or ordinarily resident in Scotland²² or in Northern Ireland.²²

1. X, a French citizen, makes a contract in Jersey with A, a French citizen, to do certain work for A, and A contracts to pay X a certain price in London for the work done. Either A or X breaks his part of the contract. The Court has jurisdiction.

¹⁸ Compare *Reynolds v. Coleman* (1887) 36 Ch.D. (C.A.) 453; *Bell v. Antwerp, London, etc. Line* [1891] 1 Q.B. 103; *Ocean S.S. Co., Ltd. v. Queensland State Wheat Board* [1941] 1 K.B. (C.A.) 402; *Hume Pipe and Concrete Construction Co. v. Moracrete* [1942] 1 K.B. (C.A.) 189; distinguish *Clarke v. Harper and Robinson* [1938] N.I. 162; *Kadel Chajkin Ltd. v. Mitchell Cotts* [1947] 2 All E.R. 786.

¹⁹ *N. V. Kwik Hoo Tong Handel Maatschappij v. James Finlay & Co.* [1927] A.C. 604.

²⁰ As to when a contract is broken in England, compare *Cherry v. Thompson* (1872) L.R. 7 Q.B. 573; *Holland v. Bennett* [1902] 1 K.B. (C.A.) 867; the termination of a contract by a letter written abroad is not a breach within the jurisdiction. Failure to pay, when payment would naturally be made in England, is a breach within the jurisdiction. *O'Mara, Ltd. v. Dodd* [1912] 2 Ir.R. 55; *Thompson v. Palmer* [1893] 2 Q.B. 80; *Hoerler v. Hanover, etc. Works* (1898) 10 T.L.R. 22 (C.A.) 103; *Robey v. Snaefell Mining Co.* (1887) 20 Q.B.D. 152; *Hassall v. Lawrence* (1887) 4 T.L.R. 23; *Duval & Co. v. Gans* [1904] 2 K.B. 685; *Fry & Co. v. Raggio* (1892) 40 W.R. 120; *Golden v. Darlow* (1891) 8 T.L.R. 57; *Rein v. Stern* [1892] 1 Q.B. 753; *Drexel v. Drexel* [1916] 1 Ch. 251; *Biddell Bros. v. Horst & Co.* [1912] A.C. 18. Contrast *Anger v. Vasnier* (1902) 18 T.L.R. (C.A.) 596; *Comber v. Leyland* [1898] A.C. 524; *Re Aktiebolaget Robertsfors* [1910] 2 K.B. 733; *Malik v. Norodin Bank Gostolovenski* [1946] 2 All E.R. (C.A.) 663.

²¹ I.e., prima facie a contract, *Van Hemelryck v. W. Lyall Shipbuilding Co.* [1921] 1 A.C. 698, 701; *Cromie v. Moore* [1936] 2 All E.R. 177; *Durra v. Bank of N.S.W.* [1940] V.L.R. 170 (quasi-contract).

²² *Waterhouse v. Reid* [1938] 1 K.B. (C.A.) 743. 'Ireland' now means Northern Ireland; *Hume Pipe and Concrete Construction Co. v. Moracrete Ltd.* [1942] 1 K.B. 189 (C.A.).

2 The circumstances are the same as in the foregoing illustration, except that A, though a French citizen and though he breaks the contract in England by refusing to pay for the work done, in England, is domiciled or ordinarily resident in Scotland or Northern Ireland. The court (*semble*) has no jurisdiction.²³

3. X, resident in London, repudiates a contract by a letter sent thence to Egypt, where the contract was made. The court has jurisdiction.²⁴

4. X, a company in Rumania, by contract made there, agrees to supply A with oil to be loaded on board ship at Rumanian ports, payment to be made partly from a deposit made by A in London and partly in cash in exchange for documents of title. X supplies oil to a less value than the deposit and then ceases to supply. The court has jurisdiction.²⁵

5. A, a German Jew, the manager of the London branch of X, a German company, is dismissed by X's London agents, sues here for wrongful dismissal. The contract is governed by German law, but the breach is committed in England. The court has jurisdiction.²⁶

Exception 6.²⁷—The court may assume jurisdiction whenever the action is founded on a tort committed in England.

Comment and Illustration

The meaning of this Exception which was re-introduced by R. S. C. (No. 3), 1920, restoring the older state of the law altered by the R. S. C., 1888, is best seen from the following Illustration :—

A is assaulted in England, or is injured in a collision in English territorial waters, or is libelled in England, by X, who then goes *e.g.*, to France and does not return to England. The court has jurisdiction to entertain an action by A for the assault or for the libel, and it makes no difference in this matter what is X's nationality. On the other hand a tort may be too remotely connected with England to justify permission to exercise jurisdiction, as for example when the plaintiff alleged the appearance of libels in French and Belgian newspapers of which only a few copies have been sold in England.²⁸

This Exception clearly does not cover the case of an assault upon A, or a libel on A, by X, committed in Paris. If the court has jurisdiction to entertain such an action it must arise, if at all, under Exception 3.²⁹ Clear evidence of a tort within the jurisdiction must be given.³⁰

²³ See *Lenders v. Anderson* (1888) 12 Q.B.D. 50; *Watkins v. Scottish Imperial Co.* (1889) 23 Q.B.D. 285.

²⁴ Compare *Martin v. Stout* [1925] A.C. 359, following *Mutzenbecher v. La Aseguradora Espanola* [1906] 1 K.B. 254.

²⁵ *Anglo-Saxon Petroleum Co. v. Steaua Romana Soci  t   anonyme pour l'Industrie du P  trole* [1924] W.N. (H.L.) 185.

²⁶ *Oppenheimer v. Louis Rosenthal & Co. A.G.* [1937] 1 All E.R. (C.A.) 23.

²⁷ See Ord. XI, r. 1 (*ee*).

²⁸ *Kroch v. Russell et Cie* (1937) 156 L.T. (C.A.) 379; contrast *Hobbs v. Australian Press Association* [1938] 1 K.B. (C.A.) 1.

²⁹ See Exception 3 and Comment, pp. 186, 187, *ante*. Other cases of tort may fall under Exception 1, p. 183, *ante*; Exception 7 (*post*); see *Lenders v. Anderson* (1888) 12 Q.B.D. 50, 55; or one concerned in a tort may be served under Exception 8, p. 194, *post*; *Croft v. King* [1898] 1 Q.B. 419.

³⁰ *George Monro, Ltd. v. American Cyanamid and Chemical Corporation* [1944] 1 K.B. 432; cf. *Bata v. Bata* [1948] W.N. 366, and *post*, pp. 803-804.

*Exception 7.*³¹—The court may assume jurisdiction whenever any injunction is sought as to anything to be done in England, or any nuisance in England is sought to be prevented or removed, whether damages are or are not also sought in respect thereof.

Comment

The injunction sought for should have reference to something to be done in England, or to a nuisance in England, and must be the substantial relief claimed.³² An injunction, as usual in the cases of that form of relief, will not be given unless it is capable of being made effective,³³ and unless there is real ground to anticipate repetition of the action in question.³⁴ Nor will it be accorded where another court can more conveniently deal with the question.³⁵

Illustrations

1. X resident in Dublin, sends cards to A in London, through the post-office and otherwise, containing libellous and defamatory matter. A brings an action claiming an injunction to restrain X from sending such post-cards, and also claiming damages. The court has jurisdiction.³⁶

2. X & Co. carry on business in Scotland, having a registered office in Glasgow. X & Co. at Manchester infringe A's trade-mark. A brings an action to restrain infringement. The court has jurisdiction.³⁷

3. A is the patentee of a particular kind of watch-case. X, in Glasgow, sells watch-cases of the patented kind in Scotland, and also in England, and particularly in Liverpool and in Manchester. X also in answer to applications by customers in England, sends the patented watch-cases to England in return for payment in Scotland. A brings an action against X for infringement of patent, and to obtain injunction against infringement of patent by X in England. Whether the court has jurisdiction? ³⁸

³¹ Ord. XI, r. 1 (f).

³² Compare *Re De Penny* [1891] 2 Ch. 63; *Watson v. Daily Record* [1907] 1 K.B. (C.A.) 853; *De Bernales v. New York Herald* [1893] 2 Q.B. (C.A.) 97 n.; *Alexander & Co. v. Valentine & Sons* (1908) 25 T.L.R. (C.A.) 29; *Joynt v. McCrum* [1899] 1 Ir.R. 217. For a case where a domiciled Scotsman would also sue in Scotland, see *British Marine Association v. McInnes* (1886) 31 S.J. 95.

³³ See *Marshall v. Marshall* (1888) 38 Ch.D. (C.A.) 330.

³⁴ *De Bernales v. New York Herald* [1893] 2 Q.B. (C.A.) 97 n. Compare *Watson v. Daily Record, Ltd.* [1907] 1 K.B. (C.A.) 853, and contrast *Alexander & Co. v. Valentine & Sons* (1908) 25 T.L.R. 29.

³⁵ *Rosler v. Hilbery* [1925] Ch. (C.A.) 250; *Société Générale de Paris v. Dreyfus* (1885) 29 Ch.D. 289; (1887) 37 Ch.D. 215.

³⁶ *Tozier v. Hawkins* (1885) 15 Q.B.D. 650 (C.A.) 680. Compare the judgment of the House of Lords on the similar rule of court in Ireland: *Dunlop Rubber Co. v. Dunlop* [1920] 1 Ir.R. 280; [1921] 1 A.C. 367. See also *Alexander & Co. v. Valentine & Sons* (1908) 25 T.L.R. 29.

³⁷ *Re Burland's Trade Mark* (1889) 41 Ch.D. 542. Compare *Marshall v. Marshall* (1888) 38 Ch.D. (C.A.) 330.

³⁸ *Speckhart v. Campbell* [1884] W.N. 24, but order set aside by C.A.; *Bittleston, C. C.* 248, action in Scotland being available; leave was given when an English company brought an action against a German company to restrain threats in respect of certain letters patent applied for: *British Oxygen Co. v. Gesellschaft*

4. X resides in Scotland, and there contracts with A & Co., an English company, to perform certain services in the Transvaal at a salary. He goes to the Transvaal, but returns thence before he has fully performed his contract. A & Co. refuse to pay X part of salary which he claims. X threatens a petition for the winding-up of A & Co. A & Co. bring an action against X, claiming (1) rescission of contract, (2) return of moneys paid, (3) injunction to restrain X from presenting petition. The court has jurisdiction.³⁹

5. N, a trader in England, orders goods from X, a foreign manufacturer in Switzerland. X addresses the goods to N in England and delivers them to the Swiss post-office by which they are forwarded to England. The goods are manufactured by X according to an invention protected by an English patent. An action is brought by A, the patentee, against X, claiming an injunction against infringement of patent. The court has no jurisdiction.⁴⁰

Exception 8.⁴¹—Whenever any person⁴² out of England is a necessary or proper party⁴³ to an action properly brought against some other person duly served with a writ in England, the court may assume jurisdiction to entertain an action against such first mentioned person as a co-defendant in the action.

Comment

It may be necessary or proper that a plaintiff, A, should make not only one person, X, but also some other person, Y, defendant in an action. This is so, for example, where X and Y are joint debtors, or where A has a claim, alternatively, either against X or Y. Under these circumstances, one of the defendants, X, may be in England and be duly served with a writ, whilst the other defendant, Y, may be out of England, so that it is impossible to effect service on him in England. This is the state of things to which Exception 8 applies.

für Industriegasverwertung (1931) 48 R.P.C. 130; *Chemische Fabrik v. Badische Anilin und Soda Fabrik* (1904) 20 T.L.R. 552. Compare *Re Burland's Trade Mark* (1889) 41 Ch.D. 542; and *Kinahan v. Kinahan* (1890) 45 Ch.D. 78.

³⁹ *Lisbon Berlyn Gold Fields v. Heddle* (1885) 52 L.T. 796. *Semble*, that the claim for an injunction justifies jurisdiction though X resides in Scotland. See Ord. XI, r. 2; *Re De Penny* [1891] 2 Ch. 63; *Waygood & Co. v. Bennie* (1885) 12 R. 651.

⁴⁰ The sale and delivery of the goods by X was complete on their being delivered to the post-office in Switzerland. Nothing was done by X in England for which A had a right of action. *Badische Anilin und Soda Fabrik v. Basle Chemical Works, Bindschedler* [1898] A.C. 200; *Saccharin Corporation v. Reitmeyer & Co.* [1900] 2 Ch. 659. *Aliter* if X had brought the goods to England and there sold them. *Semble*, in the particular case, that (1) there was neither a right of action against X if (e.g.) he had appeared before the Court, nor (2) a right to serve him with process out of England.

⁴¹ Compare the language of Ord. XI, r. 1 (g).

⁴² A foreign partnership is not a person within the meaning of this Exception, and service must be effected on the individual partners. See *Hellfeld v. Rechnitzer* [1914] 1 Ch. (C.A.) 748.

⁴³ See Scott, L.J., in *Tyne Improvement Commissioners v. Armement Anversois S.A. and others*. *The Brabo* [1948] P. 38 (C.A.); *Chaney v. Murphy* (1948) 64 T.L.R. 489.

In order that under these circumstances the court may have jurisdiction within Exception 8, three conditions must be fulfilled:—

(1) There must be an action properly brought against X, the original defendant. By 'properly brought' is meant that it is brought against X as a principal or at least a real and substantial defendant. He must not be, that is to say, a person against whom the action is brought for the sake of giving the court jurisdiction over his co-defendant, Y.⁴⁴

The original action may be an action for a tort.⁴⁵

(2) X must be duly served with the writ in England.

It would appear to follow that Exception 8 has no application either where all the defendants, or none of the defendants, in an action, are in England. It is applicable, in other words, only where one at least of the defendants is in England and one at least of the defendants is not in England.⁴⁶ Hence, where Exception 8 applies, the court may have jurisdiction to entertain an action against a person over whom, if the action had been brought against him alone, the court would have no jurisdiction.⁴⁷

(3) Y, who is out of England, must be either a necessary or proper party to the action.

The question whether Y is a proper party to an action against X depends on this: Supposing both X and Y had been in England, would they both have been proper parties to the action? If they would, and only one of them, X, is in this country, then, under our Exception, the court has jurisdiction to entertain an action against the other, Y, just as if he had been in this country.⁴⁸

⁴⁴ See, especially, *Yorkshire Tannery v. Eglinton Co.* (1884) 54 L.J. Ch. 81, and compare *Tassell v. Hallen* [1892] 1 Q.B. 321; *Collins v. North British, etc., Ins. Co.* [1894] 3 Ch. 228; *Plaskitt v. Eddis* (1898) 79 L.T. 136.

See also *Witted v. Galbraith* [1893] 1 Q.B. (C.A.) 577; *Deutsche National Bank v. Paul* [1898] 1 Ch. 283; *The Duc d'Aumale* [1903] P. (C.A.) 18, where the defendant out of the jurisdiction was the more important: *Bawtree v. Great North West Central Ry.* (1898) 14 T.L.R. 448. Cases where the English defendant is merely added to create ground for service outside the jurisdiction will not support service outside: *Flower v. Rose & Co.* (1891) 7 T.L.R. 280; compare *Sharples v. Eason & Son* [1911] 2 Ir.R. 436; *Ross v. Eason & Son* [1911] 2 Ir.R. 459, both decisions of the Court of Appeal on the corresponding Irish Order; *Rosler v. Hilbery* [1925] Ch. (C.A.) 250.

⁴⁵ *Croft v. King* [1893] 1 Q.B. 419; *Williams v. Cartwright* [1895] 1 Q.B. (C.A.) 142; *Chance v. Berridge* (1895) 11 T.L.R. 528; *Cooney v. Wilson and Henderson* [1913] 2 Ir.R. (C.A.) 402; *The Duc d'Aumale* [1903] P. (C.A.) 18.

⁴⁶ Whether it may apply where both defendants are out of England, but one of them, X, is served with a writ out of England under some other clause of Ord. XI, e.g., under clause (c) (Exception 3) as a person domiciled in England? The words of Ord. XI, r. 1 (g) seem to show that this question must be answered in the negative, for in the supposed case the original defendant, X, is not served within the jurisdiction. In *Harvey v. Dougherty* (1887) 56 L.T. 322, a contrary opinion seems to be expressed or implied; but see *John Russell & Co., Ltd. v. Cayzer, Irvine & Co., Ltd.* [1916] 2 A.C. 298, which decides that the submission of one of two defendants in Scotland is no ground for jurisdiction over the other.

⁴⁷ *Williams v. Cartwright* [1895] 1 Q.B. (C.A.) 142, 145, judgment of Esher, M.R.; and 148, judgment of Rigby, L.J.

⁴⁸ See *Massey v. Heynes* (1888) 21 Q.B.D. (C.A.) 330, 338, judgment of Esher, M.R.; *Jenney v. Mackintosh* (1886) 33 Ch.D. 595; *Re Lane* (1886) 55 L.T.

‘If a person is mixed up in a transaction carried out in this country by English subjects, I see no reason why he should not be dealt with, for the purpose of service of process, as if he was amenable to the jurisdiction of the courts here. If he does not choose to submit to the jurisdiction he must take his chances, and no remedy will be effective against him unless he has property in this country. I see no particular hardship in saying that he must come to the courts of this country if he wishes to defend himself’.⁴⁹

Exception 8 applies to a defendant domiciled or ordinarily resident in Scotland⁵⁰ or either part of Ireland.

The jurisdiction is essentially discretionary, and will not be exercised if a foreign court can more conveniently decide the issue,⁵¹ or if the plaintiff fails to make a full disclosure of the facts.⁵²

Illustrations

1. X, on instructions from Y, enters, as agent for Y, into a contract with A. The contract is made in London, and is to be performed out of England. Y repudiates the contract. A brings an action against X, who is in England, for breach of warranty that X was authorised to contract for Y, who is in Austria, and has an alternative claim against Y if X was authorised to contract for him. The court has jurisdiction to entertain an action against Y as co-defendant with X.⁵³

2. A brings an action against X and Y for breach of agreement to convey to A their respective shares in partnership formerly carried on by A, X, and Y. X is served with a writ in England. Y is in the United States. Y is a necessary or proper party to the action. The court has jurisdiction.⁵⁴

3. A & Co, an American company, own a patent for barbed wire. Y, carrying on business in Ireland, buys from N, in America, wire which is an infringement of A & Co’s patent. X & Co., a steamship company, carry the wire for Y and land it at Liverpool for transhipment to Y in Ireland. X & Co. are an English company. A & Co. bring an action against X & Co, to obtain an injunction against their dealing with the wire. Application for leave to add Y and serve Y with writ and notice in Ireland. The court has jurisdiction.⁵⁵

149; *Collins v. North British Mercantile Insurance Co.* [1894] 3 Ch. 228; *Duder v. Amsterdamsch Trustees Kantoor* [1902] 2 Ch. 132; *The Elton* [1891] P. 265; *Thanemore Steamship Co. v. Thompson* (1885) 52 L.T. 552; *The Duc d’Aumale* [1903] P. (C.A.) 18; *Oesterreichische Export, etc. Co. v. British Indemnity Co., Ltd.* [1914] 2 K.B. (C.A.) 747, *Re Beek* (1917) 87 L.J.Ch. 335; *Joynt v. McCrum* [1899] 1 Ir.R. 217; *Ellinger v. Guinness Mahon & Co.* [1899] 4 All E.R. 16.

⁴⁹ 21 Q.B.D., p. 334, judgment of Wills, J.

⁵⁰ See *The Washburn, etc. Co. v. The Cunard Co. & Parkes* (1889) 5 T.L.R. 592, judgment of Stirling, J.; *Lopez v. Chavarri* [1901] W.N. 115; *S.S. Thanemore v. Thompson* (1885) 52 L.T. 552; *Massey v. Heynes* (1888) 21 Q.B.D. (C.A.) 380, with which contrast language of Grove, J., and Huddleston, B., in *Speller v. Bristol Co.* (1884) 13 Q.B.D. 96, 98, 99. But see *Harvey v. Dougherty* (1887) 56 L.T. 322.

⁵¹ See *The Hagen* [1908] P. (C.A.) 189; *Lopez v. Chavarri* [1901] W.N. 115; *Rosler v. Hilbery* [1925] Ch. (C.A.) 250; *Re Schintz* [1926] Ch. (C.A.) 710; distinguish *Ellinger v. Guinness Mahon & Co.* (1899) 4 All E.R. 16.

⁵² *Bloomfield v. Serenyi* (1945) 173 L.T. 391 (C.A.).

⁵³ *Massey v. Heynes* (1888) 21 Q.B.D. (C.A.) 380. Contrast *Indigo Co. v. Ogilvy* [1891] 2 Ch. (C.A.) 31.

⁵⁴ *Lightowler v. Lightowler* [1884] W.N. 8.

⁵⁵ *Washburn, etc. Co. v. Cunard Co. & Parkes* (1889) 5 T.L.R. 592.

4 A brings an action of deceit against X and Y in respect of a fraud jointly committed by them in London. X is in England Y is domiciled and resident in Scotland. X has been served with the writ, and Y is a necessary and proper party to the action. The court has jurisdiction.⁵⁶

5 A brings an action against X, residing in England, and against Y, domiciled or ordinarily resident in Scotland. Before X is served with the writ, A applies for leave to serve the writ on Y in Scotland. The court has no jurisdiction.⁵⁷

6 N, who carries on business in London, deposits policies of life insurance with A & Co., a German bank, as security for advances made to him. N afterwards creates a second charge on the same policies in favour of Y, who resides in Germany. A & Co. subsequently acquire the equity of redemption in the policies and transfer it to X, resident in England, as trustee for A & Co. An action for foreclosure is then brought against X by A & Co., who then apply for leave to add Y as defendant and serve notice of writ on Y in Germany. The court has no jurisdiction.⁵⁸

*Exception 9.*⁵⁹—The court may assume jurisdiction when the action is brought by a mortgagee or mortgagor in relation to the mortgage of personal property situate in England, and seeks relief of the nature or kind following, that is to say, sale, foreclosure, delivery of possession by the mortgagor, redemption, reconveyance, delivery of possession by the mortgagee, but does not seek (unless and except so far as permissible under Exception 5⁶⁰) any personal judgment or order for payment of any moneys due under the mortgage.

Comment

This Exception, which follows the wording of Ord. XI, r. 1 (h), makes good a defect arising from the fact that an action, *e.g.*, for foreclosure, in respect of a mortgage of personal property, is not regarded by English law as an action founded on a breach of contract, whether or not the mortgage deed provides expressly for the payment of interest on the sum in respect of which the mortgage is created and the repayment of the principal. This view, of course, rests on the fact that the mortgagee has, strictly speaking, a legal estate in or charge on the property, the subject of the mortgage, and an action for foreclosure is founded on his ownership, not on a breach of contract, though such a breach is the occasion for

⁵⁶ *Williams v. Cartwright* [1895] 1 Q.B. (C.A.) 142.

⁵⁷ See *The Yorkshire Tannery v. Eglinton Co.* (1884) 54 L.J.Ch. 81.

⁵⁸ *Deutsche National Bank v. Paul* [1898] 1 Ch. 283. No actual relief was claimed against X, who was therefore not properly made a defendant, but should have been joined as co-plaintiff. The action therefore was not properly brought against X. Hence Exception 8 does not apply.

⁵⁹ Ord. XI, r. 1 (h), added in July, 1916.

⁶⁰ 'Except as permissible under Ord. XI, r. 1 (e)'. See p. 189, *ante*.

the action to assert the right of ownership. There is obviously no good ground for refusing to exercise jurisdiction in the case of an action of this kind, and the *casus omisus* is now made good. The jurisdiction, it will be observed, is essentially directed *in rem*, in accordance with the principle of Rule 25, and no claim is made in respect of it to extend personal jurisdiction over persons outside of England beyond dealing with property in England. This distinguishes the jurisdiction wholly from the Scottish practice of arresting property as a means of founding jurisdiction in matters quite unconnected with the property.

Illustrations

1. X, as beneficial owner, conveyed to A by way of mortgage his interest in personalty under an English marriage settlement, in order to secure a loan and the interest payable on it. Both X and A were then resident in England, but X is now residing in Australia. A issues an originating summons against X claiming an account of the sum due under the mortgage deed and enforcement of payment of that sum by foreclosure or sale, and applies to the court for leave to serve the summons on X in Australia. The court may allow service.⁶¹

2. A & Co, bankers, carrying on business in England, claim as against X, residing in Germany, a declaration that they are entitled to a charge on certain policies of life assurance deposited with them, and that the said charge may be enforced by foreclosure. The court has jurisdiction.⁶²

3. A, having obtained judgment against X for £2,000, obtains an order charging the judgment debt with interest on X's shares in a public company in England. X is resident in America. In order to enforce the charge A institutes an action asking for the sale of the shares. The court has jurisdiction.⁶³

Exception 10.—The court may assume jurisdiction when the action is brought under the Carriage by Air Act, 1932.⁶⁴

Comment

This Exception is based on Ord. XI, r. 1 (i) added in 1933. The Act provides uniform rules for the international carriage of persons or goods by air for reward. International carriage covers transit between the territories of two High Contracting Parties⁶⁵ or between two points within the territory of one party, if there is an agreed stopping place within the territory of another power,

⁶¹ Contrast *Hughes v. Owenham* [1913] 1 Ch. (C.A.) 254, which was decided in the opposite sense under Ord. XI, r. 1 (e), Exception 5, p. 189, *ante*, and in which an alteration of the rules to cover such cases was suggested.

⁶² Contrast *Deutsche National Bank v. Paul* [1898] 1 Ch. 283, decided under the old rules.

⁶³ Contrast *Kolchmann v. Meurice* [1903] 1 K.B. 534. As to charging orders, see the Judgments Act, 1838, ss. 14, 15; 3 & 4 Vict. c. 82, s. 1; Ord. XLVI, r. 1.

⁶⁴ For a list of the parties to the Warsaw Convention on which the Act is based, see the Carriage by Air (Parties to Convention) Order, 1936.

⁶⁵ See *Philippson v. Imperial Airways* [1939] A.C. 332, as to the meaning and proof of 'High Contracting Party'. Execution cannot issue against the property of any High Contracting Party, s. 2 *ad finem*.

even if not a party to the Convention.⁶⁶ Any action for damages must be brought at the option of the plaintiff in the territory of one of the contracting powers either before the court at the place of destination or before the court having jurisdiction where the carrier ordinarily resides or has his principal place of business, or has an establishment by which the contract has been made.⁶⁷

*Exception 11.*⁶⁸—Notwithstanding anything contained in any of the Exceptions to Rule 28, the parties to any contract may agree (a) that the court shall have jurisdiction to entertain any action in respect of such contract, and, moreover, or in the alternative, (b) that service of any writ of summons in any such action may be effected at any place within or out of England, on any party or on any person on behalf of any party or in any manner specified or indicated in such contract. Service of any such writ of summons at the place (if any) or on the party or on the person (if any) or in the manner (if any) specified or indicated in the contract shall be deemed to be good and effective service wherever the parties are resident, and if no place or mode or person be so specified or indicated, service out of England of such writ may be ordered.

Comment

This Exception follows and is based upon the language of Ord. XI, r. 2a. Though not free from ambiguity, it seems that the net effect thereof is to extend the jurisdiction of the court to any case in which the parties have either expressly or implicitly agreed to accept such jurisdiction. This provision is in accordance with the principle⁶⁹ that a court has jurisdiction over any person

⁶⁶ Schedule 1, article 1 (2). *Grein v. Imperial Airways* [1937] 1 K.B. (C.A.) 50, where a majority of the court held Brussels to be an agreed stopping place on a journey from London to Antwerp and back. See *Westminster Bank Ltd. v. Imperial Airways* [1936] 2 All E.R. 890.

⁶⁷ Schedule I, art. 28 (1).

⁶⁸ Ord. XI, r. 2a; this rule was made to remove the inconvenience resulting from the decision in *British Wagon Co. v. Gray* [1896] 1 Q.B. 85 (C.A.) that an agreement by a person domiciled or ordinarily resident in Scotland providing for the service on him of an English writ of summons in respect of the breach of such agreement would be invalid, although, had the agreement been for service on an agent in England, service there would have been valid. *Montgomery, Jones & Co. v. Liebenithal & Co.* [1898] 1 Q.B. 487. Compare *Tharsis Sulphur, etc. Co. v. Société Industrielle* (1889) 5 T.L.R. 618.

⁶⁹ See Rule 24, p. 166, *ante*.

who by his conduct has precluded himself from objecting to its jurisdiction.

Two cases are to be distinguished :—

(a) The parties to a contract may expressly agree that the court shall have jurisdiction to entertain an action in respect of such contract, and may further agree as to the manner in which a writ of summons in such an action is to be served. If any dispute arises in regard to the contract, the court will have jurisdiction to entertain an action against a defendant resident out of England, provided that service of the writ of summons is effected in the manner provided for in the agreement (if any) between the parties. If no agreement has been made on this head the court may order service of a writ out of England. It must, however, be noted that the court has no power to order such service (if there is an agreement as to the mode of service) otherwise than as provided by the agreement.

(b) Without expressly agreeing that the court shall have jurisdiction in respect of a contract, the parties may agree as to the mode in which service of a writ of summons in any action arising out of the contract may be effected. If the mode of service is followed as prescribed in the agreement, the court will have jurisdiction over a defendant resident out of England. The court, however, has no power to order service out of England in such a case; its jurisdiction depends entirely on the precise carrying out of the agreement between the parties.

The following observations deserve attention :—

(1) Where an agreement as to service of a writ has been made by the parties, the writ may be served in any place, on any person, and in any manner consistent with the agreement, and without any application to the court. The court, however, on an application by the defendant would doubtless set aside any service which was not in accordance with the agreement, and probably also any service based on what the court considered unreasonable terms in the agreement as to service. In cases where the court has power to order service, the exercise of this power is entirely discretionary. It may be noted that when this Exception is applicable, the fact that the defendant is domiciled or ordinarily resident in Scotland or Northern Ireland, is no bar to the jurisdiction.

(2) Though no express provision is made that an agreement to come within the application of this Exception must be in writing, it is obvious that, in default of a written agreement, it would often be impossible to establish the existence or the precise terms of such an agreement.

(3) The giving to the court jurisdiction to entertain an action on contract does not in general affect the law by which the meaning of the contract is to be determined. There exists, however, one important limitation to this principle. An English court gives a wide

extension to the rule that matters of procedure are governed by the *lex fori*, and hence treats the limitation of the time within which an action or other proceeding must be brought as a matter of procedure. The result is that an action on a French contract, *i.e.*, one made in France and wholly to be performed in France, if brought within the jurisdiction of the court, will be barred by the English and not by the French rule regarding the time within which such an action must be brought, and similarly no doubt as regards the necessity of written evidence.

Illustrations

1 A and X, resident in England, make a contract in France for the carrying out of certain work by X in that country, and agree that the court shall have jurisdiction in any action arising out of the contract. X takes up his permanent residence in France and acquires a French domicile. A brings an action for X's failure to carry out his part of the contract. The court has jurisdiction.⁷⁰

2 A, resident in England, contracts in Edinburgh with X, resident and domiciled in Scotland, for the erection by the latter of a house there. It is agreed that a writ of summons arising out of the contract may be served by being sent by post to X at his business address. On default by X, A initiates an action by sending a writ to X in the prescribed manner. The court has jurisdiction.

3 The circumstances are the same as in Illustration 2, except that the writ is sent by post to X in Dublin, where he has established his residence. The court has no jurisdiction.

Exception 12.⁷¹—The court has jurisdiction to entertain an action against any two or more persons being liable as co-partners, and carrying on business in England when sued in the name of the firm (if any) of which such persons were co-partners at the time of the accruing of the cause of action.

Comment

This Exception is grounded on Ord. XLVIII, r. 1.

The Order appears indeed at first sight to do little more than allow and regulate 'actions by and against firms and persons carrying on business in names other than their own', and not to touch the extent of the court's jurisdiction. But it has in reality a wider effect, at any rate as regards actions against partnerships, than this, and in such actions may extend the jurisdiction

⁷⁰ The case does not fall within Exception 3 or Exception 5, and save for the agreement, the court would have no jurisdiction.

⁷¹ Ord. XLVIII, rr. 1, 3; *Worcester, etc. Banking Co. v. Firbank* [1894] 1 Q.B. (C.A.) 784. Compare *Grant v. Anderson* [1892] 1 Q.B. (C.A.) 108; *Russell v. Cambefort* (1889) 23 Q.B.D. (C.A.) 526, which, however, was decided under repealed Ord. IX, r. 6. The Registration of Business Names Act, 1916, requires the registration of business names, principal place of business, name and nationality with residence of each partner, etc.; see *Solicitor to the Board of Trade v. Ernest* [1920] 1 K.B. 816; *Hawkins v. Duché* [1921] 3 K.B. 226; *Brown v. Thomas and Burrows* (1922) 39 T.L.R. 132.

of the court over defendants who are absent from England. For the Order provides, in actions against a firm carrying on business in England in a firm name, a mode of serving the writ at the firm's place of business in England which is applicable whether the members of the partnership be in England or not. Hence, in actions within the Order (*i.e.*, Exception 12), the court has, in effect, jurisdiction to entertain actions against persons who are not resident in England.⁷²

As to this Exception, the following points deserve notice.

(1) It applies only to partners *carrying on business in England, and carrying it on under a firm name*.⁷³ Otherwise it is necessary to sue each partner, naming them separately in the writ, which must be served in the ordinary way in England or by permission under Ord. XI outside.

(2) It extends to a firm, all or any of whom are foreigners or aliens. 'If the firm carries on business [in England], then, whether it is an English or a foreign firm, and whether it also carries on business in a colony or abroad or not, a writ may be issued against the partners in the firm name without leave, under Order XLVIII, r. 1',⁷⁴ Exception 12 applies.⁷⁵

(3) The jurisdiction of the court is not discretionary, for the writ may be served by the plaintiff in the way directed by the Order without leave of the court.⁷⁶

(4) Exception 12 extends to cases which may not fall within any of the foregoing eleven Exceptions.⁷⁷

⁷² As to connection between rules as to the service of a writ and the jurisdiction of the court, see *Heinemann v. Hale* [1891] 2 Q.B. 83, 86, 87, judgment of Cave, J.; *John Russell & Co., Ltd. v. Cayzer, Irvine & Co.* [1916] 2 A.C. 298, 303, judgment of Lord Haldane; *Re King & Co.'s Trade Mark* [1892] 2 Ch. 462, 483; *Pemberton v. Hughes* [1899] 1 Ch. (C.A.) 781, 792, per Landley, M.R.; *Countess de Gasquet James v. Duke of Mecklenburg-Schwerin* [1914] P. 53, 64; *Johnson v. Taylor Bros.* [1920] A.C. 144; *Hobbs v. Australian Press Association* [1938] 1 K.B. (C.A.); *Meyer v. Dreyfus et Cie* [1940] 3 All E.R. (C.A.) 157; and pp. 172, 180, *ante*.

⁷³ *Hellfeld v. Rechnitzer* [1914] 1 Ch. (C.A.) 748; *Singleton v. Roberts* (1894) 70 L.T. 687; *Dobson v. Festi, Rosini & Co.* [1891] 2 Q.B. (C.A.) 92. A newspaper name is not a firm name: see *De Bernales v. New York Herald* (1889) 68 L.T. 658.

⁷⁴ *Worcester, etc Banking Co. v. Furbank* [1894] 1 Q.B. (C.A.) 784, 788, judgment of Esher, M.R.; and p. 780, judgment of Davey, L.J., dissenting from opinion of Coleridge, C.J., and Wright, J., in *Grant v. Anderson* [1892] 1 Q.B. 108; and contrast *Western National Bank, etc. Co. of New York v. Perez* [1891] 1 Q.B. (C.A.) 804, and *Indigo Co. v. Ogilvy* [1891] 2 Ch. (C.A.) 31, decided before Ord. XLVIII, r. 1, came into force.

⁷⁵ The mere use of an agent is not carrying on business: see *Grant v. Anderson* [1892] 1 Q.B. (C.A.) 108; *Okura & Co. v. Forsbacka Jenverks Aktiebolag* [1914] 1 K.B. (C.A.) 715; *Thames and Mersey Marine Insurance Co. v. Austrian Lloyd Co.* (1914) 111 L.T. (C.A.) 97. There must be a place of business: *Singleton v. Roberts & Co.* (1894) 70 L.T. 687; compare *Heinemann v. Hale & Co.* [1891] 2 Q.B. (C.A.) 83. See *Shepherd v. Hirsch, Pritchard & Co.* (1890) 45 Ch.D. 231; *Lysaght v. Clark* [1891] 1 Q.B. 552.

⁷⁶ *Ibid.* But the service must be effected exactly in the way prescribed by Ord. XLVIII, r. 3, *i.e.*, not on the firm abroad: *Dobson v. Festi, Rosini & Co.* [1891] 2 Q.B. (C.A.) 92; *Hellfeld v. Rechnitzer* [1914] 1 Ch. (C.A.) 748.

⁷⁷ Note that, in an action against a firm in the firm name, execution can as a rule, as regards partners who are not in England, issue only against the property of

Question.—Has the court jurisdiction in cases not falling within Exceptions 1 to 11 (*i.e.*, not falling within Ord. XI, rr. 1, 2a) to entertain an action against an individual who is not in England, but who carries on business in England in a name or style other than his own name?

This inquiry is suggested by the very wide terms of Ord. XLVIII, r. 11, which runs as follows: 'Any person carrying on business within the jurisdiction in a name or style other than his own name may be sued in such name or style, as if it were a firm name; and, so far as the nature of the case will permit, all rules relating to proceedings against firms shall apply'.

The inquiry must be answered in the negative. If the defendant is not in England, whether he be, *e.g.*, a Frenchman,⁷⁸ a domiciled Scotsman, or (it is submitted) an Englishman, the jurisdiction of the court is not extended by his use in England of a trade name. In such circumstances, 'A person desiring to proceed against a single person, if he is a foreigner or a Scotsman [or an Englishman], must go under Ord. XI [*i.e.*, under Exceptions 1 to 11], and cannot proceed under Ord. XLVIII, r. 11 [*i.e.*, under Exception 12]. That is the substance and principle of the thing'.⁷⁹

Illustrations

1. Y and Z carry on business in London under the firm name of X & Co. A brings an action against X & Co. for the breach of a contract made by X & Co. with A to carry goods for A from France to America. Y and Z are neither of them in England. The court has jurisdiction to entertain the action.⁸⁰

2. Y and Z are residing in Natal. They carry on business under the firm name of X & Co. both in Natal and England. A sues X & Co. upon a promissory note made by Y and Z in Cape Town and payable at their London

the partnership which is in England (Ord. XLVIII, r. 8), and not against the property of such absent partners which is not property of the partnership, unless, of course, under Ord. XI, r. 1, service out of England has been permitted on such partners (see *Lindsay v. Crawford and Lindsays* (1911) 45 Ir L.T.R. 52; *Hobbs v. Australian Press Association* [1933] 1 K.B. (C.A.) 1), or they have appeared or been served in England after the issue of the writ in the action. So as regards charging orders: *Brown, Janson & Co. v. Hutchinson & Co.* [1895] 1 Q.B. 737.

It should be noted that process is sometimes possible under Ord. IX, r. 8a; see p. 176, *ante*.

⁷⁸ *St. Gobain, etc. Co. v. Hoyerermann's Agency* [1893] 2 Q.B. (C.A.) 96; see *Taylor Bros. v. A. Johnson & Co.* [1917] W.N. (C.A.) 341. Compare *Russell v. Cambefort* (1889) 23 Q.B.D. 526, overruling *O'Neil v. Clason* (1876) 46 L.J.Q.B. 191, and *Pollexfen v. Sibson* (1886) 16 Q.B.D. 792.

⁷⁹ *MacIver v. Burns* [1895] 2 Ch. (C.A.) 630, 635, *per* Lindley, L.J.; *Taylor Bros. v. A. Johnson & Co.* [1917] W.N. (C.A.) 341.

Contrast *St. Gobain, etc. Co. v. Hoyerermann's Agency* [1893] 2 Q.B. (C.A.) 96, and *MacIver v. Burns*, interpreting Ord. XLVIII, r. 11, with *Worcester, etc. Banking Co. v. Firbank* [1894] 1 Q.B. (C.A.) 784, interpreting Ord. XLVIII, r. 1.

⁸⁰ See *Worcester, etc. Banking Co. v. Firbank* [1894] 1 Q.B. (C.A.) 784. It would apparently have made no difference if Y and Z had been aliens, *e.g.*, Frenchmen, carrying on business both in France and in England. *Ibid.*, pp. 787, 788, judgment of Escher, M.R.

office, and A issues a writ against them in the name of X & Co. The court has jurisdiction to entertain the action.⁸¹

3 Y and Z are owners of a Melbourne paper, but have, unknown to X, a branch in England. A claims damages for a statement in the paper against a press association in London and obtains leave to serve the writ under Order XI on the firm in Melbourne. Y and Z object to the use of Order XLVIII, r. 1, to sue in the firm's name. The court has jurisdiction to entertain the action.⁸²

NOTE

THIRD PARTY PROCEDURE—R. S. C., Ord. XVI, s. 83. Where a defendant in an action claims to be entitled either to *contribution* or to *indemnity* against any person not a party to the action (called hereinafter a third party), or to any relief connected with the original subject-matter and substantially the same as that claimed by the plaintiff; or that any question connected with the subject-matter is substantially the same as some question between the plaintiff and defendant and should be decided as between the plaintiff, the defendant, and the third party or between either or any of them, the court may in its discretion issue a notice to be served on the third party, and thus exercise jurisdiction in the manner provided by Ord. XVI, over such third party. For the procedure in such case the reader is referred to the Rules of Court, and works on practice.

Third party procedure which originates in the Judicature Act, 1873, s. 24 (3), now the Supreme Court of Judicature (Consolidation) Act, 1925, s. 39, is, as regards service out of England of a third party notice issued by a defendant under Ord. XVI, governed in all probability by Ord. XI, r. 1, so that a defendant can obtain leave to serve such notice on a third party out of England only when the subject-matter of his claim falls under one or other of the specific cases enumerated in Ord. XI, r. 1 (see Rule 28, Exceptions 1 to 10), in which service of a writ out of England will be allowed. *Swansea Shipping Co. v. Duncan* (1876) 1 Q.B.D. (C.A.) 644; *Dubout, etc., Co. v. Macpherson* (1889) 23 Q.B.D. (C.A.) 340; *Re Besley* (1864) 33 L.J.N.C. 566; *Hood Barrs v. Frampton, Knight & Clayton* [1924] W.N. 287. Thus the procedure is not available, taken in combination with Ord. XI, r. 1 (g), *i.e.*, Exception 8, unless some party in England is duly served, *McCheane v. Gyles* [1902] 1 Ch. (C.A.) 287. This arises, of course, from the fact that the procedure is really equivalent to bringing an action and must be governed by the rules applicable to an action. It does not appear that Ord. XI, r. 8a, is applicable to a notice under this procedure so as to permit of service out of England irrespective of Ord. XI, r. 1.

The power to order joinder of parties under Ord. XVI, r. 11, which is normally exercised whenever a defendant demands that a co-contractor should thus be joined, will, at the discretion of the court, not be used if the party desired to be joined is not in England; see *Wilson & Co. v. Balcarres Brook Steamship Co* [1893] 1 Q.B. (C.A.) 422.

⁸¹ *Ibid.*

⁸² *Hobbs v. Australian Press Association* [1933] 1 K.B. (C.A.) 1.

⁸³ See Ord. XXI, r. 11, as to counterclaim by defendant against plaintiff and others.

ADMIRALTY JURISDICTION¹

RULE 29.²—The court has jurisdiction to entertain an action *in rem* against any ship, or *res* (such as cargo) connected with a ship, if

- (1) the action is an Admiralty action ; and
- (2) the ship or *res* is in any port or river of England,³
or within three miles of the coast of England,
and not otherwise.

Comment

All actions in the courts of common law, at any rate after the passing of the Common Law Procedure Act, 1852, were, as all the actions in the King's Bench Division of the High Court now are, proceedings *in personam*.⁴ The only strict action *in rem* now existing under English law is the action which used to belong exclusively to the Court of Admiralty, and now is properly brought in the Admiralty Division of the High Court against a ship or other *res*, such as cargo or freight, connected with a ship. Its object is partly to satisfy the claim of the plaintiff against the *res* by the transfer, sale, or other mode of dealing with the *res*, and very often in addition to secure a judgment *in personam* against the owners of the *res* arrested, who are by the arrest induced to appear and thus become subject to the jurisdiction *in personam* of the court to the fullest extent. Thus arrest is often chiefly important as enabling the court to exercise jurisdiction which it could not normally do either under Rule 27 or Rule 28. The foundation of this action *in rem* is the arrest of the ship, or other *res*, and this arrest cannot take place unless the ship, or other *res*, is lying at anchor either in England or in 'English waters', which means within three miles of the coast of England.⁵ Nor does the procedure *in rem* permit

¹ See Roscoe, *Admiralty Practice*, 5th ed., Chaps. 1 to 13, pp. 1-260. As to county court jurisdiction in Admiralty matters with which we are not concerned here see County Courts Act, 1934, ss. 55-59. See also, as to principle governing jurisdiction of court as regards judgments *in rem*, General Principle No. 3, Intro., p. 22, *ante*.

² See Roscoe, p. 261.

³ For meaning of 'England', see p. 43, *ante*.

⁴ See *Castrique v. Imrie* (1870), L.R. 4 H.L. 414, 427, 428, 429, opinion of Blackburn, J. The Common Law Procedure Act, 1852, abolished real actions which were actions *in rem*. Whether the action for the recovery of land might not be considered in effect an action *in rem* appears an open question.

⁵ See the Merchant Shipping Act, 1894, s. 688; Shipowners' Negligence (Remedies) Act, 1905, s. 1; Merchant Shipping (Stevedores and Trimmers) Act, 1911. For the territorial limits of British jurisdiction in the Bristol Channel,

the arrest of a ship or other property of a defendant unconnected with the cause of action.⁶

An Admiralty action or cause always had reference to shipping, or to contracts or transactions more or less closely connected with shipping. Every claim, in short, which the Court of Admiralty had jurisdiction to entertain, had to a certain extent a maritime character. The extension of the jurisdiction of the court by legislation has not altered its fundamental character.⁷

RULE 30.—The Admiralty jurisdiction of the court may be exercised either by proceedings *in rem* or by proceedings *in personam*; the plaintiff may in most instances, at his option, bring an action either ⁸ *in rem*, against the ship or other *res*, or *in personam* against the owner of or other person interested in the ship or *res*, or both *in rem* against the ship and *in personam* against the owner or such other person.⁹

see *The Fagernes* [1927] P. (C.A.) 311. It is doubted if a ship could be seized if merely passing the coast on a foreign voyage: *R. v. Keyn* (1877) 2 Ex D. 63, 218, *per* Cockburn, C.J. The Merchant Shipping Act, 1894, s. 688, does not provide for seizure in respect of personal injury only: *Harris v. Owners of the Franconia* (1876) 2 C.P.D. 173. Of course a ship might be arrested when in a Scottish, or Manx, or Jersey port, etc. But such arrest would be beyond the territorial limits of the High Court's jurisdiction, and would not give that Court the right to entertain an action against the ship. A writ in an action *in rem* can be issued at a time when the ship is not liable to arrest, but the jurisdiction becomes effective only on the serving of the warrant: *The Espanoleto* [1920] P. 223. As to the relation of writ and warrant, see also *The Nautik* [1896] P. 121, 124; *The Broadmayne* [1916] P. (C.A.) 64, 68, 69, 74, 76.

⁶ *The Beldis* [1936] P. (C.A.) 51.

⁷ The question whether an Admiralty action lies, and therefore, whether the court has jurisdiction to give judgment *in rem*, may often depend on the precise terms of some provision in the Admiralty Court Act, 1840; the Admiralty Court Act, 1861; the Maritime Conventions Act, 1911; the Administration of Justice Act, 1920; or now the Supreme Court of Judicature (Consolidation) Act, 1925, s. 22. But by transfer to it the court could entertain an action which could not properly have been instituted therein: see *The Montrosa* [1917] P. 1; *The Sheaf Brook* [1926] P. 61, is rendered obsolete by the Administration of Justice Act, 1928, under which without prejudice to the distribution of business in the High Court all jurisdiction vested in the High Court under the Act of 1925 shall belong to all the divisions alike. See also *The Eskbridge* [1931] P. 51.

⁸ See Admiralty Court Act, 1861, s. 35; Maritime Conventions Act, 1911, s. 5; Administration of Justice Act, 1920, s. 5 (2); the Supreme Court of Judicature (Consolidation) Act, 1925, s. 33 (2).

⁹ Action *in rem*,—judgment *in rem*,—maritime lien. These three things, which are sometimes confused together, should be carefully distinguished.

1. An action *in rem* is a proceeding to determine the right to, or disposition of a thing under the control of a court.

2. A judgment *in rem* is a judgment whereby a court adjudicates upon the title to, or the right to the possession of, property within the control of the court. See *Ballantyne v. Mackinnon* [1896] 2 Q.B. 455; *Minna Craig Steamship Co. v. Chartered, etc., Bank* [1897] 1 Q.B. (C.A.) 460; *Castrigue v. Imrie* (1870) L.R. 4 H.L. 414, 428; Story, s. 492.

Comment

The Admiralty jurisdiction of the High Court is now conveniently set out in sections 22 and 33 of the Supreme Court of Judicature Act, 1925. It should be noted that by section 22 (2) of that Act the claims for damage under the first twelve sub-rules, which follow the wording of s. 22 (1), are to be construed as extending to claims for loss of life or personal injuries which exist according to law. This subsection follows the Maritime Conventions Act, 1911, s. 5. In all the sub-rules and illustrations it is assumed that, unless otherwise stated, the ship is in an English port or in English waters; and 'ship' includes 'any description of vessel used in navigation not propelled by oars'.¹⁰

Illustration

A brings an action against a British ship for loss of life of H, the husband, and N, the son of A, in consequence of the negligence of the master and crew of the British ship. The action is brought under Lord Campbell's Act, 1846. The court has jurisdiction to entertain the action.

SUB-RULE 1.—The court has jurisdiction in respect of questions as to the title to or ownership of a ship, or the proceeds of sale of a ship remaining in the Admiralty

An action *in rem* does not of necessity lead to a judgment *in rem*. A brings an action against a ship for wages due to him as a sailor. X, the shipowner, appears and pleads to the action. The action may end, not in a judgment *in rem* against the ship, but in a judgment *in personam* against X, condemning him to pay, e.g., £100 and costs to A. The same procedure is applicable in the case of collisions. See *The Dictator* [1892] P. 304; *The Gemma* [1899] P. (C.A.) 285; *The Broadmayne* [1916] P. (C.A.) 64; 68, 69; 74, 75, *per* Pickford, L.J.; 76, 77, *per* Parker, L.J.; *The Dupleiz* [1912] P. 8.

3. A maritime lien is the right which a person has to the satisfaction of a given claim against a ship in whosoever hands the ship may be. Such a lien binds the ship, not only when in the hands of the owner on whose behalf a debtor or other obligation has been contracted, but also when in the hands of any person whomsoever. A maritime lien can be enforced only by proceedings in an admiralty action *in rem*. One instance of a maritime lien is this: If A obtains a judgment *in rem* against a ship in a foreign country, e.g., France, he can, on the ship reaching an English port, bring an action against the ship for the amount of the judgment, whoever be the person who is then the owner of the ship. *The City of Mecca* (1881) 6 P.D. (C.A.) 106, and Rule 92, *post*. See, as to maritime lien, *Northcote v. Owners of Heinrich Björn* (reported as *The Heinrich Björn* in the court below, 10 P.D. 44) (1886) 11 App.Cas. 270, especially 276, judgment of Lord Watson, and compare *The Bold Buccleugh* (1851) 7 Moore P.C. 267; *The Tergeste* [1903] P. 26; *The Two Ellens* (1872) L.R. 4 P.C. 161; *The Ripon City* [1897] P. 226, 241; *The Terwaete* [1922] P. (C.A.) 259; *The Sylvan Arrow* [1923] P. 220; *The Meandros* [1925] P. 61; *The British Trade* [1924] P. 104; *The Tagus* [1903] P. 44; *The Tollen* [1946] P. 135; Griffith Price in 57 L.Q.B. 409 (1941); *The Livette* (1888) 8 P.D. 209; *Harvey v. M. V. Terry* [1948] 1 D.L.R. 728.

¹⁰ See s. 22 (3) of the Supreme Court of Judicature Act, 1925.

registry, arising in an action of possession, salvage,¹¹ damage,¹² necessities,¹³ wages¹⁴ or bottomry.¹⁵

Comment

Among the terms used in this Sub-Rule the following call for special explanation.

(1) 'An action of possession' occurs when a ship is wrongfully detained, *e.g.*, by the master and an action is brought to dispossess him.¹⁶

(2) 'Salvage'¹⁷ is the reward payable for services rendered in saving any wreck, or in rescuing a ship or boat, or her cargo, or apparel, or the lives of the persons belonging to her from loss or danger.¹⁸

Since the alteration of the law by the Merchant Shipping (Salvage) Act, 1940, the Crown is no longer barred from, and has the same right to claim for salvage, as has anyone else.

(3) 'Bottomry'¹⁹ is a contract in the nature of a mortgage by which money is borrowed to be applied for the necessities of a ship. The keel or bottom of a ship (a part signifying the whole) and the freight are the security given for the repayment of the sum together with interest. Both principal and interest are forfeited if the ship is lost on the voyage. But no property passes as by mortgage, and no possession is given as by a pledge. The security here is only the cargo laden on board, and the money is raised for the necessities of the cargo only.²⁰

¹¹ *Post*, Sub-Rule 5.

¹² *Post*, Sub-Rules 3 and 4.

¹³ *Post*, Sub-Rule 7.

¹⁴ *Post*, Sub-Rule 8

¹⁵ *Post*.

¹⁶ *The New Draper* (1802) 4 C.Rob. 287; *The See Reuter* (1811) 1 Dod. 22; *The Kent* (1862) Lush. 495.

¹⁷ Roscoe, pp. 126-186, *The Creteforest* [1920] P. 111; *The Portreath* [1923] P. 155; '*Melanie*' (Owners) v. '*San Onofre*' (Owners) [1925] A.C. 246; *The Llandoverly Castle* [1920] P. 119; *The Morgana* [1920] P. 442 (on Merchant Shipping (Salvage) Act, 1916); *The Refrigerant* [1925] P. 130; *The Stiklestad* [1926] P. (C.A.) 205; *Kelvin Shipping Co v Canadian Pacific Ry.* [1928] S.C. (H.L.) 21; *Captain J. A. Cates Tug Co. v. Franklin Fire Insurance Co.* [1927] A.C. 698; *The TreKieve* (1942) 72 Ll L.Rep. (C.A.) 1. For the principle justifying jurisdiction, see *The Two Friends* (1799) 1 C.Rob. 271, 278, *per* Sir W. Scott. See also as to salvage for saving life, Admiralty Court Act, 1861, s. 9, and Merchant Shipping Act, 1894, s. 545, taken with Interpretation Act, 1889, s. 38 (1); Merchant Shipping (Salvage) Act, 1916; *The Willem III* (1871) L.R. 3 A. & E. 487; *The Johannes* (1860) Lush. 182; *The Suevio* [1906] P. 152.

¹⁸ 'But salvage is not due for services rendered to property lost at sea, other than a ship, her apparel, or her cargo, or property which had formed part of these, or freight which was being earned by carriage of the cargo'. See *The Gas Float Whetton* (No. 2) [1897] A.C. 337; Roscoe, pp. 132-133. See generally Merchant Shipping Act, 1894, s. 544 *et seq.*, as amended by the Merchant Shipping (Naval Salvage) Act, 1940, and the Supreme Court of Judicature (Consolidation) Act, 1925, Schedule 6.

¹⁹ Roscoe pp. 57-65; *The James W. Elwell* [1921] P. 351.

²⁰ Roscoe, p. 57; *The Karnak* (1868) 2 A. & E. 289, 301, *per* Sir R. Phillimore; *The Dora Foster* [1900] P. 241, 249, *per* Gorell Barnes J.

Illustration

A is the indorsee of a bottomry bond granted in Portugal by the master of an Italian ship, the *Gaetano*, on the ship, and her cargo on board. A brings an action in rem against the *Gaetano*. The court has jurisdiction.²¹

SUB-RULE 2.—The court has jurisdiction in respect of any question arising between the co-owners of a ship registered at any port in England as to the ownership, possession, employment or earnings of that ship, or any share thereof, with power to settle any account outstanding and unsettled between the parties in relation thereto, and to direct the ship, or any share thereof, to be sold, or to make such order as the court thinks fit.

Comment

Under this Sub-Rule comes the proceeding called ‘action of restraint’, whereby the minority in interest of the owners of a British ship obtain security from the majority when about to send the ship on a voyage against the will of the minority.²²

Illustration

A co-ownership action is brought by A against a ship registered at the port of Liverpool. The court has jurisdiction.²³

SUB-RULE 3.—The court has jurisdiction in respect of any claim for damage received by a ship, whether received within the body of a county or on the high seas.

Comment

This and Sub-Rule 4 include damage received by a foreign²⁴ ship and whether on the high seas or not.²⁵ Since the Admiralty Court Act, 1861, the Court of Admiralty has entertained suits for collision between British ships, even in foreign inland waters; and the Court of Admiralty, and the High Court as representing it, has also entertained suits for collisions between foreign ships in foreign waters, and between an English and a foreign ship in foreign waters.²⁶ It has also asserted its jurisdiction to restrain interference

²¹ *The Gaetano* (1881) 7 P.D. 1 (C.A.) 187.

²² *The Talca* (1880) 5 P.D. 169; *The Cavador* [1900] P. (C.A.) 47.

²³ Section 22 (1) (a) (ii).

²⁴ See *The Mecca* [1895] P. (C.A.) 95, 108, judgment of Llandley, L.J.

²⁵ Roscoe, pp. 66–120; Admiralty Court Act, 1861, s. 7; Merchant Shipping Act, 1894, s. 688, taken with Interpretation Act, 1889, s. 38 (1); The Supreme Court of Judicature Act, 1925, s. 22 (1) (a) (iii) and (iv).

²⁶ *The Courier* (1862) Lush. 541; *The Diana* (1862) Lush. 539; *The Halley* (1868) L.R. 2 P.C. 193; *The Tasmania* (1888) 13 P.D. 110; *The Karamea* [1922] 1 A.C. 68; *The Kronprinz Olav* [1921] P. (C.A.) 52; *The Teraete* [1922] P. (C.A.) 259; *The Juno* (1923) 128 L.T. 671; *The Arraiz* [1924] W.N. (C.A.) 259; *The Canton* (1928) 31 Ll.L.R. 289 (Suez Canal); *The Chatwood* [1930] P. 272 (Scheldt.)

by British subjects with the wreck of a Dutch ship on the high seas, which was in process of being salvaged by another British ship.²⁷

SUB-RULE 4.—The court has jurisdiction in respect of any claim for damage done by a ship.

Comment

Section 22 (1) (iv) of the Supreme Court of Judicature Act, 1925, on which this Sub-Rule is based has been widely interpreted; it covers even damage caused by a ship to a foreign pier, as in *The Tolten*.²⁸ Damage done by a ship includes damage done by any part of it.²⁹

SUB-RULE 5.—The court has jurisdiction in respect of any claim in the nature of salvage for services rendered to a ship (including, subject to the provisions of the Merchant Shipping Act, 1894, services rendered in saving life from a ship), whether rendered on the high seas or within the body of a county, or partly on the high seas and partly within the body of a county, and whether the wreck in respect of which the salvage is claimed is found on the sea or on the land, or partly on the sea and partly on the land.

Comment

Salvage is defined in para. 2 of the comment to Sub-Rule 1, *ante*, p. 208.

(1) The Court of Admiralty had originally no jurisdiction in salvage cases unless the services were performed on the high seas; but the jurisdiction of the court has been gradually extended by various statutes, *e.g.*, by section 565 of the Merchant Shipping Act, 1894,³⁰ and now by section 22 (1) (v) of the Supreme Court of Judicature Act, 1925, as modified by the County Courts (Amendment) Act, 1934, Sched. V; the Sub-Rule follows the terms of the amended section.

(2) The jurisdiction to entertain claims for salvage of life extends to the salvage of life from any British ship wheresoever the service may be performed, and from any foreign ship where the service has been rendered either wholly or in part in British waters, and may, under an agreement with the Government of any foreign country, be extended by Order in Council to cases in which the

²⁷ *The Tubantia* [1924] P. 78.

²⁸ [1946] P. 135 (C.A.).

²⁹ *The Minerva* [1933] P. 224.

³⁰ Repealed by Schedule 6 to the Supreme Court of Judicature (Consolidation) Act, 1925.

services are rendered by the saving of life from a ship of such foreign country, whether within British waters or not.³¹

Illustrations

1. A and B save the lives of the passengers and crew of a British ship off the coast of France. A and B bring an action of salvage against the ship. The court has jurisdiction.³²

2. A and B save the lives of the passengers of a British ship off the coast of France. The ship is in Port Douglas, in the Isle of Man. A and B have a claim for £500 salvage. The court has no jurisdiction to entertain an action by A and B for salvage against the ship.³³

SUB-RULE 6.—The court has jurisdiction in respect of any claim in the nature of towage,³⁴ whether the services were rendered within the body of a county or on the high seas.³⁵

SUB-RULE 7.—The court has jurisdiction in respect of any claim for necessities supplied to a foreign ship, whether within the body of a county or on the high seas, and, unless it is shown to the court that at the time of the institution of the proceedings any owner or part-owner of the ship was domiciled in England, in respect of any claim for any necessities supplied to a ship elsewhere than in the port to which the ship belongs.³⁶

Comment

This claim now rests on the Supreme Court of Judicature (Consolidation) Act, 1925, s. 22 (1) (a) (vii). The necessities must have been necessary for the equipment of the ship for the voyage in progress or about to be undertaken at the time of their supply.³⁷ Under the Merchant Shipping (Stevedores and Trimmers) Act, 1911, s. 8, claims for stowing, discharging, and trimming foreign ships may be enforced as claims for necessities.

SUB-RULE 8.—The court has jurisdiction in respect of any claim by a seaman of a ship for wages earned by him on board the ship, whether due under a special contract or

³¹ Merchant Shipping Act, 1894, ss. 544 and 545.

³² Merchant Shipping Act, 1894, s. 544, and Judicature Act, 1925, s. 22 (1) (a) (v).

³³ The ship is not in England or in English waters.

³⁴ Section 22 (1) (a) (vi): *The Riverman*. [1938] P. 33.

³⁵ *The Mecca* [1895] P. (C.A.) 95, 108, judgment of Lindley, L.J.; *The President Van Buren* (1925) 132 L.T. 253; *The Refrigerant* [1925] P. 130.

³⁶ Section 22 (1) (a) (vii): *Roscoe*, 202-203.

³⁷ See *The Marianne* [1891] P. 130.

otherwise, and any claim by the master of a ship for wages earned by him on board the ship and for disbursements made by him on account of the ship.³⁸

Comment

No distinction is drawn between claims by those serving on board British ships, and claims, either by foreigners or by British subjects, against foreign vessels which happen to be in the ports of this kingdom. At the same time the exercise of this jurisdiction is, as regards a foreign ship, in the discretion of the court; and if the consent of the representative of the Government to whose register the vessel belongs is withheld upon reasonable cause being shown,³⁹ the court may decline to exercise its authority,⁴⁰ but the matter is entirely discretionary.

SUB-RULE 9.—The court has jurisdiction in respect of any claim in respect of a mortgage of any ship, being a mortgage duly registered in accordance with the provisions of the Merchant Shipping Acts, 1894 to 1948, or in respect of any mortgage of a ship⁴¹ which is, or the proceeds whereof are, under the arrest of the court.⁴²

SUB-RULE 10.—The court has Admiralty jurisdiction in respect of any claim for building, equipping or repairing⁴³ a ship, where, at the time of the institution of the proceedings, the ship is, or the proceeds thereof are, under the arrest of the court.⁴⁴

SUB-RULE 11.—The court has jurisdiction in respect of any matter concerning booty of war, or the distribution thereof, which may be referred to the court by His Majesty in Council.⁴⁵

³⁸ Judicature Act, 1925, s. 22 (1) (a) (viii). For a claim under the Merchant Shipping (International Labour Conventions) Act, 1925, when a ship has been lost, see *The Crozetth Hall*, *The Celtic* [1931] A.C. 127. As regards the master's position, see *The Ile de Ceylan* [1922] P. 256; *The British Trade* [1924] P. 104. As regards pilotage, the right to bring proceedings under this head is additional to that of summary proceedings under s. 49 of the Pilotage Act, 1913; *The Ambatielos* [1923] P. 68.

³⁹ *The Leon XIII* (1883) 8 P.D. (C.A.) 121; *The Oberburgomeister von Winter* (1870) 18 W.R. 443; *Burns v. Chapman* (1859) 28 L.J.C.P. 6; *The Golubchick* (1840) 1 W.Rob. 143, per Dr. Lushington.

⁴⁰ *The Nina* (1867) L.R. 2 P.C. 38. See *The Octavie* (1863) Brown & Lush. 215.

⁴¹ Section 22 (1) (a) (ix) and see *The Tagus* [1903] P. 44.

⁴² The arrest must be in a suit which the court has jurisdiction to maintain: *The Evangelistria* (1876) 2 P.D. 241, n.

⁴³ *The Mecca* [1895] P. (C.A.) 95, 108, judgment of Lindley, L.J.

⁴⁴ Judicature Act, 1925, s. 22 (1) (a) (x); *The Aneroid* (1877) 2 P.D. 189.

⁴⁵ Judicature Act, 1925, s. 22 (1) (a) (xi) and see Smith 23 B.Y.B.I.L. 229 (1946).

SUB-RULE 12.—The court has Admiralty jurisdiction in respect of any claim—

- (1) arising out of an agreement relating to the use or hire of a ship⁴⁶; or
 - (2) relating to the carriage of goods⁴⁷ in a ship; or
 - (3) in tort in respect of goods carried in any ship;
- unless it is shown to the court that at the time of the institution of the proceedings any owner or part-owner of the ship was domiciled in England.⁴⁸

Comment

A code relative to the sea carriage of goods from England or Northern Ireland is enacted in the Carriage of Goods by Sea Act, 1924.

The decisions⁴⁹ under the Admiralty Court Act of 1861 are still, of course, applicable save where they conflict with the express terms of the new enactment. Hence it appears that (1) claims relating to the carriage of goods will include claims in respect of short delivery of cargo,⁵⁰ and claims in respect of goods which are merely brought incidentally into a British port⁵¹; (2) any claim in tort must relate to goods carried in a ship and does not include negligence by the master of a ship before the goods are actually put in the vessel.⁵² Article VII of the Rules relating to bills of lading scheduled to the Act of 1924 expressly allows shippers to limit their liability in respect of goods prior to loading and after discharge.

The rule that no claim can be brought if an owner or part owner of the ship is domiciled in England or Wales⁵³ refers to domicile at the time of the institution of the proceedings.

SUB-RULE 13.—The court possesses in addition to the heads of jurisdiction set out in the preceding twelve sub-

⁴⁶ Compare *The Montrosa* [1917] P. 1, per Evans, P.; Judicature Act, 1925, s. 22 (1) (a) (xii), and s. 33 (1) (b) and (c). See *Dampsselskab Svendborg v. London, Midland and Scottish Ry.* [1930] 1 K.B. (C.A.) 88.

⁴⁷ See *Gosse Millard v. Canadian Government Merchant Marine* [1929] A.C. 223.

⁴⁸ Cf. *The Eskbridge* [1931] P. 51.

⁴⁹ See also *Ship Marlborough Hill v. Cowan & Sons* [1921] 1 A.C. 444.

⁵⁰ *The Danzig* (1863) Br. & L. 102; *Brown & Co. v. Harrison* (1927) 96 L.J. K.B. 1025.

⁵¹ *The Pieve Superiore* (1874) L.R. 5 P.C. 482; *The Bahia* (1863) Br. & L. 61; *The Cap Blanco* [1913] P. 130.

⁵² *The Santa Anna* (1863) 32 L.J.P. & M. 198.

⁵³ The term 'England or Wales' which is used in reference to domicile in the Acts regulating Admiralty jurisdiction is strictly speaking inaccurate; for the purpose of domicile, as explained above (Rules 1-18, pp. 77-128, *ante*), England includes Wales, the whole territory being under a single system of law.

rules, any other jurisdiction formerly vested in the High Court of Admiralty.⁵⁴

Comment and Illustration

This jurisdiction, which was exercised by the old court of Admiralty, was founded on the general law maritime and included many of the heads of jurisdiction already referred to. The matter is of more than historical interest, however, since, under this inherited jurisdiction, the court still, for example, has power to deal with claims for restitution of property taken from pirates,⁵⁵ with claims to forfeit goods as droits of admiralty⁵⁶ and to enforce a judgment *in rem* obtained against a *British or foreign* ship in a foreign court.

A judgment *in rem* is obtained against a ship in a foreign court of Admiralty whereby the plaintiff in the foreign action is entitled to recover £25,000. The judgment not having been satisfied, the ship comes into an English port. A, the plaintiff in the foreign action, brings an action *in rem* against the ship in respect of the foreign judgment. The court has jurisdiction to entertain the action.⁵⁷

This claim (it is submitted) may be put in a more general form, and it may be laid down that the court has jurisdiction⁵⁸ to entertain an action *in rem* for the enforcement of any maritime lien if the case is one in which, according to English law, a maritime lien exists.

SUB-RULE 14.—The court also possesses Admiralty jurisdiction which, under or by virtue of any enactment which came into force after the commencement of the Judicature Act, 1873, and is not repealed by the Supreme Court of Judicature (Consolidation) Act, 1925, was immediately before the commencement of that Act vested in or capable of being exercised by the High Court constituted by the Act of 1873.⁵⁹

⁵⁴ Section 22 (1) (b).

⁵⁵ *E.g.*, Marsden, *Law and Custom of the Sea*, Vol. 2, pp. 108 and 250.

⁵⁶ *E.g.*, *ibid.*, p. 184.

⁵⁷ *The City of Mecca* (1881) 6 P.D. (C.A.) 106. The action failed in the particular case because the foreign judgment was not a judgment *in rem*, but the principle was apparently admitted. The jurisdiction does not depend upon statute, but is a survival of procedure under the old common maritime law.

The power to detain a ship in order to secure compensation for a workman is described by Atkin, L.J., in *Hunter v. Städtische Hochseefischerei Gesellschaft* [1925] 2 K.B. (C.A.) 498, 507, as in substance a proceeding *in rem* against the ship; but proceedings are not Admiralty proceedings as they are in the case of the Merchant Shipping (Stevedores and Trimmers) Act, 1911, s. 3.

⁵⁸ *The Tolten* [1946] F. (C.A.) 135, *per* Scott, L.J., at p. 161, referring to this passage which appeared at p. 921 of the 5th edition.

⁵⁹ Section 22 (1) (c).

SUB-RULE 15.—The court is a prize court within the meaning of the Naval Prize Acts, 1864 to 1916, as amended by any subsequent enactment, and has all such jurisdiction on the high seas and throughout His Majesty's dominions and in every place where His Majesty has jurisdiction as, under any Act relating to naval prize or otherwise, the High Court of Admiralty possessed when acting as a prize court.⁶⁰

Comment

The subject of prize law⁶¹ which is important in time of war is a matter of public international law, though of course decisions of prize courts are *in rem* and affect the title of private owners. Appeals in matters of prize go to the Privy Council.⁶²

⁶⁰ Section 23.

⁶¹ V. Higgins and Colombos, *Law of the Sea*; and Fitzmaurice: 22 B.Y.B.I.L., p. 73 (1945). 'Some Aspects of Modern Contraband Control and the Law of Prize', for a full discussion of the modern position. As to jurisdiction of foreign prize courts, *v. post*, pp. 365-367.

⁶² Section 27.

JURISDICTION IN RESPECT OF DIVORCE— NULLITY OF MARRIAGE—GUARDIANSHIP —LEGITIMACY AND LEGITIMATION¹

1. DIVORCE

(1) *Where Court has Jurisdiction.*

RULE 31.—The court has jurisdiction to entertain proceedings for the dissolution of the marriage of any parties domiciled in England at the commencement of the proceedings.²

This jurisdiction is not affected by—

- (1) the residence of the parties³; or
- (2) the allegiance of the parties⁴; or
- (3) the domicile of the parties at the time of the marriage⁵; or
- (4) the place of the marriage⁶; or
- (5) the place where the offence, in respect of which divorce is sought, is committed.⁷

The matrimonial jurisdiction of the court is confined to marriages which are 'the voluntary union for life of one man and one woman to the exclusion of all others'.⁸

¹ Cheshire, Chaps. 12–13; Wolff, pp. 74–87; Westlake, ss. 43–52; Foote, pp. 147–156; Story, ss. 200–230b; Read, Chap. 6; Restatement, ss. 110–118; Goodrich, Chaps. 10–11; Johnson, Vol. 2, Chaps. 1–2. See, as to jurisdiction in divorce and its connection with domicile, Sub-Rule to General Principle No. 3, Intro. at p. 28, *ante*. For suggestion of reform, see Cheshire, 'The International Validity of Divorces', 61 L.Q.R. 352–372 (1945) and Final Report of the Committee on Procedure in Matrimonial Causes (1947) Cmd. 7024, s. 83.

² *Wilson v. Wilson* (1872) L.R. 2 P. & D. 435; *Le Mesurier v. Le Mesurier* [1895] A.C. 517, at p. 540.

³ See *Goulder v. Goulder* [1892] P. 240.

⁴ *Niboyet v. Niboyet* (1878) 4 P.D. (C.A.) 1. In this case no objection seems to have been made on the ground of the husband being a French citizen, and the mere fact of a foreign allegiance does not appear in any reported case to have been treated by the court as a ground for declining jurisdiction.

⁵ *Goulder v. Goulder* [1892] P. 240, at p. 243.

⁶ *Ibid.*, and *Ratcliff v. Ratcliff* (1859) 1 Sw. & Tr. 467.

⁷ *Ibid.*

⁸ *Hyde v. Hyde* (1866) L.R. 1 P. & D. 130 at p. 133.

Comment and Illustrations

The principle now finally adopted by English courts is, that jurisdiction in matters of divorce depends upon domicile, or, in other words, that the question whether parties to a marriage ought to be divorced is one which concerns the authorities of the country where they live and have their legal home, and that, therefore, the courts of the country where the parties are so living, *i.e.*, are domiciled, at the time of the demand for a divorce, are the courts to which in general ought to be referred the question whether the marriage between the parties should or should not be dissolved.

The English courts at one time inclined towards the quite different principle that the right to divorce depended upon the terms of the marriage contract, and, therefore, upon the law under which the marriage was celebrated. Hence they held that jurisdiction in matters of divorce belonged exclusively to the courts of the country under the law of which the marriage took place, which was in the great majority of instances (if not always) the country where the marriage was celebrated.⁹

This is the 'contractual' theory of divorce, and it may be contrasted with the theory that divorce is a penalty inflicted by the state for offences against the marriage relation. Jurisdiction in matters of divorce is, on this view, given by the temporary residence of married persons in a particular country, especially if the offence against the marriage relation, *e.g.*, adultery, is committed in such country.

This 'penal' theory was never, on the whole, favoured by the English courts,¹⁰ but it was influential in Scotland (where adultery was made a capital offence by Act, 1563, c. 74), and afforded the theoretical justification for the freedom with which the Scottish courts at one time in practice exercised jurisdiction in matters of divorce.¹¹ A contributory cause of this freedom may have been the fact (which appears to have been disregarded by the English courts in formulating their strict theory of domicile as the basis of jurisdiction in divorce)¹² that desertion has been a ground for divorce in Scotland since the sixteenth century.

The Scottish courts have, however, abandoned the doctrine that either the *locus delicti* or matrimonial domicile in the sense of mere residence is of itself sufficient to give jurisdiction in matters of divorce,¹³ and, although it is possible that the two jurisdictions may still differ over the question whether divorce can be granted

⁹ *Tovey v. Lindsay* (1813) 1 Dow. 117; *Lolley's Case* (1812) 2 Cl. & F. 567; *McCarthy v. de Caix* (1831) 2 R. & M. 614; 2 Cl. & F. 568, n.

¹⁰ *Mordaunt v. Moncrieffe* (1874) L.R. 2 Sc. App. 374.

¹¹ Fraser, 2nd ed., pp. 1276-1294.

¹² *MacDougall v. Chitnavis* [1937] S.C. 390 at p. 404, *per* Lord Morison.

¹³ *Le Mesurier v. Le Mesurier* [1895] A.C. 517 at pp. 533-535; *Barkworth v. Barkworth* [1918] S.C. 759.

to a deserted wife whose husband has changed his domicile,¹⁴ they each adopt what may be called the 'status' theory of divorce.

On this view, just as marriage is a contract which creates or constitutes a special status, so divorce is the act by which a state, through a public authority, dissolves or puts an end to the marriage status. The consequences of the adoption of this theory are first, that the claim to divorce has no connection with the terms of the marriage contract, for divorce is not the rescission of a contract, but the extinction of a status the continuance of which is, in the judgment of the state, inexpedient whether on the grounds of justice or policy. Secondly, the fact that the parties were married under a law which does not recognise divorce affords no reason why the courts of a state, the law of which does recognise divorce, should not dissolve their marriage. Thirdly, jurisdiction to dissolve a marriage belongs exclusively to the tribunals of the country where the parties are domiciled; for this is, according to the doctrine generally prevalent, the country to which the parties belong, and by the law of which their status is determined. Finally, a judgment pronounced by such tribunal has effect everywhere. It should be noticed that the courts of countries whose law makes allegiance and not domicile determine a person's status would, on the view under discussion, hold that the right to divorce depends upon the law of the country of which the parties to a marriage are citizens, and they will apply the law of such country if they exercise jurisdiction over foreigners in matters of divorce.

'It is', says Lord Penzance, in one of the clearest pronouncements of the status theory of divorce, 'the strong inclination of my own opinion that the only fair and satisfactory rule to adopt on this matter of jurisdiction is to insist upon the parties in all cases referring their matrimonial differences to the courts of the country in which they are domiciled. Different communities have different views and laws respecting matrimonial obligations, and a different estimate of the causes which should justify divorce. It is both just and reasonable, therefore, that the differences of married people should be adjusted in accordance with the laws of the community to which they belong, and dealt with by the tribunals which alone can administer those laws. An honest adherence to this principle, moreover, will preclude the scandal which arises when a man and woman are held to be man and wife in one country, and strangers in another.'¹⁵

'It seems', says Brett, L.J., 'that the only court which, on principle, ought to entertain the question of altering the relation in any respect between parties admitted to be married or the status of either of such parties arising from their being married, on

¹⁴ *Post*, p. 232.

¹⁵ *Wilson v. Wilson* (1872) L.R. 2 P. & D. 435, 442. This statement of the law is in conformity with the expressions of Lord Westbury in *Shaw v. Gould* (1868) L.R. 3 H.L. 55, 85.

account of some act which by law is treated as a matrimonial offence, is a court of the country in which they are domiciled at the time of the institution of the suit. If this be a correct proposition, it follows that the court must be a court of the country in which the husband is at the time domiciled, because it is incontestable that the domicile of the wife, so long as she is a wife, is the domicile which her husband selects for himself, and at the commencement of the suit she is *ex hypothesi*—still a wife'.¹⁶

Hence the court has jurisdiction to grant a divorce in any case, without exception, where the domicile of the parties (*i.e.*, in effect, of the husband) is English at the commencement of the proceedings for divorce.

H and W are married in India. Adultery is committed by W in India. H, being domiciled in England, institutes a suit for divorce against W. The court has jurisdiction to grant a divorce.¹⁷

H and W are a Scottish husband and wife domiciled in Scotland, who have married in Scotland. W, during the continuance of the Scottish domicile, commits adultery in Scotland. H afterwards acquires an English domicile, and then applies to the English court for a divorce. At the time of the application, and throughout the proceeding, W, the wife, is in fact resident in Scotland. In prior proceedings before the Scottish courts by W against H, these courts held that H was domiciled in Scotland. H has, as a matter of fact, in the judgment of the High Court, acquired an English domicile. The court has jurisdiction to pronounce a divorce between H and W.^{17a}

Change of domicile during proceedings.—There does not appear to be a reported English case in which the point has been taken that a husband has changed his domicile while a matrimonial suit is pending, but the courts of South Australia,¹⁸ Queensland,¹⁹ and South Africa,²⁰ treat it as immaterial.²¹

Of the various other circumstances which might be thought material, none are, it is conceived, of importance as *limiting*^{21a} the jurisdiction of the court.

Residence.—Residence, as contrasted with domicile,²² is certainly unimportant. H and W are domiciled in England, but reside in France. W commits adultery in Paris. H, though residing abroad, can obtain a divorce from the court.²³

¹⁶ *Niboyet v. Niboyet* (1878) 4 P.D. 1, 13, 14.

¹⁷ *Ratcliff v. Ratcliff* (1859) 1 Sw. & Tr. 467.

^{17a} *Wilson v. Wilson* (1872) L.R. 2 P. & D. 435.

¹⁸ *Russell v. Russell* [1935] S.A. S.R. 85.

¹⁹ *Moss v. Moss* [1937] St. R. Qd. 1.

²⁰ *Balfour v. Balfour* [1922] W.L.D. 133.

²¹ *Dicta* in English cases said to support the view that the husband must be domiciled in the country where the proceedings are pending when its courts are asked to pronounce a decree of divorce are cited in an article in 15 A.L.J. 303 (1942), but they are general in nature, and were not addressed to the point under consideration. See also *Gane v. Gane* (1941) 58 W.N. (N.S.W.) 83 and *Flakemore v. Flakemore and Johnson* [1942] V.L.R. 156.

^{21a} Some of them may be of importance as giving jurisdiction under the exceptions to Rule 32 discussed below.

²² See *Dolphin v. Robins* (1859) 7 H.L.C. 390, 406, for expressions of Lord Chelmsford contrasting residence and domicile, and p. 77, note 4, *ante*.

²³ See *Goulder v. Goulder* [1892] P. 240; *Gillis v. Gillis* (1874) Ir. R. 8 Eq. 597.

Allegiance.—This is the tie by which a person is connected with a state²⁴ as being a subject of the sovereign of such state; and it might be thought that as a person's connection with a particular political society depends upon his allegiance, or in more popular language, his nationality, jurisdiction to declare whether a given person is to be considered married or unmarried would belong to the courts of the state or nation of which he is a member or citizen. This, however, is not the view of English tribunals. In perfect consistency with the view that civil, as contrasted with political status, depends upon domicile, they hold that the jurisdiction of an English court to grant a divorce is not affected by the allegiance of the parties. H and W are French subjects domiciled at Manchester, where W commits adultery. The court has jurisdiction to grant a divorce. Even an alien enemy, when interned, may petition for divorce.²⁵ Similarly, despite repatriation, an alien enemy may be divorced provided the parties are domiciled in England.²⁶

Other factors.—It is certain that the domicile of the parties at the time of the marriage, the place of the marriage, or the place where the offence, in respect of which divorce is sought, was committed, has no effect in limiting the jurisdiction of the court.

Service out of the jurisdiction in matrimonial causes.—Any document required to be served in any matrimonial cause may be served out of the jurisdiction without the leave of the court,²⁷ and, as such service may now be effected by registered post,²⁸ the cases in which orders for substituted service by post were made in the past are no longer of great significance. In appropriate circumstances, however, an application for substituted service may still be made under rule 8 (3) of the Matrimonial Causes Rules, 1947, and the court has power to dispense with service altogether under the proviso to section 42 of the Matrimonial Causes Act, 1857; but it will only do so in the most exceptional cases when a question of status is involved.²⁹

Security for wife's costs.—Even if the husband disputes domicile he may, in an appropriate case, be ordered to give security for his wife's costs in the issue.³⁰ Similarly, a husband may be ordered

²⁴ For difference between 'state' and 'country', see pp. 41, 42, *ante*.

²⁵ *Uhlig v. Uhlig* (1916) 86 L.J.P. & M. 90; *Krauss v. Krauss* (1919) 35 T.L.R. 637; *Weiss v. Weiss* [1940] Sc. L.T. 447.

²⁶ *Thiele v. Thiele* (1920) 150 L.T.J. 387.

²⁷ Matrimonial Causes Act, 1857, s. 42, Matrimonial Causes Rules, 1947, r. 9; *Goff v. Goff* [1934] P. 107, at p. 112.

²⁸ Matrimonial Causes Rules, 1947, r. 8.

²⁹ *Luccioni v. Luccioni* [1943] P. 49; *Read v. Read* [1942] 2 All E.R. 423; cf. *Weighman v. Weighman* [1947] 2 All E.R. 852 (service dispensed with).

³⁰ *Smith v. Smith* [1923] P. 128; *Johnstone v. Johnstone* [1929] P. 165; Matrimonial Causes Rules, 1947, r. 74 (2). A dispute as to domicile has been held proper for decision by a jury, *Lowenfield v. Lowenfield* [1903] P. 177.

to give security for his wife's costs incidental to the examination of a witness or party out of the jurisdiction.³¹

Proof of foreign marriage in matrimonial causes.—Where the parties were married abroad, the court must be satisfied that the ceremony constituted a formally valid marriage within Rule 168 (2), *post*. It may therefore be necessary for the petitioner to call an expert witness to prove that the marriage certificate would be accepted as *prima facie* evidence of a valid marriage by the courts of the country where it was celebrated,³² unless it was celebrated according to the rites of the Church of England in a British colony or dependency, in which case production of a certified copy of the relevant entry in the ecclesiastical register will suffice.³³ It is unnecessary for the petitioner to call expert evidence as to the validity of his marriage if it was celebrated in a country whose statutes and ordinances are held to be sufficiently proved by production of an authenticated copy, by virtue, for instance, of the Evidence (Colonial Statutes) Act, 1907³⁴ (mere production of the certificate coupled with proof of the relevant legislation sufficing), or in a country to which the provisions of the Evidence (Foreign, Dominion and Colonial Documents) Act, 1933, have been applied by Order in Council.³⁵

If the marriage was celebrated in a place where no appropriate local form was available to the parties, its validity as a good common law marriage may have to be established,³⁶ and there is some support, from the case of *Spivack v. Spivack*,³⁷ for the view that the presumption of English law in favour of the validity of a marriage ceremony which has been followed by cohabitation, applies in a matrimonial cause (though not, of course, in a prosecution for bigamy) although the marriage was celebrated abroad. In that case, however, there was some expert evidence as to the formal validity of the marriage under the law of the place of celebration.

Ancillary relief in matrimonial causes.—It is conceived that, in

³¹ Matrimonial Causes Rules, 1947, r. 74 (1).

³² *Mondschein v. Mondschein* (1921) 37 T.L.R. 665; an affidavit is usually accepted if the issue is uncontested. See also *Montrose* in 11 Mod.L.R. 326 (1948), where the practice of calling an expert witness to prove that the marriage certificate would be accepted as *prima facie* evidence of a valid marriage abroad is questioned on the ground that matters of evidence should be determined by the *lex fori*. Cf. *Terry v. Terry* [1948] 2 W.W.R. 152.

³³ *Ward v. Dey* (1846) 1 Rob.Eq. 759; *Browning v. Browning* [1919] W.N. 28; *Perry v. Perry* [1920] P. 361; *Pritchard v. Pritchard* (1920) 37 T.L.R. 104; *Mattheus v. Mattheus* (1930) 46 T.L.R. 543; *Winmill v. Winmill* (1934) 78 S.J. 536.

³⁴ *Drew v. Drew* [1912] P. 175; *Daniells v. Daniells* (1917) 33 T.L.R. 149; *Roe v. Roe* (1916) 33 T.L.R. 83; *Bondhote v. Bondhote* [1920] W.N. 142; *Gossage v. Gossage* (1934) 78 S.J. 551; in *Brown v. Brown* (1917) 116 L.T. 702, evidence that the relevant ordinance was still in force was required.

³⁵ *North v. North and Ogden* (1936) 105 L.J.P. 56; and see p. 860, *post*.

³⁶ *Wolfenden v. Wolfenden* [1946] P. 61; *post*, p. 771.

³⁷ (1930) 46 T.L.R. 243; cf. *Leong Sow Nom v. Chin Yee You* (1934) 49 B.C.R. 244 [1934] 3 W.W.R. 686, criticised *Falconbridge*, p. 267.

all cases in which it has jurisdiction in the main suit, the court has (where otherwise appropriate) jurisdiction to entertain applications for ancillary relief by way of alimony pending suit, permanent alimony, permanent maintenance, periodical payments, a settlement of the wife's property, variation of settlements and custody and maintenance of children.³⁸ The court will, however, decline to exercise jurisdiction in such cases where any order that it made would be wholly ineffective³⁹; but there is power to vary a settlement *inter partes*, even though it comprises property out of the jurisdiction, and is governed by foreign law and although the trustees reside out of the jurisdiction.⁴⁰ Nevertheless, service on the trustees in such a case will be set aside if they protest the jurisdiction, and there is no evidence that an order made against them would be effective.⁴¹ The divorce court also has power to make an order for the custody of a child who is out of the jurisdiction.⁴²

The decree upon which an application under section 192 of the Supreme Court of Judicature (Consolidation) Act, 1925, is made must be that of an English court,⁴³ but there is Australian authority for the proposition that, notwithstanding a husband's change of domicile after a decree of divorce, the court which pronounced such decree has jurisdiction to order him to pay maintenance.⁴⁴

Proviso.—Matrimonial jurisdiction confined to monogamous marriages.—In *Hyde v. Hyde*,⁴⁵ Lord Penzance refused to dissolve a marriage celebrated in Utah according to Mormon rites, and intended to create a Mormon marriage, because such a marriage was not the voluntary union for life of one man and one woman to the exclusion of all others, and this has since been regarded as the leading case on the subject. 'For the purpose of enforcing the rights of marriage, or for the purpose of dissolving a marriage', says Lord Greene, M.R.,⁴⁶ 'it has always been accepted as the case, following Lord Penzance's decision, that the courts of this country exercising jurisdiction in matrimonial affairs will not and cannot give effect to, or dissolve, marriages which are not monogamous marriages. The word "marriage" in the Matrimonial Causes Act has to be construed for the purpose of ascertaining what the jurisdiction of the English courts is in these matters. The reasons are that the powers conferred on the courts for enforcing or dissolving a marriage tie are not adapted to any form of union between a man and a woman save a monogamous union.'

It seems clear that this limitation of the jurisdiction of the

³⁸ Supreme Court of Judicature (Consolidation) Act, 1925, s. 187, ss. 190-198.

³⁹ *Tallack v. Tallack* [1927] P. 211; *Goff v. Goff* [1934] P. 107.

⁴⁰ *Nunneley v. Nunneley* (1890) 15 F.D. 186; *Forsyth v. Forsyth* [1891] P. 868; *Goff v. Goff*, *supra*, at p. 112.

⁴¹ *Goff v. Goff* [1934] P. 107.

⁴² *Philips v. Philips* (1944) 60 T.L.R. 397.

⁴³ *Moore v. Bull* [1891] P. 279.

⁴⁴ *Moss v. Moss* [1937] St. R. Qd. 1.

⁴⁵ (1866) L.R. 1 P. & D. 180.

⁴⁶ *Baindail v. Baindail* [1946] P. 122 at p. 125.

court applies, not only to divorce, as in *Hyde v. Hyde*,⁴⁷ but also to judicial separation,⁴⁸ restitution of conjugal rights,⁴⁹ and applications for maintenance.^{49a} There does not appear to be an actual decision on the point so far as nullity is concerned, but in *Mehta v. Mehta*,⁵⁰ Barnard, J., found it 'a little difficult to accede to the argument of counsel for the petitioner that seeking a decree of nullity is not asking for the relief of the matrimonial law of England, because, quite apart from the relief, if you can call it relief, which this court would of necessity grant in this case if the petitioner succeeded, other consequences might follow. There might be questions of maintenance . . . and questions of custody might arise'.

Although a marriage which is 'the voluntary union for life of one man and one woman to the exclusion of all others'⁵¹ is frequently referred to as a Christian marriage, a purely civil ceremony between persons who are not Christians is within Lord Penzance's definition if, under the law of the place of celebration, one man unites himself to one woman for life to the exclusion of all others.⁵²

Similarly, the court can exercise matrimonial jurisdiction in the case of a marriage contracted under the law of a country by which the status may be dissolved at the request of either party without the commission of any matrimonial offence, provided it is capable of subsisting and intended to subsist for the life of the parties.⁵³ The essence of a marriage is not qualified by the means whereby it may be dissolved if and when that question falls to be determined by the law of the domicile of the parties.⁵⁴

Jurisdiction may also be exercised in the case of a marriage celebrated in India according to the rites of a monogamous Hindu sect although the husband might subsequently renounce his faith and thus become entitled to practice polygamy according to his personal law,⁵⁵ and the court constantly exercises jurisdiction over Jewish marriages although they may be determined, so far as

⁴⁷ *Supra*.

⁴⁸ *Nachimson v. Nachimson* [1930] P. 217, where, however, the marriage was held to be monogamous.

⁴⁹ *Ardaseer Cursetjee v. Perozeboye* (1856) 10 Moo. P.C. 375.

^{49a} Cf. *Lim v. Lim* [1948] 2 D.L.R. 353.

⁵⁰ [1945] 2 All E.R. 690 at p. 693. In this case, too, the marriage was held to be monogamous.

⁵¹ L.R. 1 P. & D. at p. 133.

⁵² *Brinkley v. Att.-Gen.* (1890) 15 P.D. 76 (Japan); *Mong Kuen Wong v. May Wong* [1948] N.Z.L.R. 348 (China after 1931).

⁵³ *Nachimson v. Nachimson* [1930] P. 217 (C.A.) (marriage under early Soviet law). The case might have been different if Russian marriages were merely marriages in name conferring no status and entailing no obligation, or the particular marriage was a mere cloak for casual intercourse, *per* Lawrence, L.J., at p. 233. *See quare* as to the materiality of the intention of the parties in this connection: *see post*, p. 226.

⁵⁴ *Ibid.* at p. 227, *per* Lord Hanworth.

⁵⁵ *Mehta v. Mehta* [1945] 2 All E. R. 690.

Jewish law is concerned, by means of a ghet,⁵⁶ and although polygamy is still practised by Jews in certain parts of the world.⁵⁷

1. H and W go through a ceremony of marriage according to the laws and usages of the Parsees in Bombay where they are domiciled. The laws and usages of the Parsees permit polygamy. H deserts W and W petitions for restitution of conjugal rights. The court has no jurisdiction to entertain the suit.⁵⁸

2. H and W go through a ceremony of marriage in Bombay according to the rites of the Arya Samaj sect. Persons holding the Arya Samaj faith must practice monogamy, but H could renounce the faith and, by becoming an orthodox Hindu, legitimately practice polygamy according to his personal law. W petitions the court for nullity; the court has jurisdiction because the marriage was monogamous in its inception.⁵⁹

*Polygamous marriages generally.*⁶⁰—In *Hyde v. Hyde*,⁶¹ Lord Penzance did 'not profess to decide upon the rights of succession or legitimacy which it might be proper to accord to the issue of polygamous unions, nor upon the rights or obligations in relation to third persons which people living under the sanction of such unions may have created for themselves'. Nevertheless, his decision was widely interpreted in subsequent dicta⁶² and, in *Re Bethell*,⁶¹ Stirling, J., purported to follow it when holding that the child of a marriage contracted in Bechuanaland between a man domiciled in England⁶⁴ and a Baralong woman according to the customs of the Baralong was illegitimate.

It is now clear, however, that the English courts do, for many purposes, recognise polygamous unions contracted between persons domiciled in a country where polygamy is lawful. Thus, in

⁵⁶ *Spivack v. Spivack* (1930) 46 T.L.R. 243. As to the recognition accorded to divorces which are not effected by judicial process see pp. 370-372, *post*.

⁵⁷ *E.g.*, Morocco, see 48 L.Q.R. 360; but the court does not appear to have had to consider a case of a Jewish marriage celebrated in such a place.

⁵⁸ *Ardaseer Cursetjee v. Perozeboye* (1856) 10 Moo. P.C. 375 at p. 418 *et seq.* As to the degree of recognition which is accorded to such a marriage see *infra*.

⁵⁹ *Mehta v. Mehta* [1945] 2 All E.R. 690 at p. 693. For sufficiency of residence as a ground of jurisdiction in nullity see Rule 35, *post*.

⁶⁰ The subject is fully discussed by Beckett, 48 L.Q.R. 341-368 (1932) in a valuable article. See also Cheshire, pp. 400-417; Wolff, pp. 321-327; Goodrich, pp. 317-322; Johnson, Vol. 1, pp. 309-318; Falconbridge, pp. 653-664; Fitzpatrick, 2 Jo Comp.Leg. (2nd series) 359 (1900); Vesco-Fitzgerald, 47 L.Q.R. 253 (1931); Fleming, 11 Conv (N.S.) 201 (1947). Dicey treated the non-recognition of polygamous marriages as in reality one instance of the principle that the rules of the conflict of laws apply only among civilised states, but he said that the extent to which English law would recognise rights depending on the institution of polygamy was doubtful.

⁶¹ (1866) L.R. 1 P. & D. 180 at p. 183.

⁶² *Harvey v. Farnie* (1880) 6 F.D. 35 at p. 53, Lush, J.; *R. v. Superintendent Registrar of Marriages for Hammersmith, Ex p. Mir-Anwaruddin* [1917] 1 K.B. 634, at p. 647, Darling, J.; *R. v. Naguib* [1917] 1 K.B. 359, Avory, J. Lord Brougham was in favour of the total non-recognition of polygamous unions; *Warrender v. Warrender* (1835) 2 Cl. & F. 488 at p. 531 *et seq.*

⁶³ (1888) 38 Ch.D. 220.

⁶⁴ There was no reference to the man's domicile in the judgment, but the chief clerk's certificate contained a finding that the man was domiciled in England at the time of the marriage.

*Baindail v. Baindail*⁶⁵ the Court of Appeal held that a Hindu marriage contracted in India between persons who were domiciled there conferred upon the husband the status of a married man according to the law of his domicile, so that a woman whom he subsequently married at a registry office in England was entitled to petition the court for a declaration of nullity.

Again, in stating his opinion to the Privileges Committee of the House of Lords in the *Sinha Peerage Claim*,⁶⁶ Lord Maugham said: 'It cannot, I think, be doubted now (notwithstanding some earlier *dicta* by eminent judges) that a Hindu marriage between persons domiciled in India is recognised in our courts, that the issue are regarded as legitimate, and such issue can succeed to property in this country with a possible exception which will be referred to later'. The exception is dealt with by His Lordship in a subsequent remark in his opinion⁶⁷ 'having regard to the domicile of the parties at the date when it was solemnised, the marriage would properly be treated as valid in this country for all purposes, except it may be the inheritance of real estate before the Law of Property Act, 1925, or the devolution of entailed interests as equitable interests before or since that date, and some other exceptional cases'.

Apart from the cases of *Baindail v. Baindail*⁶⁸ and *Srini Vasam v. Srini Vasam*,⁶⁹ which recognise the status created by a polygamous marriage according to the law of the domicile, there is remarkably little English authority as to the precise extent to which such unions will be recognised.⁷⁰ 'If a Hindu domiciled in India died intestate leaving personal property,⁷¹ the succession to the personal property would be governed by the law of his domicile; and in applying the law of his domicile effect would have to be given to the rights of any children of the Hindu marriage and of his Hindu widow',^{71a} but there is, for instance, no authority as to what the position would be if the deceased died domiciled in England, having contracted a Hindu marriage, or marriages, while domiciled in India.⁷²

⁶⁵ [1946] P. 122 (C.A.), approving *Srini Vasam v. Srini Vasam* [1946] P. 67, Barnard, J.

⁶⁶ (1939) 171 Lords Jo 350; [1946] 1 All E.R. 348 (n) at p. 349.

⁶⁷ *Ibid.*; *Birtwhistle v. Vardill* (1840) 7 Cl. & F. 895, but see *post*, p. 489, n. 46a.

⁶⁸ [1946] P. 122.

⁶⁹ *Ibid.*, p. 67.

⁷⁰ There are of course a number of decisions of the Privy Council, but they are hardly in point.

⁷¹ By personal property the learned judge of course meant movables: see *ante*, p. 46.

^{71a} *Baindail v. Baindail* [1946] P. 122 at p. 127-128; see also *In the Estate of Abdul Majid Beishah* (1926) *The Times*, Dec. 16 and 18, Jan. 14 and 18; B.Y.B.I.L. 1928, p. 185; 47 L.Q.R. 256, 270; the deceased's domicile was wrongly stated to be English in *The Times* newspaper: see 48 L.Q.R. 348, n. 12.

⁷² It is to be observed that nothing in the decision of the *Sinha Peerage Petition* in favour of the claimant, a child of a Hindu marriage which was in fact monogamous, was intended to apply to a case where the petitioner was claiming as a son of a parent who has in fact married two wives [1946] 1 All E.R. p. 348, n.

The solution of such a problem would depend upon the construction of the Administration of Estates Act, 1925, and analogous questions may arise on the interpretation of other statutes such as the Fatal Accidents Act, 1846, where such words as 'wife' and 'spouse' may have to be construed by the courts in the future. In *Baindail v. Baindail*⁷³ Lord Greene, M.R., was careful to guard himself against anything that he had said being taken to have the slightest bearing on the law of bigamy, and the question whether a person who has entered into a polygamous union in a country where polygamy is lawful and where he was domiciled at the date of the ceremony can be prosecuted for bigamy if he marries in England during the lifetime of the spouse of his polygamous union, would depend upon the construction to be placed on the words 'being married' and 'marries' in the Offences against the Person Act, 1861, s. 57.

The authorities seem to establish that the question whether a particular ceremony constitutes a monogamous or polygamous marriage depends upon the law of the country where it takes place, as applied to the particular form of marriage and to the particular parties thereto, without reference to their domicile at the time of the ceremony or at any other time, and without reference to their intentions. Thus, in *Chetti v. Chetti*⁷⁴ and *R. v. Superintendent Registrar of Marriages for Hammersmith, Ex p. Mir-Anwaruddin*,⁷⁵ marriages between a Hindu and an English woman and between a Mohammedan and an English woman were respectively treated as monogamous because they were celebrated in England according to the formalities required by English law, although in each case the husband was domiciled in India and his personal law permitted polygamy.

The law of the domicile of the parties at the time of the marriage is, however, relevant to its validity under English law because the law of the domicile regulates the parties' capacity to marry under Rule 168 (1).⁷⁶ Consistently with the general rule that, in order to be capable of entering into a valid marriage, each party must have capacity to marry according to the law of his or

⁷³ [1946] P. 122 at p. 130; see also *R. v. Naguib* [1917] 1 K.B. 359, where the point was left open by the Court of Criminal Appeal

⁷⁴ [1909] P. 67.

⁷⁵ [1917] 1 K.B. 634. There are other authorities which are really to the same effect, e.g., *Hyde v. Hyde* (1866) L.R. 1 P. & D. 130; *Nachimson v. Nachimson* [1980] P. 217; *Mehta v. Mehta* [1945] 2 All E.R. 690; *Lendrum v. Chakravarti* [1929] Sc.L.T. 96 (overruled on another point by *MacDougall v. Chitnavis* [1937] S.C. 890); *contra* Lord Brougham in *Warrender v. Warrender* (1835) 2 Cl. & F. 488 at p. 535, but see *ibid.* at p. 532. See also *Connolly v. Woolrich* (1867) 11 L.C.J. 157; 1 R.L. 253; but, as explained in later Canadian cases, it is hardly an authority against the proposition cited in the text: see 48 L.Q.R. 475. The authorities are criticised by Cheshire, pp. 409-412, who favours the test of the law of the matrimonial domicile or intended matrimonial home.

⁷⁶ *Post*, p. 758.

her domicile at the time of the ceremony,⁷⁷ it is submitted that a polygamous marriage entered into by a man or woman domiciled in a country whose law does not allow the celebration of such marriages within its own territory will be treated as wholly void. Nevertheless, there is no authority directly covering the point, although the cases on marriage within the prohibited degrees cited in the last footnote would appear to be closely analogous.⁷⁸

It will have been seen from the above discussion that the case of *Re Bethell*⁷⁹ is consistent with the most recent authorities only on the assumption that the man's English domicile at the time of his Baralong marriage was a material fact. There, as the marriage was void for all purposes under his personal law, the child was illegitimate.⁸⁰

It would be possible to formulate a number of nice problems so far as polygamous unions are concerned; but although the problem, in its more general aspect, is one of reconciling fundamentally inconsistent institutions, and although the judgment of the Master of the Rolls in *Baindail v. Baindail*⁸² seems to suggest that the matter may be one of construction where a statute is involved, it is submitted that polygamous unions should be recognised in the absence of some compelling reason to the contrary. Such a reason may exist, for instance, in relation to the law of bigamy and in relation to such rules of English law as are traceable to the old doctrine that husband and wife are one.

1. H, a Mohammedan domiciled in India, goes through a ceremony of marriage at a registry office in London with W, who before the ceremony was domiciled in England. The marriage will be treated as a monogamous union.⁸³

2. The facts are as in illustration 1, except that the ceremony is celebrated according to Mohammedan rites and without civil ceremony in the mosque at Woking. (*Semble*) the marriage will be wholly unrecognised by English law.⁸⁴

3. H, domiciled in Pakistan, goes through a ceremony of marriage with W, domiciled in England. The ceremony takes place at Karachi, and is celebrated according to Mohammedan rites. (*Semble*) the marriage will be wholly unrecognised in English law because of W's incapacity under the law of her domicile to contract such a marriage.

4. H, a Hindu domiciled in India, marries W1, a Hindu woman domiciled in India, according to Hindu rites in India. Later H goes through a ceremony of marriage at a registry office in England with W2, who is domiciled in England. W2 can obtain a decree of nullity from the English court on the

⁷⁷ *Mette v. Mette* (1859) 1 Sw. & Tr. 416; *Brook v. Brook* (1861) 9 H.L.C. 193, and *Re Paine* [1940] Ch. 46.

⁷⁸ *Morris*, 62 L.Q.R. 116 ff.; *contra*, Cheshire, p. 409, and Beckett, 48 L.Q.R. 361, respectively submitting that, in the case of a woman, the test should be the law of the matrimonial home and of the husband's domicile at the time of the marriage.

⁷⁹ (1888) 38 Ch.D. 220; *ante*, p. 224.

⁸⁰ See *post*, pp 487-496.

⁸² [1946] P. 122.

⁸³ *Chetti v. Chetti* [1909] P. 67; *R. v. Superintendent Registrar of Marriages for Hammersmith*, *Ex p. Mir-Anwaruddin* [1917] 1 K.B. 684.

⁸⁴ There is no relevant Marriage Act and it is difficult to see how the marriage could be upheld as a polygamous union.

ground that H was a married man at the date of the second ceremony, that is, the first marriage is recognised to the extent of constituting a bar to the validity of the second.⁸⁵

5. H, a British subject, who is a Mohammedan domiciled in Pakistan, marries W1 and W2, Mohammedans domiciled in Pakistan, according to Mohammedan rites at Karachi. He then comes to England. (*Semble*), he cannot be convicted of bigamy.

6. The facts are as in the preceding illustration, except that the marriage to W2 is celebrated at a registry office in England, and W2 is domiciled in England. (*Semble*) H cannot be convicted of bigamy.⁸⁶

7. H marries W at a registry office in England, where they are both domiciled. H is a British subject, but, after his marriage, he acquires a domicile in Pakistan where he is converted to Mohammedanism, and marries W2, who is a Mohammedan domiciled in Pakistan, according to Mohammedan rites in Karachi. He then returns to England; (*semble*) he could be convicted of bigamy.⁸⁷

8. H, a Mohammedan domiciled in Pakistan, marries W1 and W2, Mohammedans domiciled in Pakistan, according to Mohammedan rites at Karachi. He has a number of children by each woman and subsequently acquires a domicile in England where he dies intestate. (*Quære*) can W1 and W2 claim the rights accorded to 'the surviving wife' under the Administration of Estates Act, 1925, so far as H's movable property is concerned? (*Quære*) can the children claim the rights accorded to 'children' in relation to such property under the above Act?⁸⁸

9. H, while domiciled in Pakistan, marries W1 and W2 there according to Mohammedan rites. W1 and W2 are Mohammedans domiciled in Pakistan. He has a number of children by each woman and, while in England, he is killed in an accident which is caused by the negligence of X. (*Semble*) both the women have the rights accorded to dependants of the deceased under the Fatal Accidents Act, 1846.⁸⁹

10. H, while domiciled in Pakistan, marries W1 and W2 there according to Mohammedan rites. W1 and W2 are Mohammedans domiciled in Pakistan. H comes to England and acquires an English domicile but W1 and W2 remain continuously in Pakistan. (*Semble*) neither W1 nor W2 will acquire H's English domicile by operation of law and (*semble*) either W1 or W2 can sue H in respect of torts committed by him while he is in England, because the rule that a married woman acquires her husband's domicile and her general incapacity to sue him in tort are traceable to the doctrine that husband and wife are one.

SUB-RULE.—On a petition for divorce presented by a husband domiciled in England,⁹⁰ the court has jurisdiction

⁸⁵ *Srini Vasan v. Srini Vasan* [1946] P. 67; *Baindail v. Baindail* [1946] P. 122 (C.A.). It appears to be immaterial whether H acquires an English domicile before the second ceremony.

⁸⁶ It is submitted that H would not be 'married' within the meaning of s. 57 of the Offences against the Person Act, 1861. So far as the wording of the section is concerned, it seems to be impossible to draw any legal distinction between illustrations 5 and 6. Cf. *Harvey v. Farnie* (1880) 6 P.D. 35, 53, per Lush, L.J.; *R. v. Naguib* [1917] 1 K.B. 359.

⁸⁷ *King-Emperor v. Lazar* (1907) 30 Madras L.R. 551.

⁸⁸ Cf. *Seedat's Executors v. The Master* [1917] A.D. 302 (S. Africa); *Re Ulles* (1885) 53 L.T. 711; 54 L.T. 286; *In the Estate of Belshah*, *The Times* Newspaper, December 16, 18 (1926); January 14, 18 (1927); *Sinha Peerage Claim* [1946] 1 All E.R. 348 n.; *Baindail v. Baindail* [1946] P. 122, 127-128.

⁸⁹ There is nothing in the statute which suggests the contrary construction.

⁹⁰ The Sub-Rule is taken from the 3rd edition with the exception of the concluding four words, *sed quære* as to the necessity for the petitioner to be domiciled in England in order to succeed on a claim for damages.

to award costs and (if claimed by the husband) damages against a co-respondent named in the petition, whatever his place of residence or nationality or domicile may be.

Comment and Illustration

This exercise of jurisdiction on the part of the court is provided for by the Supreme Court of Judicature (Consolidation) Act, 1925, which requires (section 177) any husband who presents a petition for divorce on the ground of the adultery of his wife to make the alleged adulterer a co-respondent to the petition unless on special grounds he is excused by the court from doing so, and provides (section 189) that a husband may claim damages against the alleged adulterer, either on a petition for divorce or judicial separation, or on a petition confined to damages (a procedure superseding the older action for criminal conversation).⁹¹ Section 42 of the Matrimonial Causes Act, 1857,⁹² provides that every petition shall be served on the party affected thereby, either within or without British territory, in such manner as the court shall direct. Despite the precise terms of the enactment, for some time a practice prevailed under which foreign co-respondents if resident abroad were held entitled to apply to be dismissed from divorce suits on the ground that they were not subject to the jurisdiction of the court by allegiance or residence in England. It has now been definitely decided that, though the court has a discretionary power to dispense with service of the petition on a foreign co-respondent residing out of England, it has jurisdiction over such a co-respondent although, of course, it may be impossible to enforce against him any order made by the court.⁹³

H, domiciled in England, petitions for divorce from W, alleging adultery at Lisbon with A, a citizen of the United States, and B, a Portuguese subject. He applies for leave to dispense with the service of the petition on A and B, on the ground that they are foreigners resident out of England, and not within the jurisdiction of the court. *Held*, that the court has jurisdiction over both co-respondents and that there is no ground in the circumstances to dispense with service in either case.⁹⁴

As a claim for costs or damages is purely personal, the domicile of the co-respondent is irrelevant.⁹⁵ For similar reasons, it is submitted that, on principle, the domicile of the petitioner should be irrelevant to the question of the court's jurisdiction to entertain

⁹¹ These sections substantially re-enact ss. 27, 28 and 33 of the Matrimonial Causes Act, 1857.

⁹² Still in force.

⁹³ *Rayment v. Rayment and Stuart* [1910] P. 271; *Chapman v. Chapman and Buist* [1910] P. 279, Evans, P.; approved in *Rush v. Rush and Bailey and Pimenta* [1920] P. (C.A.) 242.

⁹⁴ *Rush v. Rush, Bailey and Pimenta* [1920] P. 242. The case also decides that in an application of this character by a petitioner the respondent has a *locus standi* to oppose the motion; contrast *Dobson v. Dobson and Paxton* [1916] P. 110; but see *Jeffers v. Jeffers* (1877) 2 P.D. 90.

⁹⁵ *Rayment v. Rayment* [1910] P. 271.

his suit for damages, more especially as they can be claimed in a petition for judicial separation or alone as well as in a petition for divorce. These possibilities were not considered by Scrutton, J., in *Phillips v. Batho*,⁹⁶ when he said (*obiter*) that the English courts would not give damages against the co-respondent in a case in which the petitioner was domiciled in India because their jurisdiction is limited to dealing with marriages of persons domiciled in England, and the consequences following from the infringement of such marriage ties.

Nevertheless, there does not appear to be a fully reported case supporting the view that a petitioner who is not domiciled in England can claim damages,⁹⁷ and the question whether a co-respondent may raise as a defence to such a claim the fact that adultery is not civilly actionable or criminally punishable by the *lex loci delicti* has never been fully discussed.⁹⁸

(2) *Where Court has no Jurisdiction.*

RULE 32.—Subject to the statutory Exceptions hereinafter mentioned, the court has no jurisdiction to entertain proceedings for the dissolution of the marriage of any parties not domiciled in England at the commencement of the proceedings.⁹⁹

Comment and Illustrations

In a case where all the authorities were considered the law has thus been laid down by the Privy Council:—

‘Their Lordships have in these circumstances, and upon these considerations, come to the conclusion that, according to international law, the domicile for the time being of the married pair affords the only true test of jurisdiction to dissolve their marriage. They concur, without reservation, in the views expressed by Lord Penzance in *Wilson v. Wilson*,¹ which were obviously meant to

⁹⁶ [1913] 3 K.B. 25 at p. 31, see also p. 32; the decision that a judgment for damages pronounced by an Indian court which was competent to grant divorce could be sued on in England as it was ancillary to a valid judgment *in rem* is criticised by Read, pp. 262–267.

⁹⁷ But see *Bell v. Bell and Cook*, *The Times*, June 10, 1932.

⁹⁸ But see *Rayment v. Rayment* [1910] P. 271, at p. 286, and 5th edition of this work, p. 776, note (y), citing *Ross v. Sir Bhagvat Singhjee* (1891) 19 R. 81.

⁹⁹ There was an apparent, not real, exception to this Rule in the fact that under the Treaty of Peace (Turkey) Order, 1924, s. 2, the High Court had up to 1930 authority to exercise the jurisdiction over British subjects in matters of status reserved to the Crown by the Convention respecting conditions of residence and business and jurisdiction, Art. 16, including jurisdiction in divorce. The High Court was simply a substitute for the ordinary Consular Court. See *Seager v. Seager* [1925] P. 105.

(1872) L.R. 2 P. & D. 435, 442, cited *ante*, p. 218.

refer, not to questions arising in regard to the mutual rights of married persons, but to jurisdiction in the matter of divorce.' ²

Their Lordships no doubt used these words in a case which had reference to the divorce jurisdiction of a foreign court, but they obviously intended their language to be of general application. They pointedly dissented from *Niboyet v. Niboyet*,³ in which the majority of the Court of Appeal held that residence short of domicile might give the Divorce Court jurisdiction. Nor can it be doubted that the principle maintained by the Privy Council would now be followed by the House of Lords, and that English Courts do not recognise the existence of a matrimonial home or a matrimonial domicile, i.e., of residence falling short of real domicile, as the foundation of divorce jurisdiction.

1. H, a French citizen, marries W, an Englishwoman, at Gibraltar. H and W have resided for some years in England, but H resides there as French Consul, and admittedly retains his French domicile of origin, not having acquired an English domicile. W presents a petition for divorce on the ground of adultery committed in England and desertion. H appears under protest and objects to the jurisdiction. The court has no jurisdiction to grant divorce.⁴

2 H, a Mexican, domiciled in Mexico, marries in London W, an Englishwoman, domiciled at the time of her marriage in England. W petitions for divorce in England. The court has no jurisdiction.⁵

As the domicile of a wife during coverture is, under English law, the same as the domicile of her husband,⁶ our Rule means that the court has no jurisdiction to grant a divorce at the suit of a

² *Le Mesurier v. Le Mesurier* [1895] A.C. 517, 540, per Lord Watson. See the same doctrine asserted in *Casdagli v. Casdagli* [1919] A.C. 145; *Att.-Gen. for Alberta v. Cook* [1926] A.C. 444; *Saloesen v. Administrator of Austrian Property* [1927] A.C. 641 at pp 654 and 665.

³ (1878) 4 P.D. (C.A.) 1. Other earlier cases in which jurisdiction in divorce was assumed over parties not domiciled in England are *Brodie v. Brodie* (1861) 2 Sw. & Tr. 257, (residence); *Deck v. Deck* (1860) 2 Sw. & Tr. 90 (nationality); and *Zycklinski v. Zycklinski* (1862) 2 Sw. & Tr. 420 (submission). They are, of course, only of historical interest.

⁴ *Niboyet v. Niboyet* (1878) 4 P.D. (C.A.) 1. This was the judgment of the Court of Probate, which was overruled by the majority of the Court of Appeal (Brett, L.J., diss.), but *Le Mesurier v. Le Mesurier* [1895] A.C. 517, has in effect, though not technically, overruled the judgment of the Court of Appeal in *Niboyet v. Niboyet*, and supports the principle laid down by the Probate Division in that case; *Rayment v. Rayment* [1910] P. 271, 280; *Waddington v. Waddington* (1920) 36 T.L.R. 359; in *Sinclair's Divorce Bill* [1897] A.C. 469, the invalidity of an English divorce granted without proof of domicile was recognised as obvious by the House of Lords on the strength of *Le Mesurier v. Le Mesurier*, and a valid divorce granted by Act of Parliament. See also *Malone's Divorce (Valid Action) Bill* [1905] A.C. 314; *Grimshaw's Divorce Bill* (1907) 51 S.J. 529.

⁵ *Ramos v. Ramos* (1911) 27 T.L.R. 515. This is a strict application of our Rule. W by her marriage with H obtains a Mexican domicile, as that term is understood in England. This fact is not affected by the consideration that under Mexican law W does not become the wife of H till the registration of her marriage. Hence it follows that W, when petitioning for a divorce in England, is domiciled in Mexico, and that the court has no jurisdiction to grant a divorce.

⁶ See Rule 9, Sub-Rule 2, p. 107, *ante*.

wife unless the husband at the moment when the proceedings are taken is domiciled in England. The resulting hardship has led to the suggestion of exceptions by the courts which can hardly be law in the light of the most recent cases and to two statutory exceptions of limited application.⁷

Doubtful exceptions mentioned in earlier cases.—(a) *The deserted wife.*—In *Ogden v. Ogden*⁸ Sir Gorell Barnes, P., said: ‘In cases where a wife has been deserted in the country of the domicile by her husband in circumstances entitling her to sue for divorce, it has been held that she might sue in the courts of the country of the domicile notwithstanding the fact that the husband has left the country, and might possibly have done so with the intention of acquiring a domicile in another country. The decree in such a case is justified, either by considering that the husband cannot be heard to say that he has changed his domicile, or, as some have thought, that the wife must, *ex necessitate*, be entitled to treat the country of the previous matrimonial domicile as still being the country of her domicile, and to require its courts to do justice to her, because otherwise it would be impossible for a wife so situated to obtain a decree, as the respondent might keep changing his abode from place to place, asserting that he had abandoned his original domicile and any domicile with which it is sought to fix him’.

The suggestion that, in such a case, the wife is entitled to treat the country of the previous matrimonial domicile as still being the country of her domicile was, however, rejected by the House of Lords in the Scottish appeal of *Lord Advocate v. Jaffrey*,⁹ and in *Att.-Gen. for Alberta v. Cook*,¹⁰ the Privy Council held that the fact that the parties had been judicially separated before the husband’s change of domicile did not entitle the wife to petition for divorce elsewhere than in the courts of his domicile. Accordingly, in *H v. H*,¹¹ Lord Merrivale, P., repudiated the suggestion that a husband who had deserted his wife could not be heard to say that he had changed his domicile, and the fact that, in such

⁷ For more drastic suggestions of reform see Cheshire, *The International Validity of Divorces*, 61 L.Q.R. 352–72 (1945) and Final Report of the Committee on Procedure in Matrimonial Causes (1947) Cmd. 7024, s. 83.

⁸ [1908] P. 46 at p. 78. See also *Niboyet v. Niboyet* (1878) 4 P.D. 1, 14, per Brett, L.J.; *Briggs v. Briggs* (1880) 5 P.D. 163, 165, per Sir James Hannen, citing Lord Westbury in *Pitt v. Pitt* (1864) 4 Macq. 627, 640; *Armstrong v. Armstrong* [1898] P. 178, 185; ss. 343 and 344 of the report of the Divorce Commission of 1912 referred to by Bucknill, J., in *Herd v. Herd* [1936] P. 205 at p. 211. The ensuing paragraph is based on the judgment in this case.

⁹ [1921] 1 A.C. 146, at p. 152, per Lord Haldane. In America the deserted wife may be treated as having a domicile separate from that of her husband, see Restatement, s. 113.

¹⁰ [1926] A.C. 444.

¹¹ [1928] P. 206.

a case, the husband does not contest the jurisdiction, has since been held to be immaterial.¹²

(b) *Marriage annulled in court of domicile*.—On the authority of the cases of *Stathatos v. Stathatos*¹³ and *De Montaigne v. De Montaigne*¹⁴ Dicey formulated an exception to the Rule under discussion as follows:—

Where (1) a foreigner marries in England a woman then domiciled in England, and such marriage is legally valid according to the law of England, and such foreigner is either at the time of the marriage domiciled in a foreign country or after the time of the marriage acquires a domicile in a foreign country; and (2) such English marriage is, in such foreign country, declared to be invalid by the courts thereof, the High Court probably has jurisdiction to entertain a petition for divorce on the part of the wife.¹⁵

As Dicey pointed out, the exception represented an attempt of the Divorce Court to meet cases of injustice arising from a conflict of views between English and foreign courts as to the validity of marriages contracted in England between women domiciled there and men of foreign nationality and domicile. Through this divergence of view a marriage, which is contracted and binding in England, may be declared null and void, e.g., in France, and in order to save women from the hardship of being married in the view of English law, whilst held unmarried in the view of the foreign law, an anomalous and restricted jurisdiction to grant divorce, on the petition of the wife, was assumed by the Divorce Court. The decisions were treated with reserve by the Privy Council in *Att-Gen. for Alberta v. Cook*,¹⁶ and they were not followed by the Court of Session in *Mangrulkar v. Mangrulkar*,¹⁷ where it was alleged that the marriage was void in the country of the husband's domicile although there had been no declaration to this effect. Where there has been such a declaration the difficulty presented in these cases may henceforth be disposed of because the decree of nullity by the court of the husband's domicile will be recognised as valid in England, probably even if the wife has not lived in the country of the domicile, as she acquires her husband's domicile by virtue of the marriage which is valid under English law.¹⁸

¹² *Herd v. Herd* [1936] P. 205.

¹³ [1913] P. 46.

¹⁴ [1913] P. 154; see also *Ogden v. Ogden* [1908] P. 46, 82, 83.

¹⁵ Note that Sir F. Jeune, P. had refused to act on the doctrine approved in *Ogden v. Ogden*, when Mrs. Philip in 1903 sought to obtain a divorce from Philip, whose marriage with her the French Court had declared void.

¹⁶ [1926] A.C. 444 at p. 457.

¹⁷ [1939] S.C. 239. A case which appears to make it very doubtful whether Scottish and English law are different on the subject under discussion.

¹⁸ *Salvesen v. Administrator of Austrian Property* [1927] A.C. 641; *Galene v. Galene* [1939] P. 287; *De Massa v. De Massa* [1939] 2 All E.R. 150 (n);

First Statutory Exception.—Where a wife has been deserted by her husband, or where her husband has been deported from the United Kingdom under any law for the time being in force relating to the deportation of aliens, and the husband was immediately before the desertion or deportation domiciled in England, the court has jurisdiction notwithstanding that the husband has changed his domicile since the desertion or deportation.¹⁹

Comment

Unlike the second Exception discussed below, this is of permanent application; but it is limited, first because it is confined to cases in which the domicile was in England and Wales, secondly because the desertion or deportation must precede the husband's change of domicile, and thirdly because it is confined to cases where the husband is deported or else guilty of desertion. There are accordingly a number of situations which *dicta* in the earlier cases dealing with the deserted wife were intended to cure²⁰ and which are not covered by the exception.

This exception, which was created by section 13 of the Matrimonial Causes Act, 1937, applies to all matrimonial causes, a further respect in which it differs from that created by the Matrimonial Causes (War Marriages) Act, 1944, which is mentioned below. It may also be observed that the section gives the court jurisdiction in proceedings brought by the husband after he has changed his domicile, although such proceedings are hardly likely to be of frequent occurrence. Finally, it should be stressed that the section does not confer anything in the nature of a separate domicile upon the wife so that, although she might petition for divorce, if she did not do so, her movable property would, on her death intestate, be distributed according to the law of the new domicile of her husband.

Section 13 of the Matrimonial Causes Act, 1937, admits of the possibility of the courts of two countries being competent to entertain proceedings for divorce between the same parties, for it does not exclude the possibility of divorce proceedings by or against the husband in the courts of his new domicile, and there is no doubt that a decree pronounced in such proceedings would be recognised in England under Rule 71, *post*. The possibility of

these last two cases are not conclusive of the point because in each case the ante-nuptial domicile of both parties appears to have been French. See Hughes, 44 L.Q.R. 217 (1928).

Matrimonial Causes Act, 1937, s. 13; cf. Canadian Divorce Jurisdiction Act, 1930, and other imperial legislation discussed by Read, Ch. 6A, ss. 4 and 5. *E.g., Ogden v. Ogden* [1908] P. 48.

internationally valid proceedings for divorce in two countries was stigmatised as one of the absurd consequences of the exceptions to the rule under discussion which earlier judges had attempted to create.²¹ The English courts do not appear, however, to have had to consider the question whether they are precluded from exercising divorce jurisdiction when proceedings are properly pending in another country. Thus, if the husband, being domiciled in England, deserts his wife and acquires a foreign domicile, and divorce proceedings are pending in the foreign country, does the English court also have jurisdiction under this statutory exception? Or if the husband is domiciled abroad and divorce proceedings are pending in the country of his domicile, and the husband then acquires an English domicile, does the English court also have jurisdiction under Rule 31, *ante*? The matter has been the subject of conflicting decisions in the Australian courts²²; it is submitted that the English court should not be precluded from exercising jurisdiction in either case, though no doubt a stay of proceedings might be directed in a strong case.²³

Illustrations

1 H and W are domiciled in England. H deserts W and acquires a domicile in France. The court has jurisdiction in proceedings for divorce brought by W^{23a} (*semble*) even if proceedings are pending in France.

2 In 1938, W, domiciled in England, marries H, domiciled in France. In 1939 H is deported from the United Kingdom and commits adultery. The court has no jurisdiction to entertain a petition for divorce brought by W on the ground of adultery.²⁴

3. H and W are domiciled in Manitoba. H deserts W and acquires a domicile in Ontario. W returns to England, the country of her domicile before marriage, and is permanently resident there when she petitions for divorce on the grounds of desertion for three years. The court has no jurisdiction although W has at all material times been domiciled in countries whose law recognises an exception to the general rule analogous to the one under discussion.²⁵

4. H and W are domiciled in England. H commits adultery and acquires a domicile in France. The court has no jurisdiction unless W can prove desertion before H acquires a domicile in France.

Second Statutory Exception.—The court has jurisdiction to dissolve a marriage celebrated between September 3, 1939, and the day appointed by His Majesty in Council under the Matrimonial Causes (War

²¹ *Lord Advocate v. Jaffrey* [1921] 1 A.C. 144 at p. 152; *H v. H* [1928] P. 206 at p. 212.

²² *Gane v. Gane* [1941] 58 W.N. (N.S.W.) 39; *Flakemore v. Flakemore and Johnson* [1942] V.L.R. 156; see also 15 A.L.J. 303 (1942).

²³ See *post*, p. 316. ^{23a} *Zanelli v. Zanelli* (1948) 64 T.L.R. 556 (C.A.).

²⁴ Cf. *Joyce v. Joyce* [1943] 3 W.W.R. 383, for analogous Canadian case founded on desertion. The date of marriage would be material, because of the possible application of the Matrimonial Causes (War Marriages) Act, 1944.

²⁵ Cf. *Jolly v. Jolly* [1940] 2 D.L.R. 759.

Marriages) Act, 1944, notwithstanding that the parties are not domiciled in England, provided—

- (a) the husband was, at the time of the marriage, domiciled outside the United Kingdom and the wife was, immediately before the marriage, domiciled in England ;
- (b) the parties have not, since the celebration of the marriage, resided together in the country in which the husband was domiciled at the time of the marriage;²⁶ and
- (c) proceedings are brought not later than five years after the appointed day.²⁷

Comment

Section 1 of the Matrimonial Causes Act, 1937, which places restrictions on the presentation of a divorce petition within three years of the marriage, does not apply to marriages coming within the Matrimonial Causes (War Marriages) Act, 1944, under which the above Exception to the Rule was established. The Act also applies to nullity, and covers many, but not all cases of hardship. For example, the case of a deserted wife who has resided with her husband for a short period in the country of his domicile is expressly excluded. Although the Act is of a temporary nature, its provisions will have to be borne in mind for some time to come because proceedings may be brought on it up to five years after the appointed day.

(3) *Choice of Law.*

RULE 33.—In all cases in which it has jurisdiction, the court will (*semble*) apply the English domestic law of divorce.²⁸

Comment

The English courts have not, as yet, been called upon to differentiate between the questions of jurisdiction and choice of law

²⁶ For the purposes of this proviso the whole of the U.S.A., the whole of India, and the whole of any British possession are to be treated as one country.

²⁷ Matrimonial Causes (War Marriages) Act, 1944, discussed 22 B.Y.B.I.L. 264; s. 2 applies to Scotland and s. 3 to Northern Ireland. See also the South African War Marriages Act, 1944, and Matrimonial Causes Jurisdiction Act, 1945, and the Australian Commonwealth Matrimonial Causes Act, 1945.

²⁸ Beyond observing (5th ed., p. 280) that the court has no jurisdiction to entertain proceedings for dissolution of marriage for any offence which is not a ground for divorce under the law of England, Dicey did not deal specifically with the question of choice of law in relation to matrimonial causes; and, in view of the manner in which the matter appears to be dealt with by the court, it seems more convenient to discuss it under the heading of jurisdiction in relation to each separate matrimonial cause.

in relation to divorce. This is doubtless because the latter question could hardly arise once the principle that the parties must be domiciled in England in order to give the court jurisdiction was established, for the law of the domicile is that which is appropriate to determine questions of status.

It is submitted that a further reason why the court can only apply English law in divorce cases is the fact that the law and procedure of the court are entirely laid down by statute. There is no jurisdiction inherited from the Ecclesiastical Courts, and no inherent jurisdiction. The grounds upon which a decree may be pronounced are defined by statute, and a petition could not be presented on any other ground. The bars to divorce are equally fully stated, and, on being satisfied that they are not present, the court is obliged by statute to pronounce a decree if the petitioner proves his case. Accordingly, although a question of choice of law might, at first sight, appear to be possible in cases falling within the Matrimonial Causes Act, 1937, s. 13, it is submitted that, if a wife who was domiciled in England and Wales immediately before her husband deserted her and acquired a new domicile, petitions for divorce on a ground recognised by the law of such new domicile, but not by English law, the court would have no power to pronounce a decree. Conversely, if a wife so situated petitions for divorce on a ground recognised by English law, it seems that the court would be bound to pronounce a decree if she made out her case, although her husband had acquired a domicile in a country which did not recognise divorce notwithstanding that she was domiciled in such country at the time of the presentation of her petition. It seems that similar results would follow in the case of a petition presented under the Matrimonial Causes (War Marriages) Act, 1944.

Illustrations

1. H and W were domiciled in England. H deserts W and acquires a domicile in an American State in which incompatibility of temper is a ground for divorce. W petitions the English court for divorce on this ground under section 13 of the Matrimonial Causes Act, 1937. (*Semble*) the petition will be dismissed because incompatibility of temper is not a ground for divorce under English law.

2. H and W were domiciled in England. H deserts W and acquires a domicile in Eire where he commits adultery. W petitions for divorce under section 13 of the Matrimonial Causes Act, 1937. (*Semble*) English law will be applied although divorce is impossible in Eire.

2. JUDICIAL SEPARATION AND RESTITUTION OF CONJUGAL RIGHTS

RULE 34.—The court has jurisdiction to entertain a suit for judicial separation or the restitution of conjugal rights when the parties thereto

- (1) were in law resident in England at the time of the institution of the suit,³² or
- (2) were domiciled in England at the time of the institution of the suit,³³ or
- (3) had a matrimonial home in England when the events occurred on which a claim for separation is based, or their cohabitation ceased,³⁴ or
- (4) come within the provisions of s. 13 of the Matrimonial Causes Act, 1937.³⁵

Comment

The jurisdiction of the court in matters matrimonial, other than proceedings to obtain a divorce *a vinculo*, was appointed under the Act establishing judicial divorce to be exercised in accordance with the principles and rules on which the Ecclesiastical Courts acted prior to 1858,³⁶ whence it followed that jurisdiction to entertain a suit for judicial separation (the equivalent of divorce *a mensa et toro*) or for the restitution of conjugal rights was held to depend primarily upon the more or less permanent residence of the parties, and not upon their being domiciled in England; although this came

³² *Armtyage v. Armtyage* [1898] P. 178; *Anghinelli v. Anghinelli* [1918] P. 247 (C.A.) (judicial separation); *Perrin v. Perrin* [1914] P. 135 (restitution). The decisive time is the date when the copy of the petition is issued for service; *Raeburn v. Raeburn* (1928) 44 T.L.R. 384. The words 'in law' have been added so as to meet cases such as this where a person not physically present within the jurisdiction was treated as resident there; cf. *Sim v. Sim* [1944] P. 87.

³³ *Eustace v. Eustace* [1924] P. 45 (C.A.) a case of judicial separation. Jurisdiction was exercised without discussion in restitution proceedings in *Rudd v. Rudd* [1924] P. 72, and it appears that it must have been on the basis of domicile. See also *Dicks v. Dicks* [1899] P. 275; *Bateman v. Bateman* [1901] P. 136; *Brown v. Brown* (1917) 115 L.T. 702; *Bell v. Bell* [1922] 2 Ir.R. 152; *Boardman v. Boardman* (1936) 36 S.R. (N.S.W.) 474, restitution jurisdiction based on domicile or residence of both parties within the forum.

³⁴ *Ward v. Ward* (1923) 39 T.L.R. 440 (judicial separation); *Milligan v. Milligan* [1941] P. 78 (restitution).

³⁵ *Ante*, p. 284. The Matrimonial Causes (War Marriages) Act, 1944, does not apply to proceedings for judicial separation or restitution of conjugal rights.

³⁶ 'In all suits and proceedings, other than proceedings to dissolve any marriage the . . . Court shall proceed and act and give relief on principles and rules which in the opinion of the said court shall be as nearly as may be conformable to the principles and rules on which the Ecclesiastical Courts have heretofore acted and given relief, but subject to the provisions herein contained and to the Rules and Orders under this Act.' Matrimonial Causes Act, 1857, s. 22. This section is repealed by the Supreme Court of Judicature (Consolidation) Act, 1925, Sched. VI, doubtless because it is hardly consistent with the Matrimonial Causes (Amendment) Act, 1884 and later judicial interpretation; in s. 32 there is a general provision for the exercise of jurisdiction 'as nearly as may be in the same manner as that in which it might have been exercised by the court to which it formerly appertained', so far as regards procedure and practice, but subject to the Act and Rules of Court. See also s. 103. The alteration was, however, treated as immaterial by Pilcher, J., in *Hutter v. Hutter* [1944] P. 95 at p. 99.

to be recognised as an independent ground of jurisdiction. 'Can there be any doubt', asked James, L.J., 'that before the English Act of Parliament transferring the jurisdiction in matrimonial causes from the Church and her courts to the Sovereign and her court, the injured wife could have cited the adulterous husband before the bishop, and have asked either for a restitution of conjugal rights or for a divorce *a mensa et toro*, and in either case for proper alimony? The jurisdiction of the court Christian was a jurisdiction over Christians, who, in theory, by virtue of their baptism, became members of the one Catholic and Apostolic Church. The Church and its jurisdiction had nothing to do with the original nationality or acquired domiciles of the parties, using the word domicile in the sense of the secular domicile, *viz.*, the domicile affecting the secular rights, obligations, and status of the party. Residence, as distinct from casual presence on a visit or *in itinere*, no doubt was an important element; but that residence had no connection with, and little analogy to, that which we now understand when we endeavour to solve, what has been found so often very difficult of solution, the question of a person's domicile'.³⁷

Just as personal presence within the jurisdiction on a casual visit or *in itinere* does not amount to residence within the meaning of the Rule under discussion, so there may be residence in law where it does not exist in fact. 'A seaman ordinarily absent from this country is resident in the home which he provides here for his wife. So is a man of business whose employment keeps him abroad'.³⁸ Moreover, the Ecclesiastical Courts appear to have regarded an unseparated wife as resident in law where her husband was resident. Accordingly, in *Sim v. Sim*,³⁹ it was held that the court had jurisdiction to entertain proceedings for judicial separation brought by a wife resident out of the jurisdiction against a husband who was permanently resident in England, though domiciled in Scotland.

The Ecclesiastical Courts really only attached importance to the residence of the respondent within the diocese in which he was cited, but there does not appear to be a reported case of proceedings for judicial separation or restitution of conjugal rights in which jurisdiction was exercised, on the basis of residence, against a wife resident in England, at the suit of a husband resident abroad. It is interesting to speculate what the effect of the principle in *Sim v. Sim*,⁴⁰ which is attributable to the non-recognition of the voluntary separation of spouses by the Ecclesiastical Courts, and to the predominance of the husband in matrimonial law generally, would be in such a case. It seems to illustrate the artificial consequences

³⁷ *Niboyet v. Niboyet* (1878) 4 P.D. (C.A.) 1, 4, 5. Except as regards divorce *a vinculo* this judgment is clearly good law and this passage was quoted with approval by Swinfen Eady, M.R., in *Anghinelli v. Anghinelli* [1918] P. 247 at p. 252. See also *E. v. E.* (1907) 23 T.L.R. 364.

³⁸ *Raeburn v. Raeburn* (1928) 44 T.L.R. 384 at p. 386.

³⁹ [1944] P. 87; discussed 8 M.L.R. 74.

⁴⁰ *Supra*.

which result from a too rigid adherence to the principles of the Ecclesiastical Courts in these matters; but the court has construed section 22 of the Matrimonial Causes Act, 1857, very strictly, and, as yet, it does not appear to have been affected by the repeal of that section and the altered wording of section 32 of the Supreme Court of Judicature (Consolidation) Act, 1925.⁴¹

While, as shown by the remarks quoted above, domicile is not, as in the case of divorce, the only basis of jurisdiction, the court has never, at any rate since the Matrimonial Causes Act, 1884, was passed, declined to exercise jurisdiction on the ground that, though the parties to the marriage were domiciled in England, they were not both resident in England at the time when a suit for the restitution of conjugal rights or judicial separation was commenced. In *Eustace v. Eustace*,⁴² a case of judicial separation, Atkin, L.J., expressed some doubt as to the propriety of jurisdiction based on domicile in the case of proceedings for restitution of conjugal rights.⁴³ It is to be observed, however, that the judgments of the Court of Appeal in *Eustace v. Eustace*⁴⁴ were given before the decision of the Privy Council in *Att.-Gen. for Alberta v. Cook*,⁴⁵ and accordingly at a time when it was still possible to contend that a wife could acquire a domicile separate from that of her husband after a decree of judicial separation.

As Dicey observed, the truth would appear to be that, as the result of the enactment of the Matrimonial Causes Act, 1884, was to make a decree for restitution of conjugal rights a normal prelude to divorce proceedings by a wife, it became obviously difficult to refuse to entertain a suit for restitution where the parties were domiciled in England, and jurisdiction in divorce therefore existed. This point has become unimportant since the equalisation of the sexes as regards grounds of divorce, but it is submitted that the same principle should apply to jurisdiction in judicial separation and restitution of conjugal rights.⁴⁶

The third case in the Rule is intended to cover those cases where there has been a genuine matrimonial residence in England though domicile may not be proved, or, having existed, has been destroyed by the deliberate act of the husband in acquiring another domicile and deserting his wife. This might indeed be met by estopping the husband from setting up his new domicile, but that would leave the case where domicile had never existed uncovered. It was accepted as a ground of jurisdiction in the case of judicial separation

⁴¹ See note 36, *ante*, p. 238.

⁴² [1924] P. 45.

⁴³ At p. 54; see also Duke, L.J. at p. 58.

⁴⁴ *Supra*.

⁴⁵ [1926] A.C. 444.

⁴⁶ For cases in which jurisdiction in restitution of conjugal rights appears to have been exercised, admittedly without much discussion, on the basis of domicile, see note 33, *ante*, p. 238.

in *Ward v. Ward*,⁴⁷ and in the case of restitution of conjugal rights in *Milligan v. Milligan*.⁴⁸ The latter case also decides that in relation to the jurisdiction of the English court the 'matrimonial home' means the husband's residence here in such circumstances that any husband similarly circumstanced, and not estranged from his wife, would set up his home here.

The provisions of section 13 of the Matrimonial Causes Act, 1937, have already been discussed, and therefore it need only be added that in instances in which one or other of the four conditions specified in the Rule is not fulfilled, the court will not exercise jurisdiction.⁴⁹ Contrary to the Rule in cases of suits for nullity, the court does not derive jurisdiction from the mere fact that a marriage has been celebrated in England, and, although in a suit for nullity it can issue a decree in effect establishing a marriage, it has no power to make a declaratory judgment as to the validity of any marriage^{49a} save as incidental to jurisdiction under the Supreme Court of Judicature (Consolidation) Act, 1925, s. 188.⁵⁰

Rules as to service of petitions for restitution of conjugal rights were authoritatively laid down in 1914,⁵¹ in substance as enumerated in the first three sections of the rule from the point of view of jurisdiction, and 'they seem to have been taken as defining the jurisdiction, not merely the essentials of service out of the jurisdiction'.⁵² Although the rules then laid down are not reproduced in the Matrimonial Causes Rules, 1947, those rules, by permitting (rule 9) the service of any document required to be served in any matrimonial cause within or without British territory, remove the difficulty arising from the omission of provision as to service of petitions for restitution of conjugal rights from section 42 of the Act of 1857, which the rules of 1914 were made to remedy.⁵³

Choice of law.—So far as choice of law in cases of judicial separation and restitution of conjugal rights is concerned, it has never been doubted that English domestic law will be applied once the court is satisfied that it has jurisdiction. In view of the number of possible grounds for the latter, it is obvious that cases may arise in which the jurisdiction of the court is concurrent with that of some other tribunal, and it is conceivable that judicial separation might be decreed in England in a case in which similar relief was

⁴⁷ [1923] 39 T.L.R. 440.

⁴⁸ [1941] P. 78.

⁴⁹ *Graham v. Graham* [1923] P. 31, distinguished on its facts in *Eustace v. Eustace* [1924] P. 45 (C.A.) (judicial separation); *Firebrace v. Firebrace* (1878) 4 P.D. 63; *Countess de Gasquet James v. Duke of Mecklenburg-Schwerin* [1914] P. 53 (restitution). For a possible application of the Matrimonial Causes Act, 1937, s. 13, see Illustration 9, *post*.

^{49a} *Countess de Gasquet James v. Duke of Mecklenburg-Schwerin* [1914] P. 53.

⁵⁰ Re-enacting the Legitimacy Declaration Act, 1858. The validity of a marriage might sometimes be tested by proceedings for jactitation of marriage.

⁵¹ *Perrin v. Perrin* [1914] P. 135.

⁵² *Milligan v. Milligan* [1941] P. 78 at p. 82.

⁵³ For service of documents in matrimonial causes generally, see *ante*, p. 220.

not obtainable in the country where, for instance, the parties might be domiciled. This is particularly important so far as Scotland is concerned because of the difference between the Scotch and English law as to desertion.⁵⁴

If proceedings are actually pending in another country, the court may direct a stay of proceedings, but, although the matter is discretionary, the tendency of the decisions is undoubtedly against the making of such a direction.⁵⁵ It has been held by the High Court of Australia that a decree of judicial separation granted by the court of the domicile is an effective bar to an application by a husband for a decree of restitution of conjugal rights after change of domicile and residence to another jurisdiction.⁵⁶

Summary jurisdiction and alimony.—The Summary Jurisdiction (Separation and Maintenance) Acts, 1895–1925, do not constitute special legislation conferring jurisdiction upon the magistrates in cases in which the husband is neither domiciled nor resident in England.⁵⁷ It seems, however, that, provided the cause of complaint arose wholly or in part within the local jurisdiction of the justices from whom an order is sought, or provided the provisions of the Acts are otherwise complied with, the mere presence as distinct from the ordinary residence of the husband in England will suffice to confer jurisdiction.⁵⁸

If, after an order has been made in favour of a wife under the above enactments, the parties are divorced by a court of competent jurisdiction, the magistrates will usually discharge their order, although it is possible that they have a discretion in the matter, and the order might perhaps be kept alive if the guilty husband acquired an English domicile after the foreign divorce.⁵⁹ Similarly, if a divorce is obtained from a competent foreign court after a decree of judicial separation has been pronounced by the English court, the latter will discharge any order for alimony which may have been made, and it is doubtful whether it has any discretion in the matter although the order remains effective until it is discharged, and does not automatically cease to operate on the pronouncement of the divorce by the foreign court.⁶⁰

⁵⁴ See *Forsyth v. Forsyth* [1947] 1 All E.R. 406 at p. 414.

⁵⁵ E.g., *Thornton v. Thornton* (1886) 11 P.D. 176; *Von Eckardstein v. Von Eckardstein* (1907) 23 T.L.R. 539, 593. Cf. *Klosser v. Klosser* [1945] 2 All E.R. 708, and see Rule 52, *post*.

⁵⁶ *Ainslie v. Ainslie* (1927) 39 Commonwealth L.R. 381; see also *Lord v. Lord* (1908) 28 V.L.R. 566.

⁵⁷ *Forsyth v. Forsyth* [1948] P. 125 (C.A.); approving *M'Queen v. M'Queen* [1920] 2 Sc.L.T. 405; see also *Berkley v. Thompson* (1884) 10 App.Cas. 45.

⁵⁸ *Forsyth v. Forsyth* [1948] P. 125 at p. 136.

⁵⁹ *Mezger v. Mezger* [1937] P. 19; *Kirk v. Kirk* [1947] 2 All E.R. 118; the latter case does not definitely decide that the order may be kept alive in any circumstances.

⁶⁰ *Pastra v. Pastra* [1930] P. 27; as to ancillary relief in matrimonial causes, generally, see pp. 221–2, *ante*.

Illustrations

1. H and W are domiciled in Australia. Owing to H's cruelty while travelling in Italy, W seeks the protection of her parents in England and establishes a home for herself and her children there. H comes to England and demands her return to him with her children. She refuses, and, while H and W are residing in England, begins a suit for judicial separation. The court has jurisdiction.⁶¹

2. H is domiciled in Australia, where he marries W. They come to England but do not acquire an English domicile. H returns to Australia. W, who remains in England, desires to sue for restitution of conjugal rights. The court has no jurisdiction.⁶²

3. H and W, the latter domiciled in England at the time of her marriage, marry and are domiciled in Australia. H ill-treats W, who returns to her father's home. W desires to secure a judicial separation on the ground of H's cruelty. The court has no jurisdiction.⁶³

4. H and W are domiciled in Scotland. H deserts W and sets up home in England without, however, changing his domicile. W, while still residing in Scotland, petitions for judicial separation. The court has jurisdiction.⁶⁴

5. H and W are domiciled in Scotland, but W usually lives in a house in England purchased by H as a residence during a period when he was a Member of Parliament. H normally lives in Scotland. A petition for judicial separation is filed when H was in Scotland, but is served on him in England. H contests the jurisdiction and in Scotland claims restitution of conjugal rights. The court has jurisdiction.⁶⁵

6. H is born in France, but retains his English domicile of origin acquired from his father. He marries in France, W, who is an Englishwoman, domiciled in England. H deserts W, who returns to England while H remains in France. W brings a suit for restitution of conjugal rights. The court has jurisdiction.⁶⁶

7. The circumstances are as in the preceding illustration, but H has acquired a French domicile before the desertion. The court has no jurisdiction.

8. H and W are domiciled in Scotland. They live together at various places in England and, while H is looking for accommodation, he announces his intention of not cohabiting any more with W. H is abroad when W petitions for restitution of conjugal rights. The court has jurisdiction because there was notionally a matrimonial home in England when cohabitation ceased.⁶⁷

9. H and W, domiciled and married in England, live together in France for ten years. H then, having treated W with cruelty, deserts her, and settles in Canada, becoming domiciled there. W petitions for judicial separation, or restitution of conjugal rights. The court has in either case jurisdiction under s. 13 of the Matrimonial Causes Act, 1937.⁶⁸

⁶¹ *Armitage v. Armitage* [1898] P. 178.

⁶² See *Firebrace v. Firebrace* (1878) 4 P.D. 63, 68; *Yelverton v. Yelverton* (1859) 1 Sw. & Tr. 574. It must be assumed that there was no matrimonial home in England when cohabitation in the legal sense ceased.

⁶³ Contrast *Armitage v. Armitage* [1898] P. 178, where the circumstances differ.

⁶⁴ *Sim v. Sim* [1944] P. 87.

⁶⁵ *Raeburn v. Raeburn* (1928) 44 T.L.R. 384.

⁶⁶ In *Brown v. Brown* (1917) 116 L.T. 702, the marriage took place in Sierra Leone, where the husband, against whom the suit was brought, was resident. The ground for jurisdiction appears clearly to have been domicile, as in *Rudd v. Rudd* [1924] P. 72.

⁶⁷ *Milligan v. Milligan* [1941] P. 78.

⁶⁸ *Ante*, p. 234.

3. DECLARATION OF NULLITY OF MARRIAGE

(1) *Jurisdiction.*

RULE 35.⁶⁹—The court has jurisdiction to entertain a suit for a declaration of nullity of marriage—

- (1) where both parties are domiciled in England at the date of the presentation of the petition⁷⁰; or
- (2) where the petitioner is domiciled in England at the date of the presentation of the petition and the marriage is alleged to be void⁷¹; or
- (3) where the marriage was celebrated in England⁷²; or
- (4) where both parties are resident in England at the date of the presentation of the petition⁷³; or
- (5) (*semble*) where the petition is founded upon a decree of nullity pronounced by a foreign court which is alleged to have been a court of competent jurisdiction⁷⁴; or
- (6) if the case comes within the provisions of s. 13 of the Matrimonial Causes Act, 1937, or the Matrimonial Causes (War Marriages) Act, 1944.⁷⁵

⁶⁹ The Rule and comment have been entirely re-written in the light of the decision of the Court of Appeal in *De Reneville v. De Reneville* [1948] P. 100, discussed by Falconbridge, 26 Can.Bar Rev. 908 (1948). The rules governing jurisdiction in nullity in the case of void marriages may be assumed to apply to jactitation of marriage, for which see *Goldstone v. Smith* (1922) 88 T.L.R. 403. For service of petition and ancillary relief in matrimonial causes generally see pp. 220, 221–2, *ante*.

⁷⁰ *De Reneville v. De Reneville* [1948] P. 100 at p. 109; cf. *Salvesen v. Administrator of Austrian Property* [1927] A.C. 641. See also cases cited in note 55, *post*, p. 254.

⁷¹ *White v. White* [1937] P. 111, as explained in *De Reneville v. De Reneville* [1948] P. 100 at pp. 113, 117; *Mehta v. Mehta* [1945] 2 All E.R. 690; *Spencer v. Ladd* [1948] 1 D.L.R. 39; *Ex p. Oston* [1948] 1 S.A.L.R. 1011.

⁷² *Simonin v. Mallac* (1860) 2 Sw. & Tr. 67; *Linke v. Van Aerde* (1894) 10 T.L.R. 426; *Ogden v. Ogden* [1908] P. 46; *Hussein v. Hussein* [1938] P. 159; *Sproule v. Hopkins* [1903] 2 Ir.R. 133; *Lendrum v. Chakravarti* [1929] Sc.L.T. 96; *MacDougall v. Chitnavis* [1937] S.O. 390; see also cases cited in note 27, *post*, p. 25; but for contrary view where the marriage is voidable see *Inverclyde v. Inverclyde* [1931] P. 29; *Lougheed v. Glark* [1943] St.R.Qd. 157.

⁷³ *Easterbrook v. Easterbrook* [1944] P. 10; *Hutter v. Hutter* [1944] P. 95; *Mason v. Mason* [1944] N.Ir. 134; but for contrary view where marriage is voidable see *Inverclyde v. Inverclyde* [1931] P. 29.

⁷⁴ *Galene v. Galene* [1939] P. 237; *De Massa v. De Massa* [1939] 2 All E.R. 150 n. The suggestion that this should be treated as a separate head of jurisdiction is made in Morris, *Cases on Private International Law*, p. 179.

⁷⁵ See statutory Exceptions to Rule 32, *ante*, and Illustrations 14–17, *post*, p. 258.

Comment

The circumstances in which the court has jurisdiction to entertain a suit for the declaration of nullity of marriage have not been settled with precision, but, on the only occasions upon which the matter has been fully considered by the House of Lords⁷⁶ and the Court of Appeal,⁷⁷ domicile has been treated as the primary basis of jurisdiction. 'Whether there cannot be jurisdiction which is not that of the domicile in restricted instances to entertain a suit for nullity', is a 'doubtful question which remains to be answered by the House of Lords'.⁷⁸ Sub-clauses (3) to (5) of the Rule under consideration must therefore be treated with caution, although they are supported by decisions of courts of first instance.

Void and Voidable Marriages.—Before discussing the sub-clauses of the Rule *seriatim*, reference must be made to the distinction between void and voidable marriages as this has an important bearing on the question of the jurisdiction of the court in nullity cases.

'A void marriage is one that will be regarded by every court in any case in which the existence of the marriage is in issue as never having taken place and can be so treated by both parties to it without the necessity of any decree annulling it'.⁷⁹ Such a decree may, however, be sought, if desired, not only by the parties, but also by other interested persons even after the death of the parties.⁸⁰ They 'might just as well, so far as legal consequences are concerned, have lived together without going through any ceremony'.⁸¹ Instances of marriages which are void according to English domestic law are afforded by cases in which one of the parties is already married, or is within the prohibited degrees of relationship to the other.

A voidable marriage, on the other hand, 'is one that will be regarded by every court as a valid subsisting marriage until a decree annulling it has been pronounced by a court of competent jurisdiction',⁸² and the decree can only be made at the instance of

⁷⁶ *Salvesen v. Administrator of Austrian Property* [1927] A.C. 641.

⁷⁷ *De Reneville v. De Reneville* [1948] P. 100.

⁷⁸ *Salvesen v. Administrator of Austrian Property* [1927] A.C. 641 at p. 654, per Lord Haldane; *De Reneville v. De Reneville* [1948] P. 100 at pp. 108-109, per Lord Greene, M.R. The suggestion of Lord Phillimore in *Salvesen's Case* (at p. 671) that the court of the domicile was the only competent court must, at present at least, be regarded as representing too strict a view of the law. In the actual case, however, the Wiesbaden court was the court of the common domicile, and only the courts of France (the *locus celebrationis*) could have had an alternative jurisdiction as there was no sufficient residence elsewhere, as was pointed out by Andrews, C.J., in *Mason v. Mason* [1944] N.Ir. 134.

⁷⁹ *De Reneville v. De Reneville* [1948] P. 100 at p. 111, per Lord Greene, M.R.

⁸⁰ *Browning v. Reane* (1812) 2 Phil.Ecc. 638.

⁸¹ *Dunbar v. Dunbar* [1909] 2 Ch. 689 at p. 694, per Warrington, J.

⁸² *De Reneville v. De Reneville* [1948] P. 100 at p. 111, per Lord Greene, M.R. Difficulty may arise where a decree is ~~and necessary~~ under foreign law.

the parties.⁸³ Instances of marriages which are voidable according to English domestic law are afforded by cases in which the marriage has not been consummated owing to the impotence of one of the parties, and by cases which come within the provisions of section 7 of the Matrimonial Causes Act, 1937.⁸⁴

Whether the marriage is void or voidable, the decree of nullity, when pronounced, declares that the marriage never existed. This is doubtless justifiable on historical grounds, for it appears that the Ecclesiastical Courts originally drew no distinction between void and voidable marriages so far as the legal consequences of the *de facto* relationship were concerned.⁸⁵ Nevertheless, now that the distinction is clearly recognised,⁸⁶ 'it is, perhaps, unfortunate that a form of decree which was appropriate when a marriage was regarded as indissoluble and could only be got rid of by decreeing that it had never taken place is still used indiscriminately in the case of both void and voidable marriages'.⁸⁷ It is submitted that the retrospective operation of a nullity decree should be abolished so far as voidable marriages are concerned, although this would virtually annihilate the distinction, in the case of these marriages, between nullity and divorce.

The retrospective operation of the English nullity decree in the latter case has produced artificial distinctions⁸⁸ and hardship⁸⁹ in English domestic law, and the question of its effect, so far as the conflict of laws is concerned, has produced an acute conflict of judicial opinion which was not completely settled by the Court of Appeal in *De Reneville v. De Reneville*.⁹⁰

In *Inverclyde v. Inverclyde*⁹¹ Bateson, J., insisted on the necessity of looking behind the form of the nullity decree and regarding the substance of the matter in a case in which the marriage was alleged to be voidable on account of the respondent's

⁸³ *A v. B* (1868) 1 P. & D 559.

⁸⁴ Under this section a marriage is voidable (a) if not consummated owing to the respondent's wilful refusal to consummate it, (b) if either party was suffering from recurrent fits of insanity or epilepsy at the time of the marriage, (c) if the respondent was suffering from venereal disease in a communicable form at the time of the marriage, or (d) if the respondent was pregnant by someone other than the petitioner at the time of the marriage.

⁸⁵ See articles by Newark, 8 M.L.R. 203 (1945), and Cohn, 64 L.Q.R. 324, 533 (1948).

⁸⁶ Contrast *Galloway v. Galloway* (1914) 30 T.L.R. 531, and *Law v. Harrigan* (1916) 33 T.L.R. 381, with *Fowke v. Fowke* [1938] Ch. 774 and *Adams v. Adams* [1941] 1 K.B. 536 (C.A.).

⁸⁷ *De Reneville v. De Reneville* [1948] P. 100 at p. 110, *per* Lord Greene, M.R.

⁸⁸ Contrast *Newbould v. Att.-Gen.* [1931] P. 75 with *Dodsworth v. Dale* [1936] 2 K.B. 503, and contrast *Re Eaves* [1940] Ch. 109, with *Re Dewhirst* [1948] Ch. 198.

⁸⁹ *Dredge v. Dredge* [1947] 1 All E.R. 29.

⁹⁰ [1948] P. 100; see, e.g., *Gower v. Starrett* [1948] 2 D.L.R. 853 suggesting that the distinction is immaterial from the point of view of jurisdiction, and disapproving *Spencer v. Ladd* [1948] 1 D.L.R. 89, which decision is, however, more consistent with the most recent English authorities.

⁹¹ [1951] P. 29.

impotence. He accordingly held that only the courts of the domicile had jurisdiction in such circumstances as the proceedings were analogous to a claim for divorce.⁹² The distinction between void and voidable marriages which he thus treated as crucial was, however, treated as irrelevant to the question of jurisdiction by Hodson, J., and Pilcher, J., respectively in *Easterbrook v. Easterbrook*⁹³ and *Hutter v. Hutter*.⁹⁴

In *De Reneville v. De Reneville*⁹⁵ the Court of Appeal treated the distinction between void and voidable marriages as relevant to the question of jurisdiction because a voidable marriage confers the husband's domicile upon the wife by operation of law, whereas a void marriage does not have this effect. However, while approving of the distinction drawn by Bateson, J., for the purposes of jurisdiction, the Court of Appeal did not express an opinion as to the correctness of the actual decision in *Inverclyde v. Inverclyde*⁹⁶ in which the marriage was celebrated and the parties were resident in England. It is therefore still necessary to consider other grounds of jurisdiction than that of domicile both in the case of void and voidable marriages.

*De Reneville v. De Reneville*⁹⁷ shows that it may be necessary to refer to foreign law in order to determine into which category a particular marriage falls, but this question is best considered after the possible bases of jurisdiction in nullity have been discussed. It will, however, always be for the English court, after hearing evidence of foreign law, to decide whether the marriage was void or voidable, not merely in a verbal sense, but in the sense of the words as explained above.⁹⁸

(1) *Domicile of both parties.*—It must now be taken to be settled law that the domicile of both parties in England at the date of the presentation of the petition gives the court jurisdiction, whatever may have been the domicile of the parties at the date of the marriage, wherever the marriage may have been celebrated, and whether it is alleged to be void or voidable.

In *Salvesen v. Administrator of Austrian Property*,⁹⁹ a case which turned upon the recognition of a German decree of nullity, the wife was domiciled in Scotland at the time of the marriage which was celebrated in France, but the decree of the German court was recognised as a valid judgment *in rem* by the House of Lords, because the parties were domiciled in Germany when it was sought. It may be assumed that the English courts will not

⁹² Rules 31 and 32, *ante*, pp. 216, 230.

⁹³ [1944] P. 10; discussed 60 L.Q.R. 115 and Falconbridge, Ch. 42.

⁹⁴ [1944] P. 95; discussed 8 M.L.R. 73, 22 B.Y.B.I.L. 279, 285 and Falconbridge, Ch. 42.

⁹⁵ [1948] P. 100.

⁹⁶ [1931] P. 29.

⁹⁷ [1948] P. 100.

⁹⁸ *Ibid.* at p. 115.

⁹⁹ [1927] A.C. 641.

recognise the jurisdiction of a foreign court in circumstances other than those in which they themselves would hold that they have jurisdiction.

‘In nullity cases the parties will have the same domicile at the date of the institution of the suit in one of two events, namely, (i) if the marriage is by the proper law¹ voidable and not void, in which case the wife will have acquired the same domicile as the husband by the mere fact of the marriage and retains that domicile until the marriage is annulled; (ii) if the marriage is void but, nevertheless, the wife on the facts acquires a domicile of choice in the country contemplated as that of the matrimonial domicile and has not subsequently changed that domicile.’²

These remarks of the Master of the Rolls appear to answer the question raised by James, L.J., in *Niboyet v. Niboyet*³ where he asked how it would be possible to make domicile the test of jurisdiction in a nullity case. ‘Suppose the alleged wife were the complainant, her domicile would depend on the very matter in controversy. If she was really married, her domicile would be the domicile of her husband; if not married, then it would be her own previous domicile’. The fallacy, as Dicey pointed out,⁴ lies in the assumption that a marriage which can be annulled does not effect a change in the domicile of the wife. If the marriage is voidable, it will produce this result by operation of law. If it is void, the wife’s domicile is a question of fact, and the court must consider whether the marriage is void or voidable when determining the question of jurisdiction. It does not decide whether the wife is ‘really married’ or not, but only whether, on the grounds of complaint alleged by the petitioner (which must be assumed to be true until the contrary is proved on any issue as to jurisdiction), the marriage is voidable or void.

In the latter event, husband and wife may have separate domiciles, because the wife may not have acquired or retained a domicile in the country where the husband is domiciled.

(2) *Petitioner domiciled in England and marriage alleged to be void*.—The view that the court has jurisdiction to pronounce a decree in a suit for nullity in which the marriage is alleged to be void in a case in which the petitioner alone may be domiciled in England, does, ‘theoretically at least, open up the possibility of conflicting judgments by the courts of the respective domiciles, but, if it be not the right view and if the only court with jurisdiction is a court in a country where both are domiciled, the

¹ See Rule 36, *post*, p. 259.

² *De Reneville v. De Reneville* [1948] P. 100 at pp. 109–110.

³ (1878) 4 P.D. 1 at p. 9. This doctrine is also enunciated in *Ogden v. Ogden* [1908] P. 46, at p. 78; but in the same judgment the validity of domicile as a basis of jurisdiction is conceded (p. 80), no attempt being made to reconcile the two doctrines.

⁴ 5th ed. p. 298; he cited *Turner v. Thompson* (1888) 13 P.D. 37.

problem of jurisdiction based on domicile in the case of a void marriage where the domiciles are different would appear to be insoluble'.⁵

This point appears to have been ignored by the courts of Ontario,⁶ Manitoba⁷ and New Zealand,⁸ when they dismissed petitions alleging that marriages celebrated out of the jurisdiction were void in cases in which the petitioner alone was domiciled within the jurisdiction. The grounds for their doing so were that they could not pronounce upon the status of someone who was domiciled out of the jurisdiction; but this reasoning might equally well be adopted by the courts of the country in which the marriage was celebrated, with the result that no court would be able to pronounce a nullity decree in the case of a void marriage if the parties had no common domicile. In any event, the court of the country where the marriage was celebrated 'might be extremely inconvenient to both parties, and, if neither party were domiciled or resident in the country, it is difficult to see what interest that country would have in his or her matrimonial status'.⁹

The English courts have assumed jurisdiction on the ground of the petitioner's domicile in England in cases in which the marriage has been alleged to be void on account of the bigamy of the respondent husband¹⁰ and on account of mistake as to the nature of the ceremony on the part of the petitioning wife.¹¹ In both cases the respondent was domiciled and resident out of the jurisdiction, and the marriage was celebrated abroad, and in the latter case the wife's English domicile was expressly treated as the basis of jurisdiction.

The case of *De Reneville v. De Reneville*¹² makes it clear that this is adequate in any case in which the marriage is void according to the proper law for determining this issue,¹³ but it also decides that, where the petition alleges two grounds of nullity, one of which would, if proved, render the marriage void, while

⁵ *De Reneville v. De Reneville* [1948] P. 100 at p. 113, *per* Lord Greene, M.R.

⁶ *Manella v. Manella* [1942] 4 D.L.R. 712; discussed by Hancock, 21 Can. Bar Rev. 149; cf. *Gower v. Starrett* [1948] 2 D.L.R. 863 (British Columbia), where the petition would have been dismissed if the marriage had not been celebrated in that province.

Hutchings v. Hutchings [1980] 4 D.L.R. 678.

⁸ *Gagen v. Gagen* [1929] N.Z.L.R. 177.

⁹ *De Reneville v. De Reneville* [1948] P. 100 at p. 122, *per* Bucknill, L.J.

¹⁰ *White v. White* [1937] P. 111; followed in *Ex p. Strachan* [1946] N.P.D. 592; *Spencer v. Ladd* [1948] 1 D.L.R. 39; and *Ex p. Oston* [1948] 1 S.A.L.R. 1011; not followed in *Shaw v. Shaw* [1946] 1 D.L.R. 168. *White v. White* is discussed in 53 L.Q.R. 315. The decision was partly based on the petitioner's residence within the jurisdiction, but, after the observations of the Master of the Rolls on this aspect of the case in *De Reneville v. De Reneville* [1948] P. 100 at p. 117, it is best treated as turning on the English domicile of the petitioner. The fact that the respondent did not protest the jurisdiction may also now be treated as immaterial (*post*, pp. 255-6).

¹¹ *Mehra v. Mehra* [1945] 2 All E.R. 690.

¹² [1948] P. 100.

¹³ *Ibid.* at p. 115.

the other only renders it voidable, the court has no jurisdiction to pronounce a decree on the latter ground if both parties are not domiciled in England, at any rate in a case in which the marriage was celebrated abroad, and both parties are not resident in England.¹⁴

The Irish Court appears to have treated the domicile of the respondent husband as a sufficient ground for jurisdiction where the petition for nullity was founded on bigamy.¹⁵ The respondent's domicile was, however, not discussed as a possible basis of jurisdiction in the case of a void marriage in *De Reneville v. De Reneville*,¹⁶ and, as there does not appear to be a relevant English case, it has been thought best to omit this possibility in formulating the Rule; although the acceptance of jurisdiction where the respondent is domiciled in England and the marriage is alleged to be void, would not appear to contravene one of the principles enunciated in the judgment of the Master of the Rolls in *De Reneville v. De Reneville*,¹⁷ namely, that a person who is resident, but not domiciled in England ought not to be allowed to compel someone who is both domiciled and resident abroad to come to this country and submit the question of his status to its courts.

(3) *Marriage celebrated in England.*—This principle is infringed by the assumption of jurisdiction on the sole ground that the marriage was celebrated in England, and, in view of some remarks of Bucknill, L.J., in *De Reneville v. De Reneville*,¹⁸ sub-clause (3) of the Rule must be treated with reserve. The law was, however, thus laid down in a case in which the court was asked to pronounce a decree of nullity on the score of bigamy where neither of the parties was domiciled in England at the date of the petition, but the marriage was celebrated in England :—‘The marriage contract was entered into here, and on that ground the court was asked to deal with it. In *Simonin v. Mallac*¹⁹ the parties to the marriage were domiciled French people; but the marriage was celebrated here and the judge held that he had jurisdiction to deal with the contract. In *Sottomayor v. De Barros*²⁰ the parties were Portuguese, and not resident or domiciled here. But the case was decided here (*sic*).²¹ In *Niboyet v. Niboyet*²² the Master of the Rolls said that the principles of dissolution of marriage did not apply to nullity suits, and that in these suits the validity of the ceremony was to be determined according to the law of the place

¹⁴ *Ibid.*

¹⁵ *Johnson v. Cooke* [1898] 2 Ir.R. 130.

¹⁶ [1948] P. 100.

¹⁷ At p. 118.

¹⁸ At p. 122, quoted, *ante*, p. 249.

¹⁹ (1860) 2 Sw. & Tr. 67.

²⁰ (1877) 3 P.D. 1 (C.A.).

²¹ The marriage was celebrated in England.

²² (1878) 4 P.D. 1 at p. 19.

in which it was celebrated. The jurisdiction of this court to deal with the question of the validity of the marriage of the parties to the present suit was therefore clear'.²³

It has been suggested²⁴ that in cases where bigamy is alleged as a ground of nullity, jurisdiction cannot be denied to the court of the country where the marriage was celebrated, which, indeed, is plainly the court most concerned, and Dicey's view was that jurisdiction on the ground that England was the place of celebration of the marriage could clearly be justified not merely for correcting the civil register of the country, but also because the court of a country in which a marriage is celebrated is especially qualified to decide as to the validity of the marriage in point of form.²⁵

Although there does not appear to be a reported English case since *Linke v. Van Aerde*,²⁶ from the judgment in which the passage quoted above is taken, in which the fact that the marriage was celebrated in England was so categorically stated to be a sufficient ground of jurisdiction, there are a number of cases containing a foreign element in which the court has tried nullity suits concerning marriages which were celebrated in England without delivering a considered judgment on the question of jurisdiction.²⁷ Jurisdiction has, however, been expressly exercised on the ground that the marriage was celebrated within the forum in Scotland,²⁸ Ireland²⁹ and Canada.³⁰

All the English cases appear to concern void marriages with the exception of *Simonin v. Mallac*,³¹ where the marriage was voidable according to the law of the domicile of the parties, and, as this case, which was partly concerned with the question of the validity of a foreign nullity decree, was decided before the doctrine that the law of the domicile should determine questions of status was developed, it is arguable that the court should have jurisdiction where the marriage was celebrated in England and

²³ *Linke v. Van Aerde* (1894) 10 T.L.R. 426, Gorell Barnes, J.

²⁴ 5th ed., p. 297.

²⁵ 3rd. ed., pp. 301-2.

²⁶ (1894) 10 T.L.R. 426.

²⁷ *Valer v. Valer* (1925) 133 L.T. 830; *De Massa v. De Massa* [1939] 2 All E.R. 150 n.; *Hussein v. Hussein* [1938] P. 159; *Galens v. Galens* [1939] P. 237; *Srinivasan v. Srinivasan* [1946] P. 67; *Baindail v. Baindail* [1946] P. 122; see also *Simons v. Simons* [1939] 1 K.B. 490 at p. 498, per Goddard, L.J. A marriage celebrated under the Foreign Marriage Act, 1892, may be treated as one which is celebrated in England; see s. 1 and *Hay v. Northcote* [1900] 2 Ch. 262; *sed quare* as to the refusal to recognise the French nullity decree in this case: see *post*, pp. 332-3.

²⁸ *Lendrum v. Chakravarti* [1929] Sc.L.T. 96; *MacDougall v. Chitnavis* [1937] S.C. 390, but, in the latter case with some reserve (see p. 401 and p. 404). Cf. *Murison v. Murison* [1923] S.C. 624; *Tallarico v. Lord Advocate* [1923] Sc.L.T. 272.

²⁹ *Sproule v. Hopkins* [1903] 2 Ir.R. 133 at p. 136.

³⁰ *Reid v. Francis* [1929] 4 D.L.R. 311 (impotence); *Hinds v. Macdonald* [1932] 1 D.L.R. 96 (duress); *Gower v. Starrett* [1948] 2 D.L.R. 853 (bigamy); *Spencer v. Ladd* [1948] 1 D.L.R. 29 (bigamy).

³¹ (1860) 2 Sw. & Tr. 67.

alleged to be void, although it may not be a sufficient ground for jurisdiction in the case of a voidable marriage. This appears to have been the view of Bateson, J., in *Inverclyde v. Inverclyde*,³² but this aspect of the judgment in that case was not considered by the Court of Appeal in *De Reneville v. De Reneville*.³³

(4) *Residence of both parties*.—The latter case decides that the residence of the petitioner alone is an insufficient ground for jurisdiction in nullity, at any rate where the marriage is alleged to be voidable, and the case of *Robert v. Robert*,³⁴ where jurisdiction was assumed in the case of such a marriage on the sole ground of the petitioner's residence in England, is overruled.³⁵ In *De Reneville v. De Reneville*³⁶ the Master of the Rolls was clearly of opinion that the residence of the petitioner would be insufficient in the case of a void marriage, and, although it is not clear what the opinion of Bucknill, L.J., would be,³⁷ this has been omitted altogether as a possible ground of jurisdiction in the formulation of the Rule.

It is, however, unfortunate that the distinction between void and voidable marriages was not stressed in this connection, for, as has been observed,³⁸ the English courts may frequently be called upon to pronounce on the validity of a marriage which is alleged to be void in other contexts than that of nullity. For example, if a testator leaves property to the children of A, the validity of A's marriage may have to be considered by the Chancery Division,³⁹ or a person charged with bigamy may take the point that his first marriage was void.⁴⁰ Similarly, the respondent to a petition for judicial separation may allege that the marriage is void, although he is not domiciled in England and although the marriage was celebrated abroad.⁴¹ In such a case, in which the petitioner might be neither domiciled nor resident in England,⁴² 'it would surely be pedantic and inconsistent for the court to tell the parties "We will determine the validity of your marriage if you petition for judicial separation, but not if you petition for nullity"'.⁴³

The court's finding that the marriage was void in the former suit would bind the parties, and presumably entitle them to

³² [1931] P. 29; cf. *Lougheed v. Clark* [1948] St.R.Qd. 157.

³³ [1948] P. 100.

³⁴ [1947] P. 164; discussed by Garner, 63 L.Q.R. 486 (1947).

³⁵ [1948] P. 100 at p. 117.

³⁶ [1948] P. 100 at p. 117.

³⁷ His remarks at p. 123 are carefully confined to the case of voidable marriages, and he does not advert to the observations of the Master of the Rolls (at p. 117) on the aspect of his own decision in *White v. White* [1937] P. 111 which founds jurisdiction in the case of a void marriage on the residence of the petitioner.

³⁸ 61 L.Q.R. 341 at p. 343 (Morris).

³⁹ *Re Paine* [1940] Ch. 46.

⁴⁰ *R. v. Naguib* [1917] 1 K.B. 359.

⁴¹ *Nachimson v. Nachimson* [1930] P. 217.

⁴² *Sim v. Sim* [1944] P. 87.

⁴³ 61 L.Q.R. 343-4.

remarry in England. However, it would not be a judgment *in rem*, and this may be why the Court of Appeal would not affirm the petitioner's residence as a sufficient ground for jurisdiction in nullity cases even when the marriage is alleged to be void. Nevertheless, the above examples which could be multiplied,⁴⁴ show that very inconvenient situations may arise in such a case, although the doctrine of the insufficiency of the petitioner's residence as a ground for jurisdiction seems to be sound on principle so far as voidable marriages are concerned.

In *De Reneville v. De Reneville*⁴⁵ the Court of Appeal expressly refrained from stating an opinion as to the sufficiency of the residence of both parties as a ground for jurisdiction in nullity. Accordingly, so far as voidable marriages are concerned, there is a conflict on this point between the cases of *Easterbrook v. Easterbrook*⁴⁶ and *Hutter v. Hutter*⁴⁷ on the one hand, and the case of *Inverclyde v. Inverclyde*⁴⁸ on the other hand.

In the former cases jurisdiction was exercised over parties to voidable marriages who were not domiciled in England,⁴⁹ and, although in each of them the marriage was celebrated in England, they appear to have been decided primarily on the basis of the residence of both parties within the jurisdiction, and were so treated by Andrews, J., in his fully considered judgment in the Northern Irish case of *Mason v. Mason*.⁵⁰ *Inverclyde v. Inverclyde*⁵¹ is, however, a clear authority against the assumption of jurisdiction on any grounds short of domicile where the marriage is alleged to be voidable.

Residence as a possible ground for jurisdiction in nullity was also fully discussed by the British Columbian Court of Appeal in *Shaw v. Shaw*,⁵² in which case the marriage was alleged to be voidable. The petitioning wife was resident within the jurisdiction, but the marriage had been celebrated and the husband was resident and domiciled in another province. The court accordingly held that it had no jurisdiction, but it would have assumed jurisdiction if both parties had been resident and the marriage had been celebrated in British Columbia.

⁴⁴ E.g., claims for maintenance, claims concerning the validity of a separation agreement, claims for slander, claims under an intestacy, charges of having carnal knowledge of a girl under sixteen, etc. The logical consequence of the above argument is that there should be no rules as to jurisdiction in the case of a void marriage, and it is submitted that this is sound on principle.

⁴⁵ [1948] P. 100.

⁴⁶ [1944] P. 10.

⁴⁷ [1944] P. 95.

⁴⁸ [1931] P. 29; followed in *Fleming v. Fleming* [1934] 4 D.L.R. 90; see also *Sheppard v. Sheppard* [1947] 2 W.W.R. 826.

⁴⁹ But in *Easterbrook v. Easterbrook* (at p. 11) Hodson, J., appears to have considered that the respondent was domiciled in England; this point was expressly not decided by Pilcher, J., in *Hutter v. Hutter* (at p. 104).

⁵⁰ [1944] N.Ir. 184; discussed 61 L.Q.R. 341. In this case the marriage was alleged to be void.

⁵¹ [1931] P. 29; cf. *Lougheed v. Clark* [1948] St.R.Qd. 157.

⁵² [1946] 1 D.L.R. 168.

Apart from *Roberts v. Brennan*,⁵³ which is unsatisfactorily reported,⁵⁴ there does not appear to be any other English case in which jurisdiction was expressly assumed on the ground of residence. There are, however, a number of cases in which the question of jurisdiction was not discussed, although the marriage was celebrated abroad, and either residence or domicile may be regarded as having been the material factor.⁵⁵ Moreover, the cases on foreign marriages in the Ecclesiastical Courts are probably best treated as having turned on residence so far as the jurisdiction of the courts was concerned.⁵⁶

The residence of the party cited within the jurisdiction of the particular court was a sufficient ground for jurisdiction in the Ecclesiastical Courts, but, as there does not appear to be any modern case in point, the residence of the respondent alone has not been treated as an adequate basis of jurisdiction in the formulation of the Rule. It could be justified historically, and the words of section 22 of the Matrimonial Causes Act, 1857⁵⁷ might be called in aid; but it is doubtful whether cases turning on disputed jurisdiction between different dioceses are relevant to the conflict of laws. Accordingly, although s. 22 was much relied on in the judgment of Pilcher, J., in *Hutter v. Hutter*,⁵⁸ it is submitted that it cannot be regarded as relevant to questions of jurisdiction in nullity now that the importance of the distinction between void and voidable marriages (which was ignored by the Ecclesiastical Courts) has been clearly established.⁵⁹

So far as voidable marriages are concerned, it is difficult to justify on principle the founding of jurisdiction on the residence of both parties. For, in such cases, a decree affecting the status of the parties is *ex hypothesi* necessary, and for this purpose, the courts of the domicile would appear to be the appropriate tribunal.

A nullity decree also affects status if it is pronounced with reference to a void marriage,⁶⁰ but *ex hypothesi* it is not strictly necessary. Accordingly, the only objection on principle to the jurisdiction of tribunals other than those of the domicile in such a case, would appear to be that their judgments might not be

⁵³ [1902] P. 143.

⁵⁴ *De Reneville v. De Reneville* [1948] P. 100 at p. 116.

⁵⁵ *Lawford v. Davies* (1878) 4 P.D. 61; *Westlake v. Westlake* [1910] P. 167; *Bach v. Bach* (1927) 43 T.L.R. 493; *Le Mesurier v. Le Mesurier* (1930) 99 L.J.P. 33; *Peal v. Peal* [1931] P. 97. *Apt v. Apt* [1948] P. 83 (C.A.), may perhaps be treated as a case in which jurisdiction was assumed on the basis of the petitioner's domicile in England on the assumption that her allegation that the proxy marriage would be void was accepted by the court; see also *Bater v. Bater* [1906] P. 209 at p. 220, *per Gorell Barnes, P.*; *Ogden v. Ogden* [1908] P. 46 at p. 80; *Swift v. Swift* [1920] 3 W.W.R. 74; *Corbett v. Adamson* (1894) 20 V.L.R. 278; *A. B. v. C. D.*, 38 Sc.L.R. 559.

⁵⁶ *Ruding v. Smith* (1821) 2 Hagg.Cons. 371; *Chichester v. Donegal* (1822) 1 Ad. 5; *Middleton v. Janverin* (1802) 2 Hagg.Cons. 437.

⁵⁷ See p. 238, n. 36, *ante*.

⁵⁸ [1944] P. 95.

⁵⁹ *De Reneville v. De Reneville* [1948] P. 100.

⁶⁰ *Salvesen v. Administrator of Austrian Property* [1927] A.C. 641.

regarded as internationally valid. This objection cannot apply, so far as the English courts are concerned, when the question in issue is whether a nullity decree which has been obtained elsewhere, is one which will be recognised in England, and this is why sub-clause (5) has been inserted in the Rule.

(5) *Decree already pronounced by Court of Competent Jurisdiction.*—In such a case, the only question will be whether the foreign court which pronounced the decree had jurisdiction according to the rules of the English conflict of laws.⁶¹ Therefore, it is difficult to see why anything more than residence of the petitioner in England should be required in order to give the court jurisdiction. Indeed it is questionable whether even this requirement should be insisted upon, for it is possible to imagine cases in which the question whether a person should come to reside permanently in England may depend upon the view which will be taken by the English courts of the validity of a foreign nullity decree.

It must be admitted, however, that the authorities on the subject are very scanty, for there are only two relevant cases which have been decided since the competence, if not the exclusive competence, of the courts of the domicile in nullity cases was recognised by the House of Lords in *Salvesen v. Administrator of Austrian Property*.⁶² In both of these cases⁶³ a marriage between domiciled French people had been celebrated in England, and it was voidable according to French law. In each case a nullity decree had been pronounced by the French court and a decree nisi of nullity was accordingly pronounced in England. It is submitted that such a decree might also have been pronounced if the marriage had been celebrated abroad.

Other possible grounds of jurisdiction.—Before mentioning the statutory grounds of jurisdiction in nullity it may be convenient to enumerate the grounds of jurisdiction which have from time to time been suggested as sufficient although they are not mentioned in the Rule. These are (a) the domicile of the respondent in the case of a void marriage, (b) the residence of the petitioner in the case of a void marriage, and (c) the residence of the respondent in the case of a marriage which is alleged to be void or voidable. The reasons for the exclusion of these grounds from the Rule have already been given.⁶⁴

In addition, mention should be made of (d) the fact that the respondent does not contest the jurisdiction of the court, and (e) hardship. The first of these further grounds of jurisdiction has

⁶¹ See Rule 73, *post*, p. 381.

⁶² [1927] A.C. 641; see n. 78, *ante*, p. 245.

⁶³ *Galene v. Galene* [1939] P. 237; *De Massa v. De Massa* [1939] 2 All E.R. 150 n.

⁶⁴ See p. 250, and pp. 252, 254, *ante*.

now been definitely rejected by the Master of the Rolls⁶⁵ and, although he mentioned the second as a possible ground of jurisdiction,⁶⁶ there does not appear to be a case in point.

*Hutter v. Hutter*⁶⁷ seems to have been treated by Jones, J., as a case of hardship in his judgment in the court of first instance in *De Reneville v. De Reneville*.⁶⁸ The marriage had been celebrated in England, and the wife's antenuptial domicile was English; the husband was domiciled in the United States, and he successfully petitioned for nullity in England on the ground of the wife's wilful refusal to consummate the marriage. It is not clear whether this was a ground for nullity according to the law of the particular American state in which he was domiciled, but it is difficult to see how the facts can be said to establish a case of hardship, unless the husband's military service in England with the accompanying practical difficulties of resorting to the court of his domicile is treated as a material factor; and it was certainly not considered by Pilcher, J., in his judgment.

(6) *Statutory grounds of jurisdiction*.—The provisions of section 13 of the Matrimonial Causes Act, 1937, and the Matrimonial Causes (War Marriages) Act, 1944, have already been discussed in relation to jurisdiction in divorce.⁶⁹ As they each confer jurisdiction in nullity on the English court in similar circumstances, no further discussion of detail is called for here.

It may be observed, however, that any difficulty in applying the Matrimonial Causes (War Marriages) Act to the question of jurisdiction in a nullity case is avoided by the express provision in s. 5 (1) that 'marriage' includes a purported marriage, and the terms 'husband' and 'wife' shall be construed accordingly.

There is no similar provision in the Matrimonial Causes Act, 1937, and it has been suggested⁷⁰ that s. 13 may not give the court jurisdiction in a nullity case as a person who is not a 'husband' cannot be guilty of desertion. However, there seems to be no reason why the section should not apply to a voidable marriage, as this must be assumed to be valid until it is annulled. In the case of a void marriage, there may be some difficulty in construing the section, but in most cases to which it could apply, the question will hardly arise as the court will have jurisdiction on the ground of the wife's domicile in England. Moreover, as we have seen,⁷¹

⁶⁵ *De Reneville v. De Reneville* [1948] P. 100 at p. 113. Cf. *Sheppard v. Sheppard* [1947] 2 W.W.R. 826.

⁶⁶ At p. 108.

⁶⁷ [1944] P. 95.

⁶⁸ [1947] P. 168 at p. 180.

⁶⁹ See statutory exceptions to Rule 32, *ante*, pp. 234, 235.

⁷⁰ Tolstoy's *Divorce Law and Practice*, p. 14. The suggestion is confined to so much of s. 13 of the Matrimonial Causes Act, 1937, as relates to desertion, but it is difficult to see why it stops there for, by a parity of reasoning, if there is no marriage, the man is not a 'husband' within the meaning of the section.

⁷¹ *Ante*, p. 252.

there is much to be said on principle for the view that the court should have jurisdiction in a nullity case in which the marriage is alleged to be void on much wider grounds than those in which it should have jurisdiction where the marriage is alleged to be voidable.

Illustrations

(1) and (2) *Domicile*.

1. H, domiciled in England, marries W, domiciled in France. W petitions the court for nullity on account of H's impotence. The court has jurisdiction wherever the marriage was celebrated, and wherever W may be resident at the date of the presentation of her petition.⁷²

2. W, domiciled in England, marries H in France where he is domiciled. While permanently resident in England, W petitions the court for nullity alleging that the marriage is voidable on the ground of H's impotence. H is still resident and domiciled in France. The court has no jurisdiction.⁷³

3. H, domiciled in England, marries W in France where she is domiciled. The parties reside together in England, and W forms the intention of remaining there permanently. W petitions the court for nullity on the ground that the marriage is void for want of formality. The court has jurisdiction.⁷⁴

4. W, domiciled in England, marries H in Australia where he is domiciled. W returns to England two days after the marriage, and intends permanently to reside in England when she petitions the court for nullity on the ground that the marriage is void owing to H's bigamy. The court has jurisdiction.⁷⁵

5. H, domiciled in England, marries W, domiciled in Eire, in India. W, while permanently resident in England but intending ultimately to return to Eire, petitions the court for nullity on the ground of the bigamy of H who is still domiciled in England but resident in India. *Quære*, whether the court has jurisdiction.⁷⁶

(3) *Marriage Celebrated in England*.

6. H and W, both domiciled in France, are married in London in accordance with all the formalities required by English law, but without the consents required by French law. The marriage is declared a nullity by a French court. W, when residing in England, petitions to have the marriage annulled. H is in Italy, and, though served with the petition, does not appear. The court has jurisdiction.⁷⁷

7. H is a Dutchman and W a Dutchwoman. They are married in England. At that time they are both probably domiciled in England. At the time of the marriage between H and W, H is, in fact, married to another woman then living. Afterwards and during the lifetime of H, W marries N, who is domiciled in a foreign country. W brings a suit for a declaration of the nullity of her marriage with H. Neither W nor H is then domiciled in England. The court has jurisdiction.⁷⁸

8. H, a Frenchman, domiciled in France, marries W, an Englishwoman, domiciled in England. The marriage is solemnised before the British consul at Bordeaux under and in accordance with the Foreign Marriage Act, 1892. It is declared invalid by a French court. The English court has jurisdiction.⁷⁹

⁷² Cf. *De Reneville v. De Reneville* [1948] P. 100.

⁷³ *Ibid.*; see also *Diachuk v. Diachuk* [1941] 2 D.L.R. 607 and *Sheppard v. Sheppard* [1947] 2 W.W.R. 826. The court would have jurisdiction if the marriage was void by French law, see next Rule.

⁷⁴ *Ibid.*

⁷⁵ *White v. White* [1937] P. 111.

⁷⁶ Cf. *Johnson v. Cooke* [1898] 2 Ir.L.R. 130.

⁷⁷ *Simonin v. Mallac* (1860) 2 Sw. & Tr. 67.

⁷⁸ *Linke v. Van Aerde* (1894) 10 T.L.R. 426.

⁷⁹ Cf. *Hay v. Northcote* [1900] 2 Ch. 262.

(4) *Residence*

9. H and W, both domiciled in Northern Ireland, are married in Scotland. They are both resident in England. The court has jurisdiction to declare the marriage void on the ground of bigamy.⁸⁰

10. H and W are married in England, where they are both resident at the date of the presentation of the petition. but H's domicile is admitted to be Scottish. W petitions for nullity alleging that the marriage is voidable on the ground of H's impotence. *Quære*, whether the court has jurisdiction.⁸¹

11. H and W are married in Guernsey where they are both domiciled. While residing in England W petitions the court for nullity on the ground of H's wilful refusal to consummate the marriage. H is still resident and domiciled in Guernsey. The court has no jurisdiction.⁸²

12. H is a British subject who married W, who is also a British subject, when they were both domiciled in France. H, though not domiciled, is permanently resident in England when he petitions for nullity on the ground of a previous marriage of W in England. W is still domiciled and resident in France. *Quære*, whether the court has jurisdiction, and *quære*, whether the court would have jurisdiction if H were resident in France, and W were resident, but not domiciled, in England.⁸³

(5) *Foreign Nullity Decree.*

13. H and W who are domiciled in France marry in England according to all the formalities required by English law. The marriage is annulled by the French court for want of publication of banns and want of the parental consents required by French law. H petitions the court for a declaration of nullity while residing in England. The court has jurisdiction,⁸⁴ and (*semble*) the court would have jurisdiction if the marriage had been celebrated abroad, and wherever H and W might be domiciled and resident at the date of the petition.

(6) *Statutory Jurisdiction.*

14. H marries W in Ontario, but both parties are domiciled in England. H leaves W stating that he never intends to return to her, and acquires a domicile in New York. W returns to England and petitions the court for nullity on the ground of H's impotence. The court has jurisdiction under s. 13 of the Matrimonial Causes Act, 1937.

15. H and W are married in Scotland but are both domiciled in England. H is deported from the United Kingdom and acquires a domicile in Eire. W petitions the court for nullity. The court has jurisdiction under s. 13 of the Matrimonial Causes Act, 1937.

16. H and W, who are domiciled in England, marry in Eire. H leaves W, stating that he does not intend to live with her again, and acquires a domicile in New York. W forms the intention of permanently residing in Eire, but, while on a visit to England, petitions the court for nullity on the ground of H's bigamy. *Quære*, whether the court has jurisdiction under s. 13 of the Matrimonial Causes Act, 1937.

17. H, domiciled in Ontario, marries W in Eire in 1942. W was domiciled in England at the date of the marriage. H returns to Ontario in 1945, but W

⁸⁰ Cf. *Mason v. Mason* [1944] N.Ir. 134.

⁸¹ Contrast *Inverclyde v. Inverclyde* [1931] P. 29 with *Hutter v. Hutter* [1944] P. 95.

⁸² These are the facts of *Robert v. Robert* [1947] P. 164, in which Barnard, J., held that he had jurisdiction. The case is, however, overruled by *De Reneville v. De Reneville* [1948] P. 100 at p. 118. *Quære* whether the court would have had jurisdiction if the petition had been founded on bigamy.

⁸³ See pp. 252, 254, *ante*. As H could be convicted of bigamy in respect of his marriage in France, it is, to say the least of it, strange that the court should not have jurisdiction to declare the marriage a nullity.

⁸⁴ *Galene v. Galene* [1939] P. 237; cf. *De Massa v. De Massa* [1939] 2 All E.R. 150n.

does not accompany him W petitions the court for nullity in 1947. The court has jurisdiction under the Matrimonial Causes (War Marriages) Act, 1944, whatever be the ground of the petition

(2) *Choice of Law*.⁸⁵

RULE 36.—(1) The question whether a marriage is void for want of capacity of either party will be determined by the law of his or her antenuptial domicile, and the question whether a marriage is formally valid will be determined by the law of the place of celebration, in accordance with Rules 168 and 169.⁸⁶

(2) If the marriage complies with Rule 168 as regards capacity and form, the question whether the marriage is voidable will (*semble*) be determined by the law of the husband's domicile at the date of the marriage⁸⁷ or possibly by the law of the husband's domicile at the date of the presentation of the petition for nullity.⁸⁸

Comment

Introductory.—The Ecclesiastical Courts appear to have applied the *lex loci celebrationis* to all questions affecting the validity of marriage. Shortly after the Matrimonial Causes Act, 1857, came into force, however, the courts began to distinguish between questions affecting the parties' capacity to intermarry and questions concerning the formal validity of the marriage. As we shall see,⁸⁹ it was decided that each of the parties must be capable of marrying the other according to the law of his or her antenuptial domicile, while questions of form continue to be governed by the *lex loci celebrationis*.

Accordingly it seems to have been assumed that all questions of choice of law which can arise in a nullity suit may be characterised either as matters of form, or else as matters of capacity. Thus, in *Robert v. Robert*,⁹⁰ Barnard, J., applied the law of Guernsey to the question whether a marriage, celebrated in Guernsey between persons who were domiciled there at all material times, should be annulled on the ground of the respondent's refusal to consummate it, either because 'wilful refusal

⁸⁵ Cheshire, 458-460; Wolff, pp. 327 *et seq.*; Restatement, s. 136; Falconbridge, 26 Can.Bar Rev. 914-923 (1948).

⁸⁶ *Post*, pp. 753, 779.

⁸⁷ *De Reneville v. De Reneville* [1948] P. 100.

⁸⁸ This possible conflict is discussed by Fleming in 11 M.L.R. 98 (1948) *et seq.* No authority covers the point.

⁸⁹ *Post*, pp. 760-763.

⁹⁰ [1947] P. 164; discussed from the point of view of choice of law by Garner, 63 L.Q.R. 489 (1947) and by Fleming, 11 M.L.R. 98 (1948).

to consummate a marriage, in order to be justified on principle as a ground for annulment and not dissolution, must be considered as a defect in marriage, an error in the quality of the respondent' (a matter for the *lex loci celebrationis*)⁹¹ or else because a question of capacity was involved, with the result that the *lex domicilii* must be applied in accordance with the decision in *Sottomayor v. De Barros*.⁹²

It may still be the correct view that, so far as the conflict of laws is concerned, the only problem which can arise in a nullity suit, apart from questions of jurisdiction and procedure, is one of characterising the ground upon which relief is sought as a matter of form or capacity; but the decision of the Court of Appeal in *De Reneville v. De Reneville*,⁹³ and the earlier decision of Barnard, J., in *Mehta v. Mehta*,⁹⁴ suggest that some further analysis is required. It must be emphasised, however, that any discussion of the subject of choice of law in nullity suits is necessarily of a somewhat speculative nature as there are very few cases in which it has been considered, and a number of points are wholly uncovered by authority.

The Effect of De Reneville v. De Reneville.⁹⁵—In *De Reneville v. De Reneville* it was decided that the question whether a marriage celebrated in France, between a domiciled Frenchman and a woman domiciled in England, was void or voidable on the ground of the husband's impotence or wilful refusal to consummate it must be determined by the law of France. According to Lord Greene, M.R.,⁹⁶ this was because French law was that 'of the husband's domicile at the date of the marriage or (preferably . . .) because at that date it was the law of the matrimonial domicile in reference to which the parties may have been supposed to enter into the bonds of marriage'. According to Bucknill, L.J.,⁹⁷ it was 'reasonable that the law of the country where the ceremony of marriage took place, and where the parties intended to live together, and where they in fact lived together should be the law which controlled the validity of their marriage'.

The question arises as to how these remarks, which stress the intention of the parties as the factor which should determine the validity of their marriage, can be reconciled with Rules 168 and 169⁹⁸ as to capacity, a matter which cannot, consistently with principle, be made to depend upon the intention of the parties. It

⁹¹ At p. 24. The first ground cannot be regarded as satisfactory after *De Reneville v. De Reneville* [1948] P. 100.

⁹² (1877) 3 P.D. 1.

⁹³ [1948] P. 100.

⁹⁴ [1945] 2 All E.R. 690; discussed by Morris, 62 L.Q.R. 118.

⁹⁵ [1948] P. 100; see an article by Graveson in 12 Conv. (N.S.) 185 (1948).

⁹⁶ At p. 114.

⁹⁷ At p. 122.

⁹⁸ *Post.* pp. 758, 779.

is submitted that regard must be had to the precise nature of the issue involved in *De Reneville v. De Reneville*.⁹⁹

This was whether the English court had jurisdiction, and, as we have seen,¹ the court treated the question whether, assuming the wife's allegations to be proved, the marriage was void or voidable as crucial for this purpose, for on the latter hypothesis, she was domiciled in France at the date of the institution of the suit, while on the former hypothesis she was, on the facts, domiciled in England.

The possible relevance of French law to the issue emerged for the first time in the Court of Appeal, and Lord Greene, M.R., dealt with the case on the alternative hypotheses that the marriage was void and voidable.² Having decided that the marriage was voidable by English law,³ he proceeded to state his reasons for holding that the validity of the marriage should be determined by French law in the passage which has been quoted above. It is submitted, however, that his remarks cannot be divorced from their context of the particular facts and circumstances of the appeal; for, in saying that the validity of the marriage must, apart from questions of form which he expressly excluded as being referable to the *lex loci celebrationis*, be determined by the law of the matrimonial domicile, he can hardly have intended to dissent from the view expressed, *inter alia*, by the Court of Appeal in *Sottomayor v. De Barros*,⁴ (to which he did not refer in his reserved judgment), that each party must have capacity to marry according to the law of his or her antenuptial domicile. Nor can it be supposed that the Master of the Rolls intended to say that the law of the matrimonial domicile should govern the validity of a marriage which is bigamous according to the law of the antenuptial domicile of one of the parties.⁵

The limited nature of the question of choice of law which was before the Court of Appeal in *De Reneville v. De Reneville*⁶ is plainly indicated by the judgment of Bucknill, L.J., in that case. He assumed that the facts alleged by the wife were proved, and proceeded to deal with the appeal on the alternative hypotheses (a) that English law, and (b) that French law applied to the case. Having decided that, according to English law, incurable impotence renders a marriage voidable, and having observed that French law as to the effect of impotence was a matter of fact depending upon evidence which was not before him, he formulated

⁹⁹ [1948] P. 100. The dictum of Lord Greene, M.R. (at p. 114) quoted in the text supports Professor Cheshire's views as to the law which should govern capacity to marry, which are discussed and respectfully dissented from *post*, pp. 762-3; see Cheshire, p. 266 *et seq*.

¹ *Ante*, p. 247.

² [1948] P. 100 at p. 108.

³ At p. 113.

⁴ (1877) 3 P.D. 1.

⁵ See p. 264, *post*.

⁶ [1948] P. 100.

the issue of choice of law which was before the court by asking the following question: Assuming that by English law incurable impotence renders the marriage voidable and not void, but that by French law it renders the marriage void *ab initio* in the same sense as that in which a marriage is void *ab initio* if one of the parties is already married, ought the court, when deciding whether it has jurisdiction to make a decree of nullity on the ground of incurable impotence, to apply English or French law as to the legal effect of impotence on the validity of the marriage? ⁷

He did not even raise the question whether, assuming the marriage to be void by English law, its validity should be determined by French law, and it is submitted that, so far as the problem of choice of law is concerned, *De Reneville v. De Reneville* ⁸ merely adds a gloss or illustration to the established principle that questions of capacity to marry must be determined by the law of the antenuptial domicile of each of the parties, by deciding that, if an incapacity imposed by the law of the wife's antenuptial domicile merely renders the marriage voidable, the question whether the marriage is void, voidable, or valid will be determined by the law of the husband's domicile at the date of the marriage. It is submitted that this is perfectly logical, for, if the marriage is voidable by the law of the wife's antenuptial domicile, in the sense that it will be regarded as valid until a decree annulling it has been pronounced, her marriage will, by operation of the law of her antenuptial domicile, confer upon her the domicile of her husband unless the marriage is void for want of capacity by the law of his domicile.

The only other possible method of reconciling the dicta on choice of law in *De Reneville v. De Reneville* ⁹ with the orthodox view as to the law governing capacity to marry, short of treating it as having overruled this view without adverting to it, would be to regard allegations of impotence and wilful refusal to consummate as raising some question other than one of capacity. But Lord Greene, M.R. categorically stated that the question with which he was concerned was one of essential validity, and, although this is an ill-defined term, it is usually said to include capacity.¹⁰ Moreover, as we have seen,¹¹ Bucknill, L.J., equated the possible nullity of the marriage on the ground of incurable impotence with nullity on the ground of bigamy.

It is therefore assumed in the ensuing discussion that *De Reneville v. De Reneville* ¹² is only authority for the limited

⁷ At p. 119. The question has been formulated in the text in accordance with the wording of the first and third questions which, in the opinion of Bucknill, L.J., arose on the appeal.

⁸ *Supra*.

⁹ *Supra*.

¹⁰ Cheshire, p. 290.

¹¹ *Supra*.

¹² [1948] P. 100.

proposition as to choice of law which has been mentioned above, and that apart from matters of procedure, all questions of choice of law which can arise in a nullity suit may, subject to one possible qualification,¹³ be characterised either as matters of form or else as matters of capacity. However, the judgments in *De Reneville v. De Reneville*¹⁴ throw light on the difficult problem of choice of law by stressing the importance of the distinction between void and voidable marriages.

(a) *Choice of law where marriage alleged to be void.*—The cases illustrating the application of the *lex loci celebrationis* to matters affecting the formal validity of a marriage and the application of the law of the antenuptial domicile of each of the parties to questions of capacity are discussed in connection with Rules 168 and 169,¹⁵ and they do not call for further comment here. It may be observed, however, that virtually all the latter cases deal with marriages which are within the prohibited degrees of relationship or in contravention of the requirements of various laws as to parental consent.

Want of age.—Although there is no authority on the point, there is no reason to suppose that the validity of a marriage which is alleged to be void for want of age by the law of the domicile of one or both of the parties would not be governed by similar principles.

Bigamy.—Cases of bigamy were not mentioned by Dicey under the head of capacity; but there is high authority for placing them under this rubric.¹⁶ Questions of choice of law will not frequently arise in bigamy cases. Firstly, because it is assumed that bigamy is prohibited throughout Christendom. Thus, in *White v. White*,¹⁷ Bucknill, J., as he then was, said 'There cannot be any conflict of laws between different jurisdictions, because it is clear that the ceremony was bigamous, and, therefore, by the law of every Christian community, there never was any matrimonial status common to the petitioner and the respondent'.

Secondly, because, if the law of the antenuptial domicile of each of the parties, and the law of the place of celebration,¹⁸ did sanction a bigamous union, the case would be one of a polygamous marriage over which the Divorce Court has no jurisdiction under the proviso to Rule 81.¹⁹

It is possible, however, for a conflict of laws to arise, even

¹³ As to the law governing the question whether the parties have consented to the celebration of the marriage, see *post*, pp. 264–5.

¹⁴ [1948] P. 100.

¹⁵ *Post*, pp. 758, 779.

¹⁶ *Shaw v. Gould* (1868) 3 H.L. 55 at p. 69, *per* Lord Cranworth; *De Reneville v. De Reneville* [1948] P. 100 at p. 122, *per* Bucknill, L.J.

¹⁷ [1937] P. 111 at p. 125.

¹⁸ According to which the parties must probably be capable of intermarrying as well as by the law of their antenuptial domicile, see Exception 2 to Rule 168, *post*, p. 778.

¹⁹ *Ante*, p. 216.

within Christendom, in a bigamy case, and it is submitted that it is this type of case which demonstrates the impossibility of accepting any other view than that of the relevance of the law of the antenuptial domicile of each of the parties to the validity of marriages which are alleged to be void for want of capacity.

For example, W and H1 are domiciled in England. W obtains a divorce from H1 in a country by the law of which divorce jurisdiction is exclusively based on residence. W then marries H2 in that country, in which he is domiciled. *Ex hypothesi* the marriage is valid according to the law of H2's domicile and the law of the country in which the parties intend to live together; but it would surely be held to be invalid in England because W was still married to H1, and therefore incapable of marrying H2 by the law of her domicile at the date of the purported marriage.²⁰

Want of Consent of Parties.—There are some cases which suggest the problem as to which system of law should govern the validity of a marriage alleged to be void on account of the absence of the real consent of the parties to the celebration of the marriage ceremony.²¹ As the problem of choice of law in such circumstances does not appear to have been judicially considered at all, however, its solution is almost entirely a matter of speculation.

It is suggested that four are possible in that any one of the following systems of law might be applied in the comparatively unlikely event of a conflict between them. (i) The *lex loci celebrationis*; (ii) the law of the husband's domicile at the date of the marriage; (iii) the law of the antenuptial domicile of each of the parties; and (iv) the *lex fori*.

(i) The first might be justified on the ground that the question concerns the form or ceremony of the marriage, but the application of the *lex loci celebrationis* is inconsistent with the actual decision in *Mehra v. Mehra*,²² in which a marriage was held void on the ground of the wife's mistake as to the nature of the ceremony without reference to the law of India, where the marriage was celebrated and the husband was domiciled. The theory is perhaps also inconsistent with the distinction drawn by the Court of Appeal in *Apt v. Apt*²³ between the fact of and the method of giving consent, the latter alone being referable to the *lex loci celebrationis*.

²⁰ Cf. *Shaw v. Gould* (1868) 3 H.L. 65. It is significant that Lord Greene, M.R. did not contemplate referring the validity of the marriage in *Baindail v. Baindail* [1946] P. 122 to the law of the husband's domicile at the date of the marriage.

²¹ *Cooper v. Crane* [1891] P. 369; *Valier v. Valier* (1925) 133 L.T. 830; *Hussein v. Hussein* [1938] P. 159; *Mehra v. Mehra* [1945] 2 All E.R. 690; *Lendrum v. Chakravati* [1929] Sc.L.T. 96; *MacDougal v. Chitnavis* [1937] S.C. 390. See also the question raised in *Apt v. Apt* [1948] P. 83 at p. 89 as to what would have been the position if the attorney had been revoked, but the marriage had been celebrated by proxy before the notice of revocation was received.

²² [1945] 2 All E.R. 690.

²³ [1948] P. 83 at p. 88.

(ii) The only possible justification for the exclusive application of the law of the husband's domicile to questions of consent, would be that absence of real consent of the parties may render a marriage voidable but not void.²⁴ However, it seems impossible to make the solution to the problem depend upon the presumed intentions of the wife when her case might be that she did not intend to marry or live with her husband. The view that the law of the husband's domicile applies is, moreover, inconsistent with the fact that the relevance of such law was not even considered in a number of cases in which it might have been held to apply.²⁵

(iii) The application of the law of the antenuptial domicile of each of the parties is consistent with all the decisions, and it may perhaps be justified on the ground that the question raised is analogous to one of capacity, in that marriage is essentially a 'voluntary union', and the question as to whether a union is in law voluntary should depend upon the personal law to which each of the parties was subject at the date of the ceremony.²⁶

(iv) The only other possibility would be to apply the *lex fori* on the ground that the question whether a union is voluntary is a matter of fact, and, before considering the legal effect of a marriage ceremony, the court must first be satisfied as to the fact of marriage.²⁷ This solution is also consistent with the decisions, but it is open to the objection that it may involve the application of the *lex fori* to a question of substantive law.

Insanity.—In the absence of any authority on the subject, it may be assumed that questions concerning the validity of a marriage which is challenged on the ground of insanity would be classified as matters of capacity if the law of the antenuptial domicile of either party renders marriages of insane persons void, as does English law in the case of certified lunatics.²⁸ In some cases, however, it is possible that the matter might be classified as one affecting the consent of the parties to the marriage ceremony and so referable to whatever system of law is held to govern this question.²⁹

Incapacity rendering marriage void under foreign law.—Finally it may be observed that the English courts will, where necessary, declare a marriage to be void on the ground of an incapacity existing under the law of the antenuptial domicile of one of the parties, although the marriage is valid under English law. In this

²⁴ There is apparently a conflict of opinion as to its precise effect by English domestic law; see authorities cited in Falconbridge, p. 625 n. (d).

²⁵ See n. 21, *ante*.

²⁶ See dictum of Lord Merriman, P., in *Apt v. Apt* [1947] P. 127 at p. 146.

²⁷ See e.g., the manner in which Sir Edward Simpson framed the first question which the court had to decide in *Scrimshire v. Scrimshire* (1752) 2 Hagg.Cons. 395 at p. 398.

²⁸ Marriage of Lunatics Act, 1811.

²⁹ *Manella v. Manella* [1942] 4 D.L.R. 712.

respect it will be seen that there appears to be an important difference between void and voidable marriages.

(b) *Choice of law where marriage alleged to be voidable*.—It is a legitimate inference from the judgments of the Court of Appeal in *De Reneville v. De Reneville*³⁰ that, even if a marriage is valid by the law of the antenuptial domicile of the wife, the English court may, if it has jurisdiction, annul the marriage if it is proved to be voidable by the law of the husband's domicile.

Two difficult questions remain to be considered.—(i) If the ground for avoidance which is proved to exist by the law of the husband's domicile is one which is not recognised by English law, for example, the requirements of French law as to parental consents³¹ or the possibility of annulment under German law by reason of one spouse's mistake as to the personal attributes of the other,³² will the court grant a decree? (ii) If the husband, and, in the case of a voidable marriage *ex hypothesi* the wife, has changed his domicile since the date of the marriage, will the court apply the law of the husband's domicile at the date of the marriage, or the law of the husband's domicile at the date of the presentation of the petition, when deciding whether to pronounce a nullity decree?

(i) *Ground for avoidance must be recognised by English law*.—It is submitted that the answer to the first question must be in the negative, because the grounds for nullity, in the case of a voidable marriage, are limited by statute just as strictly as are the grounds for dissolution.³³ Wholly different considerations apply, as we have seen, in the case of marriages which are alleged to be void. The court is then simply asked to declare what was the effect of a given ceremony on the status of the particular parties, having regard to the law of the place of celebration and the law of their antenuptial domiciles. It is not asked to declare that a status which *ex hypothesi* exists, never has existed.

(ii) *Open question whether law of domicile at time of marriage or petition should be applied*.—It has been said that the distinction between domicile *tempore celebrationis* and *tempore judicii* has not

³⁰ [1948] P. 100.

³¹ *Simonin v. Mallac* (1860) 2 Sw. & Tr. 67; *Ogden v. Ogden* [1908] P. 46.

³² *Mitford v. Mitford* [1923] P. 130; see suggestion by F. H., 8 M.L.R. 78.

³³ *Napier v. Napier* [1915] P. 184 at p. 188. This point is overlooked by Graveson in 12 Conv. (N.S.) 185 (1948). Cf. the analogous argument with regard to choice of law in divorce, *ante*, p. 237. The converse may not, however, be true in the case of nullity because the court may decline to grant a decree, although the ground upon which it is sought is recognised by English law, if the marriage is valid by the law of the husband's domicile at the date of the marriage; see discussion, *post*, p. 267. It is submitted that, subject to the question of the recognition of the nullity decree, *Simonin v. Mallac* (1860) would be decided in the same way today because the marriage was voidable, and the ground upon which relief was sought is not recognised in English law. Thus, in *De Massa v. De Massa* [1939] 2 All E.R. 150 n. Lord Merrivale insisted on the parties first obtaining a nullity decree in France before he would pronounce a decree.

always been clearly recognised,³⁴ and, as there was no distinction between complete nullity and voidability in canon law, it would be logically and historically correct to hold that, even if the court has jurisdiction in the case of a voidable marriage, it can only pronounce a decree if the ground upon which it is sought is recognised by the law of the husband's domicile at the date of the marriage.

In answer it may be urged, however, that, as the practice of 'looking behind the form and regarding the substance of the matter' has been approved by the Court of Appeal³⁵ when the question is one of jurisdiction in the case of a voidable marriage, it must be adopted when the question is one of choice of law. The substance of the matter is that someone is claiming to terminate an existing status, and his right to do so should be referred to the law of his domicile at the date the claim is made.³⁶

The judgments in *De Reneville v. De Reneville*³⁵ do not really assist in the solution of the problem as to whether the law of the domicile *tempore judicii* should prevail over that *tempore celebrationis* (for the husband's domicile was French at both times), and the conflict may be regarded as one between logic and convenience. As the matter is wholly uncovered by authority the question can only be regarded as an entirely open one.

Matrimonial Causes Committee Report.—In conclusion it may be observed that the final report of the Committee on Procedure in Matrimonial Causes³⁷ recommends that, when both parties are resident in this country, the High Court should have jurisdiction in divorce or nullity as if both parties were 'at the material time' domiciled here, provided that the law of the place where they are domiciled recognised as a sufficient cause for a decree the same cause for which it is sought here. Obviously such a reform cannot be achieved by case law so far as divorce is concerned, and it is submitted that the recommendation is of doubtful value so far as nullity on the ground that a marriage is void is concerned, for as we have seen,³⁸ there are many circumstances in which the English courts may have to decide upon the validity of such a marriage without reference to the domicile of the parties at any date other than that of the marriage in an issue with which the parties themselves may not be concerned. It is interesting to speculate, however, whether the effect of the recommendation will be achieved by case law so far as nullity on the ground that a marriage is voidable is concerned. The cases of *Easterbrook v.*

³⁴ 11 M.L.R. p. 101

³⁵ *De Reneville v. De Reneville* [1948] P. 100.

³⁶ Thus, if a case comes within s. 13 of the Matrimonial Causes Act, 1937, or the Matrimonial Causes (War Marriages) Act, 1944, it is almost incredible that any law other than English law, as that of the country in which the parties are assumed to be domiciled, should be applied.

³⁷ 1947 Cmd. 7024, s. 83 (iii).

³⁸ *Ante*, p. 252.

*Easterbrook*³⁹ and *Hutter v. Hutter*⁴⁰ show that the residence of both parties may be a sufficient ground for jurisdiction in such a case; but they do not display any anxiety on the part of the English courts to consult the law of the husband's domicile on the question of choice of law, as the marriages which were annulled appear to have been valid according to the law of the husband's domicile, which was the same at the time of the marriage and at the time of the proceedings. After the judgment in *De Reneville v. De Reneville*⁴¹ it seems that these decisions can only be supported on the basis of the presumption of the identity of English and foreign law until the contrary is proved.

In view of the present uncertainties and possible cases of hardship it is submitted that the whole question of the jurisdiction of the courts and the choice of law in matrimonial causes is one which is in urgent need of clarification by legislation.

Illustrations

1. W, domiciled in England, marries H, who is domiciled in Australia, in Melbourne. On proof by W that H was already married, the court may pronounce a decree of nullity without reference to Australian law.⁴²

2 W marries H in India where he is domiciled. At the time of the marriage W was domiciled in England. On proof by W that she believed the ceremony was not a ceremony of marriage but was converting her to the Hindu religion, the court may pronounce a decree of nullity without reference to the law of H's domicile.⁴³

3. W, domiciled in England, marries H, domiciled in Germany, in Berlin. W petitions the court for nullity on the grounds of H's masculine indolence and unbearable selfishness. By German law a marriage is voidable on these grounds. (*Semble*) the court cannot pronounce a decree of nullity even if it has jurisdiction.⁴⁴

4 H, domiciled in Ontario, marries W, domiciled in England, in London. While both parties are resident in England, H petitions the court for nullity on the ground of W's wilful refusal to consummate the marriage, which is not a ground for nullity by the law of Ontario. (*Semble*) on proof being given of this fact the court will not pronounce a decree even if it has jurisdiction.⁴⁵

5. The facts are as in Illustration 4 except that after the celebration of the marriage and before the institution of the suit H acquires a domicile in England. *Quære*, whether the court will pronounce a decree on the basis that English law applies to the case.

6. H and W marry in New York where they are both domiciled. H subsequently acquires a domicile in England and W petitions the court for nullity on the grounds of H's incurable impotence at the time of the marriage. By the law of New York this is a ground for divorce but not for nullity. *Quære*, whether the court will apply English law and pronounce a decree.⁴⁶

³⁹ [1944] P. 10.

⁴⁰ [1944] P. 96; see Falconbridge, Ch. 42.

⁴¹ [1948] P. 100.

⁴² *White v. White* [1937] P. 111.

⁴³ *Mehta v. Mehta* [1945] 2 All E.R. 690.

⁴⁴ *Cf. Mitford v. Mitford* [1928] P. 180.

⁴⁵ But see *Easterbrook v. Easterbrook* [1944] P. 10.

⁴⁶ *Cf. Turner v. Thompson* (1888) 13 P.D. 37.

4. APPOINTMENT OF GUARDIANS ⁴⁷

RULE 37.—(1) The court has jurisdiction to appoint a guardian to an infant who is either—

- (a) a British subject ⁴⁸; or
- (b) domiciled in England ⁴⁹; or
- (c) resident in England, ⁵⁰

and the fact that the infant possesses no property in England is immaterial. ⁵¹

(2) The fact that an infant is entitled to or possessed of property in England does not of itself confer jurisdiction upon the court to appoint a guardian to him. ⁵²

Comment

This is one of the rare cases where an English court may have jurisdiction by reason of the nationality of the *de cuius*. 'The jurisdiction of this court with regard to the custody of infants', said Lord Cranworth in *Hope v. Hope*, ⁵³ 'rests upon this ground, that it is the interest of the State and of the sovereign that children should be properly brought up and educated; and according to the principle of our law, the sovereign, as *parens patriæ*, is bound to look to the maintenance and education (as far as it has the means of judging) of all his subjects.' The court has therefore jurisdiction to appoint a guardian to a British subject, even though the infant is not domiciled or resident in England, ⁵⁴ and has no property in England. ⁵⁵

It is likewise clear that the court has jurisdiction to appoint a guardian to an infant who is resident in England, even though he is a foreign national domiciled abroad. In the most recent case upon the subject, ⁵⁶ the Chancery Division appointed a guardian to a Jewish infant who had been brought from Germany by his relatives as a refugee from Nazi persecution. The Guardianship

⁴⁷ See Halsbury, Vol. 17, ss 1437-8; Cheshire, p. 533; Wolff, s. 82; Schmitt-hoff, p. 287. As to the principles upon which this jurisdiction will be exercised, see pp. 484-487, *post*.

⁴⁸ *Hope v. Hope* (1854) 4 De G.M. & G. 328; *Re Willoughby* (1885) 30 Ch.D. 324; and compare *Re Bourgoise* (1889) 41 Ch.D. 310.

⁴⁹ *Brown v. Collins* (1883) 25 Ch.D. 56, 62; *Ponder v. Ponder* [1932] S.C. 233; *Re X's Settlement* [1945] Ch. 44; *McLean v. McLean* [1947] S.C. 79. Compare the South African cases of *Coombe v. Coombe* [1909] T.H. 241; and *Leyland v. Chetwynd* (1901) 18 S.C. 239.

⁵⁰ *Johnstone v. Beattie* (1843) 10 Cl. & F. 42; *Re Pavitt* [1907] Ir.R. 234; *Re O'Brien* [1938] Ir.R. 323.

⁵¹ *Re Willoughby* (*supra*); *Re Pavitt* (*supra*); *Re O'Brien* (*supra*); *Re D.* [1943] Ch. 305.

⁵² *Brown v. Collins* (1883) 25 Ch.D. 56.

⁵³ (1854) 4 De G.M. & G. 328, 345.

⁵⁴ *Logan v. Fairlie* (1825) Jac. 193; *Stephens v. James* (1833) 1 M. & K. 627; approved in *Hope v. Hope*, *ubi sup.* at p. 346.

⁵⁵ *Re Willoughby* (1885) 30 Ch.D. 324.

⁵⁶ *Re D.* [1943] Ch. 305.

(Refugee Children) Act, 1944, now provides that the Secretary of State may appoint a guardian of any person who is for the time being in England if it appears to him—(a) that the ward arrived in the United Kingdom at any time after the end of the year 1936 in consequence of war (whether foreign or civil) or of religious, racial or political persecution, and had not at the time of his arrival attained the age of sixteen years; (b) that no parent of the ward is in the United Kingdom; and (c) that the ward has not attained the age of twenty-one years, and, in the case of a female, has never been married.

It seems also that the court has jurisdiction *ratione domicilii*, even (*semble*) though the infant is a foreign national and resides abroad.⁵⁷

5. DECLARATION OF LEGITIMACY

RULE 38.⁵⁸

- (1) Any British subject, or any person whose right to be deemed a British subject depends wholly or in part on his legitimacy, or on the validity of a marriage, being domiciled in England or Northern Ireland, or claiming any real or personal estate situate in England, may apply by petition to the court, praying the court for a decree declaring that the petitioner is the legitimate child of his parents, and that the marriage of his father and mother, or of his grandfather and grandmother, or his own marriage, was a valid marriage.
- (2) Any person, being so domiciled or claiming as aforesaid, may apply by petition to the court for a decree declaratory of his right to be deemed a British subject.
- (3) The court has jurisdiction to hear and determine such application, or applications, which may be included in the same petition, and to make such decree thereon as the court thinks just; and the decree made by the court, except as hereinafter

⁵⁷ The point has never arisen for crisp decision. In *Brown v. Collins* (1888) 25 Ch.D. 56, 62, Kay, J., refers to domicile *and* residence. Dicta in the other cases cited, *ante*, note 49, support the view stated in the text; but the children there were British subjects.

⁵⁸ Legitimacy Declaration Act, 1858, ss. 1, 2, 8; now the Supreme Court of Judicature (Consolidation) Act, 1925, s. 188, as amended by the British Nationality Act, 1948, s. 31.

mentioned, is binding to all intents and purposes upon the Crown and all other persons whomsoever.

- (4) The decree of the court does not in any case prejudice any person, unless such person has been cited or made a party to the proceedings, or is the next of kin, or other real or personal representative of, or derives title under or through, a person so cited or made a party; nor shall such sentence or decree of the court prejudice any person, if subsequently proved to have been obtained by fraud or collusion.
- (5) The Attorney-General must be supplied with a copy of any petition under this Rule and be a respondent on the hearing of the petition.
- (6) No proceedings under this Rule affect any final judgment or decree already issued by a court.⁵⁹

Comment

Conditions of Jurisdiction.—The jurisdiction of the court depends upon the petitioner fulfilling certain conditions :—

1. He must be a British subject, or a person claiming to be a British subject.

2. The petitioner must at the time of presenting his petition either be domiciled in England or Northern Ireland, or claim real or personal estate in England.

He does not fulfil the requirements of our Rule if he is domiciled out of England and Northern Ireland (*e.g.*, in the Isle of Man), unless he claims property in England.⁶² It will not bring him within it, if, when domiciled, *e.g.*, in Scotland, he claims property in Ireland.

While the petitioner's domicile may be either English or Northern Irish the estate claimed must be in England.

⁵⁹ This Rule in substance repeats s. 188 of the Supreme Court of Judicature (Consolidation) Act, 1925 (as amended), with one or two verbal alterations intended simply to make it read as a Rule.

As to Ireland, see the Legitimacy Declaration Act (Ireland), 1868, still in force in Northern Ireland; and as to Scotland, see Duncan and Dykes, *Principles of Civil Jurisdiction*, Chap. 13; Maclaren, *Court of Session Practice*, pp. 61, 62, and the Legitimacy Declaration Act, 1858, s. 9 (as amended). That Act is still in force as regards Scotland; see Schedule VI of the Act of 1925.

⁶² *Johnston v. Att.-Gen.* (1873) 43 L.J.P. & M. 3.

3. He must petition the court to declare one or any of the following things:

(a) The legitimacy of the petitioner.

(b) The validity of the petitioner's own marriage.

(c) The validity of the marriage of the petitioner's parents or grandparents.

(d) The petitioner's right to be a British subject.

Nature of Jurisdiction—When the above conditions are fulfilled⁶³ (and not otherwise), the court has jurisdiction to declare—

(i) The legitimacy or the illegitimacy of the petitioner.

(ii) The validity or invalidity of any marriage which the court is petitioned to declare valid.

(iii) That the petitioner has, or has not, a right to be deemed a British subject.

This jurisdiction applies as well to past as to existing marriages, and is a totally different thing from the authority inherited by the court from the Ecclesiastical Courts to entertain a suit for the declaration of the nullity of an existing marriage.⁶⁴ A petitioner cannot, under Rule 38, pray to have a marriage declared invalid, or any person declared illegitimate, or not a British subject, though the decree of the court may declare invalid a marriage which it is asked to declare valid, and, when asked to declare the legitimacy or the British nationality of the petitioner, may declare that he is illegitimate, or is not a British subject.⁶⁵

The decree of the court is binding to all intents and purposes upon all persons whomsoever, including the Crown; but if certain persons interested in the decree are not cited, neither they nor their representatives are prejudiced thereby, and the decree is, like other judgments, ineffective (*i.e.*, it does not prejudice any person), if proved to have been obtained by fraud or collusion.⁶⁶

Illustrations

1. A, a British subject, domiciled in England, marries first at Cape Town, and then in London, N, who has been divorced at Cape Town from her husband for adultery with A. The validity of either marriage under the law of the Cape Province is doubtful. A petitions to have his marriage with N declared valid. The court has jurisdiction.⁶⁷

2. A, a British subject whose domicile is Northern Irish, is for a time settled in Japan, and there marries a Japanese woman according to forms

⁶³ Compare *Shaw v. Att.-Gen.* (1870) L.R. 2 P. & M. 156; *Mansel v. Att.-Gen.* (1877) 2 P.D. 265; (1879) 4 P.D. 232; *Scott v. Att.-Gen.* (1886) 11 P.D. 123; *Brinkley v. Att.-Gen.* (1890) 15 P.D. 76; *Armitage v. Att.-Gen.* [1906] P. 135; *Slingsby v. Att.-Gen.* (1915) 31 T.L.R. 246; (1916) 32 T.L.R. (C.A.) 364; 33 T.L.R. (H.L.) 120. As to practice and procedure, see Halsbury. Vol. 2, s. 784.

⁶⁴ See Rule 35, p. 244, *ante*.

⁶⁵ Legitimacy Declaration Act, 1858, s. 1; Judicature Act, 1925, s. 188. See *Re Chaplin's Petition* (1867) 36 L.J.P. & M. 90, where the question proposed to be settled was a child's legitimacy in connection with divorce proceedings.

⁶⁶ Judicature Act, 1925, s. 188 (3), proviso; and see as to effect of foreign judgments in England, Chap. 16, especially Rule 78, *post*.

⁶⁷ *Scott v. Att.-Gen.* (1886) 11 P.D. 123.

required by Japanese law. A petitions for a declaration that his marriage is valid. The court has jurisdiction.⁶⁸

3. A is a British subject domiciled in France, and claiming a freehold estate in Middlesex. A petitions to have himself declared the legitimate son of his parents, or to have the marriage in France of his parents declared valid. The court has jurisdiction.

4. A is born, and is domiciled in France, and has lived in France till the age of 22. A's father was also born in France. A's paternal grandfather was an Englishman born in England, who married, or is alleged to have married, A's grandmother in Paris. A claims a freehold estate in Middlesex. A petitions to have the marriage of his grandfather and grandmother declared valid. The court has jurisdiction.⁶⁹

5. The circumstances are the same as in Illustration No. 4, except that A petitions to be declared a British subject. The court has jurisdiction.⁷⁰

6. A is a British subject domiciled in France. He claims to succeed, as next of kin, to *goods* situate in England. He petitions to have himself declared the legitimate son of his parents. The court has jurisdiction.

7. A is a British subject. He is domiciled in Scotland. He claims real estate in Ireland. He petitions to be declared the legitimate child of his parents. The court has no jurisdiction.⁷²

8. A, a British subject domiciled in England, petitions the court for a declaration that he is his father's heir at law. The court has no jurisdiction.⁷³

9. A alleges in his petition that the marriage of the petitioner's grandfather with the petitioner's grandmother is a valid marriage, and that he is entitled to succeed to a baronetcy. The court has no jurisdiction to adjudicate upon a claim to a title of honour.⁷⁴

10. A, a British subject domiciled in England, marries before 1933 a citizen of the United States, domiciled in the State of New York. Her marriage is dissolved by divorce, and A marries H, a domiciled Englishman. Doubts having arisen as to the validity of her second marriage, A petitions that the marriage with H may be declared valid. The court has jurisdiction.⁷⁵

6. DECLARATION OF LEGITIMATION

RULE 39 (1).—Any person claiming that he or his parent or any remoter ancestor became or has become a legitimated person, whether domiciled in England or elsewhere,

⁶⁸ *Brinkley v. Att.-Gen.* (1890) 15 P.D. 76.

⁶⁹ This case is certainly within the words of the Legitimacy Declaration Act, 1858, s. 2, and the Supreme Court of Judicature (Consolidation) Act, 1925, s. 188. Now, however, that an alien can take, acquire, hold and dispose of real or personal property of any description in the United Kingdom (Status of Aliens Act, 1914, s. 17), it appears to a certain extent an anomaly that a claim to real estate in England should be a sufficient ground to give the court jurisdiction to declare the claimant a British subject. The Act of 1858, of course, belonged to the period when aliens could not hold land.

⁷⁰ *Ibid.*

⁷² The petitioner is neither domiciled in England nor in Northern Ireland, nor does he claim real or personal estate in England.

⁷³ *Mansel v. Att.-Gen.* (1877) 2 P.D. 265; (1879) 4 P.D. 232.

⁷⁴ *Frederick v. Att.-Gen.* (1874) L.R. 3 P. & D. 196. The decision of the court, may, of course, indirectly decide who is entitled to succeed.

⁷⁵ *Armitage v. Att.-Gen.* [1906] P. 135. The precise ground on which the petition was entertained does not appear from the report. Presumably A was a person whose right to be deemed a British subject depended on the validity of her marriage with H. But it is clear that A was only domiciled in England if her marriage with H were valid, and the petition did not

and whether a British subject or not, may apply to the High Court or a county court for a declaration that he or his parent or any remoter ancestor became or has become a legitimated person by the subsequent marriage of his parents.⁷⁶

(2) A county court to which a petition is presented may, if it considers that the case is one which, owing to the value of the property involved or otherwise, ought to be dealt with by the High Court, and shall, if so ordered by the High Court, transfer the matter to the High Court.⁷⁷

(3) The regulations as to applications for a declaration of legitimacy set out in Rule 38 are so far as relevant applicable to a claim for a declaration of legitimation.

Comment

The Legitimacy Act, 1926, s. 1, introduced legitimation by subsequent marriage into English domestic law for the first time. That section applies only if the father of the illegitimate person was or is at the date of the marriage domiciled in England or Wales. Where the father was or is at the date of the marriage domiciled in a foreign country by the law of which the illegitimate person became legitimated by virtue of the subsequent marriage, that person, if living, is recognised by section 8 as having been legitimated. Under section 9 of the Act the right to claim a declaration of legitimation extends to persons legitimated under section 8 as well as under section 1.⁷⁸ Hence there is no limitation to the right of any person British or alien, English or foreign in domicile, to claim a declaration of legitimation. Due notice must be given to the Attorney-General⁷⁹ and proceedings are held in public, not in camera.⁸⁰

If the petitioner is an infant under seven years of age, he must proceed by a guardian appointed by the court,⁸¹ and the court will not, as a rule, appoint a guardian unless and until the registrar has

allege that she was claiming any property in England. A similar difficulty arose in *Newman v. Att.-Gen.*, *The Times*, February 27, 1906: the infant there was a British subject and domiciled in England alike only if what he desired to have established, i.e., his legitimacy, was proved. See Morris ('Recognition of Divorces granted outside the Domicile', 24 *Can. Bar Rev.* (1946) pp. 77-8)

⁷⁶ Legitimacy Act, 1926, s. 2 (1) and (2), as amended by the Administration of Justice Act, 1928, s. 19 (3) and by the British Nationality Act, 1948, s. 31.

⁷⁷ Legitimacy Act, 1926, s. 2 (2), as amended.

⁷⁸ *Collins v. Att.-Gen.* (1931) 47 T.L.R. 484.

⁷⁹ *Re Clayton* (1927) 43 T.L.R. 659.

⁸⁰ *Greenway v. Att.-Gen.* (1927) 44 T.L.R. 124.

⁸¹ *Re Upton's Petition* (1860) 6 Jur.(n.s.) 404.

reported whether the institution of proceedings is likely to benefit the infant.⁸²

Questions relating to the legitimacy or legitimation of a person may, of course, arise in proceedings other than a petition for a declaration of legitimacy under the Judicature Act, 1925, s. 188, or the Legitimacy Act, 1926, s. 2.⁸³ Long before 1858, and also since, the courts have decided such questions whenever they have arisen as between the parties to a cause,⁸⁴ whether the person whose legitimacy was in question was alive or dead,⁸⁵ or whether or not he was a party to the proceedings.⁸⁶

The jurisdiction of the court in matrimonial proceedings, under the Judicature Act, 1925, s. 193 (1), to make provision with respect to the custody, maintenance and education of the children, the marriage of whose parents is the subject of the proceedings, does not depend upon the legitimacy of the children: the test under the section is parenthood, not legitimacy.⁸⁷

Section 23 of the British Nationality Act, 1948, provides that, for purposes relating to the acquisition of British nationality and of citizenship of the United Kingdom and Colonies, a child born out of wedlock and legitimated by the subsequent marriage of his parents is to be treated as if he had been born legitimate, as from the date of the marriage or January 1, 1949, whichever is the later.^{87a} Whether a child has been so legitimated is to be tested by the law of the domicile of his father at the time of the marriage. This section is likely to enhance the importance of the jurisdiction exercisable by the court in accordance with Rule 89.

Illustrations

1. A is a French national domiciled in England. He petitions for a declaration that he was legitimated by the marriage of his father (whose domicile was English) with his mother in 1910, the legitimation taking effect from January 1, 1927, the date of operation of the Legitimacy Act, 1926. The court has jurisdiction.

2. A is a French national domiciled in France. He petitions for a declaration that he has been legitimated by the marriage of his father, domiciled in France, with his mother in 1929. The court has jurisdiction.⁸⁸

3. A is a British subject domiciled in England. He petitions for a declaration that he was legitimated in 1900 by the marriage of his father, who was domiciled in Scotland both at the time of A's birth and marriage with his mother in that year. The court has jurisdiction.⁸⁹

⁸² *Re Chaplin's Petition* (1867) L.R. 1 P. & D. 328.

⁸³ For examples, see Halsbury, Vol. 2, s. 781; see Welsh in 63 L.Q.R. (1947) at p. 92.

⁸⁴ *Per Denning, J.*, in *M. v M* [1946] P. 31, 34.

⁸⁵ *Morris v. Davies* (1837) 5 Cl. & Fin. 163; *Re Grove* (1888) 40 Ch.D. 216.

⁸⁶ *E.g.*, in affiliation proceedings.

⁸⁷ *M. v M.* [1946] P. 31; approved in *Colquitt v. Colquitt* [1948] P. 19.

^{87a} This renders *Abraham v. Att.-Gen.* [1934] P. 17 obsolete.

⁸⁸ *Collins v. Att.-Gen.* (1931) 47 T.L.R. 484: British subject domiciled in Germany.

⁸⁹ This case would seem to be within the terms of the Legitimacy Act, 1926, s. 2 (1), which is not confined to persons who became legitimated under the Act itself on or after January 1, 1927.

JURISDICTION IN BANKRUPTCY AND IN REGARD TO WINDING-UP OF COMPANIES

1. BANKRUPTCY ¹

Interpretation of Terms.

RULE 40.—In this Rule, and in all the Rules of this Digest which refer to an English bankruptcy, the following terms have, unless the contrary appears from the context, the following meanings:—

(1) ‘ The court ’ means the court having jurisdiction in bankruptcy under the Bankruptcy Act, 1914, and includes—

(i) the High Court ; and

(ii) the County Courts.²

(2) The expression ‘ debtor ’, unless the context otherwise implies, includes any person, whether a British subject or not, who at the time when any act of bankruptcy was done or suffered by him—

(a) was personally present in England ; or

(b) ordinarily resided or had a place of residence in England ; or

(c) was carrying on business in England, personally, or by means of an agent, or manager ; or

(d) was a member of a firm or partnership which carried on business in England.³

(3) ‘ An act of bankruptcy ’ is committed by a debtor who commits any one or more of the following acts :

(a) if in England or elsewhere he makes a conveyance or assignment of his property to a trustee or trustees for the benefit of his creditors generally ;

¹ See Baldwin, *Law of Bankruptcy*, 11th ed., and Williams, *Law and Practice in Bankruptcy*, 15th ed. For a discussion of theories of bankruptcy, see Story, pp. 565–576; Cheshire, pp. 630–640, Westlake, pp. 162–174; Wolff, ss. 531–538.

² Bankruptcy Act, 1914, s. 96.

³ Bankruptcy Act, 1914, s. 1 (2).

- (b) if in England or elsewhere he makes a fraudulent conveyance, gift, delivery, or transfer of his property, or any part thereof;
- (c) if in England or elsewhere he makes any conveyance or transfer of his property or any part thereof or creates any charge thereon, which would, under the Bankruptcy Act, 1914, or any other Act, be void as a fraudulent preference if he were adjudged bankrupt;
- (d) if with intent to defeat or delay his creditors he does any of the following things, namely, departs out of England, or being out of England remains out of England, or departs from his dwelling-house, or otherwise absents himself, or begins to keep house;
- (e) if execution against him has been levied by seizure of his goods under process in an action in any court, or in any civil proceeding in the High Court, and the goods have been either sold or held by the sheriff for twenty-one days;
- (f) if he files in the court a declaration of his inability to pay his debts or presents a bankruptcy petition against himself;
- (g) if a creditor has obtained a final judgment or final order against him for any amount, and, execution thereon not having been stayed, has served on him in England, or, by leave of the court, elsewhere,⁴ a bankruptcy notice under the Bankruptcy Act, 1914, and he does not within seven days after service of the notice, in case the service is effected in England, and in case the

⁴ How far this authorises service on a foreigner domiciled abroad was doubted by Baldwin, p. 160. But the statute is clear in its permission subject to the discretion of the court, if the foreigner comes within the definition of a debtor in section 1 (2) of the Bankruptcy Act, 1914. See *Williams on Bankruptcy*, p. 31. *Re Pearson* [1892] 2 Q.B. (C.A.) 263, is inapplicable to the present state of the law. Compare *post*, p. 279, note 7. For the subsequent effectiveness of a notice which was originally invalid, see *Re Clark, Ex p. Beyer, Peacock & Co., Ltd.* [1896] 2 Q.B. 476. See also Bankruptcy Rules, 1915, ss. 143 and 158 as well as Ord. XI, r. 8A (July, 1920). See also *Re a Debtor* (No. 1838 of 1911) [1912] 1 K.B. (C.A.) 53.

service is effected elsewhere, then within the time limited in that behalf by the order giving leave to effect the service, either comply with the requirements of the notice or satisfy the court that he has a counter-claim, set off, or cross demand which equals or exceeds the amount of the judgment debt or sum ordered to be paid, and which he could not set up in the action in which the judgment was obtained, or the proceedings in which the order was obtained ;

- (h) if the debtor gives notice to any of his creditors that he has suspended, or that he is about to suspend, payment of his debts.⁵

(4) 'A petition' means a petition presented to the court either by a creditor (called a petitioning creditor) or by a debtor (called a petitioning debtor) that the court shall make a receiving order, which is the first step towards a debtor being adjudicated a bankrupt.⁶

Comment

(1) '*The court*'.—This term hardly needs explanation: it simply points out that for the purpose of this Digest, as indeed for the purpose of the Bankruptcy Act, 1914, the courts having jurisdiction in bankruptcy are described as one court, and, except on matters with which the Digest is not concerned, may be considered as the High Court.

(2) '*Debtor*'.—The definition of 'debtor' deserves very careful attention. For many years before the passing of the Bankruptcy Act, 1914, it was felt that the word 'debtor' in reference to the English bankruptcy law could not be used in its vague and popular sense. There was great difficulty in avoiding either a too narrow or a too general use of the word. If, for instance, the English Bankruptcy Court dealt only with debtors who were British subjects and who had contracted debts in England, it would have had no power to make bankrupt either English merchants who had contracted debts abroad, *e.g.*, in France, or aliens, *e.g.*, French citizens, who, carrying on business in England and making great profits from the English trade, had contracted heavy debts to English merchants. If, on the other hand, the English Bankruptcy Court tried to adjudicate bankrupt every debtor who had contracted a heavy debt to an English merchant, it was certain that the Bankruptcy Court would find itself engaged in the futile effort to

⁵ Bankruptcy Act, 1914, s. 1 (1) (a) to (h).

⁶ See Bankruptcy Rules, 1915, ss. 145-149b.

adjudicate bankrupt debtors living in foreign countries who neither owed obedience to English law, nor in many cases could be compelled to obey the judgment of an English court. It became, in short, clear to English judges that, to use an expression which is often employed in judgments delivered under the earlier Bankruptcy Acts, as regards our Bankruptcy Court, the word 'debtor' should if possible be confined to 'a person subject to the English bankruptcy law', but at the same time it became apparent that to define who were the persons who were subject to the English bankruptcy law was no easy task.⁷ The present definition of a 'debtor' is intended to determine by statute the circumstances which render a debtor a person subject to the English bankruptcy law, and is, it is submitted, exhaustive.⁸

(3) '*An act of bankruptcy*'.—It must suffice for our present purpose to call attention to the following points:—

1. Every act which can constitute an act of bankruptcy is enumerated in this Rule.

2. Any transaction which is to constitute an act of bankruptcy must, unless the contrary is apparent from the terms of this Rule, have occurred in *England*.⁹

3. Of the acts of bankruptcy enumerated in this Rule, some, e.g., those included in clauses (a), (b) and (c), can be committed either in England or in any other country; others, e.g., those included in clauses (e) and (f), must be committed in England, without, however, postulating the physical presence of the debtor there; and some, it would seem, must, as to part of the transaction, be committed in England, but may, as to other portions of it, be committed out of England. Such would appear to be the case as to some at any rate of the acts included in clauses (d) and (g).

4. The dealings with a debtor's property which constitute an act of bankruptcy under clauses (a), (b) and (c), may take place either in England 'or elsewhere'. But it has been laid down by very high authority that a conveyance, or the like, made out of England must, if it is to be an act of bankruptcy, be a conveyance 'which is to operate according to English law',¹⁰ e.g., a

⁷ Dicey, *Conflict of Laws*, 2nd ed., pp. 279-282; and compare *Ex p. Blain* (1879) 12 Ch.D. (C.A.) 522, 526, 531; *Re Pearson* [1892] 2 Q.B. (C.A.) 263; *Ex p. Crispin* (1873) L.R. 8 Ch. 374, 379; *Ex p. Pascal* (1876) 1 Ch.D. (C.A.) 509, 512; *Cooke v. Chas. A. Vogeler Co* [1901] A.C. 102, 108. See now *Re Debtors* (No. 836 of 1935) [1936] Ch. 622, 632 (C.A.). And see *Re a Debtor* (No. 335 of 1947) [1948] 2 All E.R. 533, 538.

⁸ On the effect of this definition of 'debtor', see Comment and Illustrations on Rules 41, 42, pp. 281, 284. In Scotland jurisdiction is not based on domicile alone: *Wylie, Petr.* [1928] Sc.L.T. 665; *Gibb, The International Law of Jurisdiction in England and Scotland* (1926), pp. 153, 155; *Duncan and Dykes, Principles of Civil Jurisdiction as applied in the Law of Scotland* (1911), pp. 224-25.

⁹ *Baldwin*, p. 98, citing *Ingliss v. Grant* (1794) 5 T.R. 530. And see *Williams*, pp. 3, 17, 39-40, 55-56; *Alexander v. Vaughan* (1776) 1 Cowp. 398.

¹⁰ See *Ex p. Crispin* (1873) L.R. 8 Ch. 374, 380, *per Mellish, L.J.*; *Cooke v. Charles A. Vogeler Co.* [1901] A.C. 102, 109, 112.

conveyance executed out of England by a person domiciled in England, which is to operate according to English law, and must not be a conveyance executed in his own country by a person domiciled abroad, and intended to operate according to the law of the foreign country in which it is made, even if the person concerned is a debtor within the meaning of section 1 (2) of the Bankruptcy Act, 1914.¹¹

The proviso is intended to exclude from the character of acts of bankruptcy acts done abroad by a person not domiciled in England, and not intended to operate at all according to English law, *i.e.*, not intended to have any effect on property in England.¹²

5. Whether a debtor does or does not commit an act of bankruptcy under clause (d), *e.g.*, by departing out of England or remaining out of England, may depend upon the answer to the question whether he is or is not a person living in England; for the words of the clause 'imply that the person who remains out of England has his home or place of business in England, and cannot reasonably be held to apply to the case of a foreigner remaining in his own home'.¹³

¹¹ *Re Debtors* (No 836 of 1935) [1936] Ch 622, 632 (C.A.). See *Re a Debtor* (No 335 of 1947) [1948] 2 All E.R. 533. Emphasis must be laid on the intention that the conveyance should have some effect on property in England. See *post*, note 12. and compare *Ex p. Defries, re Myers* (1876) 35 L.T. 392, at p. 394, *per* Mellish, L.J.

¹² Compare Baldwin, pp. 110, 111, 113. It should be noted that the case of *Dulaney v. Merry & Son* [1901] 1 K.B. 536, would now probably have to be decided in the opposite sense. It is believed that the assignment must be registered under the Deeds of Arrangement Act, 1914, irrespective of whether the person domiciled abroad who executes the assignment is a 'debtor' in the meaning of s. 1 (2) of the Bankruptcy Act, 1914, provided the assignment is intended to operate in England. Compare Williams, p. 881, and Channell, J., in *Dulaney v. Merry* at p. 543. But see *Re Pilkington's Will Trust* [1937] Ch. 574. It is submitted that an assignment in Scotland which concerns movables in England is an assignment intended to operate in England (*i.e.*, according to English law), although the transaction was concluded outside England, and the assignor intended it to be governed by the law of Scotland. Compare *Re Nelson, ex p. Dare and Dolphin* [1918] 1 K.B. 459, 469, 476, 477.

¹³ *Ex p. Crispin* (1873) L.R. 8 Ch. 374, 380. The word 'foreigner' in this connection therefore covers persons, whether aliens or not, who ordinarily reside in any other country than England. Compare *Ex p. Gutierrez* (1879) 11 Ch.D. (C.A.) 298; *Ex p. Brandon* (1884) 25 Ch.D. (C.A.) 500. A person domiciled in England who lives outside it habitually can hardly fall under the operation of clause (d). Thus the fact that the debtor is a person domiciled or resident abroad may be relevant for determining whether he has committed an act of bankruptcy in the sense of s. 1 (1) (d) by remaining out of England. It has been said with reference to the same provision in s. 6 (3) of the Bankruptcy Act, 1869, that 'these words imply that the person who remains out of England has his home or place of business in England and cannot be held to apply to the case of a foreigner remaining in his own home'. See *Ex p. Crispin* (1873) 8 Ch.App. 374, 380, and compare *Re a Debtor* (No. 335 of 1947) [1948] 2 All E.R. 533, 536, 539, 540 (C.A.) where the court held that the debtor was carrying on business in England. It is difficult to accept the proposition expressed in *Re a Debtor* (No. 335 of 1947) at p. 539, that there is only one standard for assessing whether an act of bankruptcy in the sense of s. 1 (1) (d) has been committed irrespective

6. An act of bankruptcy must be a personal act or default, and it cannot be committed through an agent unless the agent is authorised to do the particular act, nor by a firm as such.¹⁴ Thus X is a Chilean citizen, who has never been in England, but he is a member of an English firm which trades and contracts debts in England. An action is brought against the firm, judgment is obtained, and execution is issued, under which the goods of the firm are seized and sold. The seizure and sale of the goods is not an act of bankruptcy on the part of X.

(4) 'A petition'.—The petition hardly needs explanation: it is the written document by which generally a creditor (called a petitioning creditor), but occasionally a debtor (called a petitioning debtor) requests the court to take the first steps towards adjudicating such debtor a bankrupt.

Proceedings to adjudicate a debtor a bankrupt usually¹⁵ commence with a petition either from a petitioning creditor or from a petitioning debtor.

(1) WHERE COURT HAS NO JURISDICTION

RULE 41.—The court has no jurisdiction on a bankruptcy petition being presented by a creditor or a debtor to adjudicate bankrupt any person who

- (1) is not a debtor as defined in Rule 40 (2), *ante*¹⁶; or
- (2) has not committed or suffered any act of bankruptcy as defined in Rule 40 (3), *ante*.¹⁷

Comment

This Rule is most important. It contains the principle which restricts the jurisdiction of the Bankruptcy Act, 1914, namely, that no debtor should come within its operation who is not a debtor as defined in Rule 40 (2), *ante*, and next, that no debtor shall be adjudicated bankrupt who has not distinctly committed an act of bankruptcy as defined in the said Rule. The operation

of whether the debtor is resident in England at the time of the Act. The C.A. relied on *Cooke v. Charles Vogeler Co* [1901] A.C. 102 and *Re Debtors* (No. 836 of 1935) [1936] Ch. 622, where it was held that an act of bankruptcy in the sense of s. 1 (1) (a) was not committed if an assignment of movables was made by a person domiciled abroad and was intended to operate abroad. It is believed that the relevance of the debtor's domicile for the purpose of s. 1 (1) (a)–(c) does not exclude the relevance of a debtor's residence for the purpose of an act of bankruptcy in the sense of s. 1 (1) (d).

¹⁴ *Ex p. Blain* (1879) 12 Ch.D. (C.A.) 522, 527, 529; compare Baldwin, p. 98; *Cooke v. Chas. A. Vogeler Co.* [1901] A.C. 102, 113, *per* Lord Davey. Compare Williams, pp. 40, 343.

¹⁵ For an exception, see Rule 42, proviso, p. 284, *post*.

¹⁶ *I.e.*, Bankruptcy Act, 1914, s. 1 (2).

¹⁷ Bankruptcy Act, 1914, s. 1 (1).

of this principle and the difficulties which may arise in applying it are best shown by illustrations.¹⁸

Illustrations

1. X, the alleged debtor, incurs a heavy debt in England whilst staying there for a fortnight. X then goes to France, where he is domiciled and where he resides, and whilst in France makes a conveyance of his property to a trustee for the benefit of his creditors generally. A, a creditor, presents a bankruptcy petition against X. The court has no jurisdiction.¹⁹

2. The circumstances are the same as in Illustration 1, except that X, though often coming to England for a month or two, has not, at the time of committing the act of bankruptcy, ordinarily resided or had a place of residence in England. The court has no jurisdiction.

3. X is, as in both Illustrations 1 and 2, in France at the time when the act of bankruptcy is committed, and at that time he neither is carrying on business in England personally or by means of an agent or manager, nor is a member of a firm or partnership which carries on business in England. The court has no jurisdiction.²⁰

4. X resides about half the year in England and about half the year in France. He has contracted heavy debts in each country. At the moment when he makes a conveyance of his property to a trustee for the benefit of his creditors, which is intended to operate according to English law, he is in France. X, further, though as a rule he resides at least half the year in London, does not have any one fixed place of residence there, but lives in different hotels. *Semble*, the court has jurisdiction.²¹

5. X makes a conveyance of his property to a trustee for the benefit of his creditors generally which is intended to operate according to English law. He is in France at the time, and has not been in England for years, yet has had for years, and still has, a dwelling-house in London furnished and with servants in it, in which he could at any moment reside if he came there. *Semble*, the court has jurisdiction.²²

¹⁸ It is for the sake of brevity assumed throughout these illustrations that a bankruptcy petition has been presented against the debtor, and that the circumstances mentioned are the only points which require consideration in order to determine whether the court has or has not jurisdiction.

¹⁹ X was not at the time of committing the act of bankruptcy present in England and was not a debtor in the meaning of s. 1 (2) of the Bankruptcy Act, 1914, and the assignment is probably not intended to operate in England. Also the conditions of s. 4 (1) for presenting a creditor's position are not fulfilled. See *post*, Rule 42.

²⁰ In each of these illustrations the reason why the court has no jurisdiction is that X is not a debtor within the terms of Rule 40 (2), *ante*, i.e., of the Bankruptcy Act, 1914, s. 1 (2), though in each illustration X has committed an act of bankruptcy provided the conveyance is intended to operate according to English law.

²¹ The question is whether X is ordinarily residing in England. See *Ex p. Bright, re Bright* (1901) 18 T.L.R. 37 (C.A.); (1903) 19 T.L.R. 203 (C.A.); [1903] W.N. 17; *Re Norris, ex p. Reynolds* (1888) 4 T.L.R. 452; 5 Mor. 111; *Re Heccard* (1889) 24 Q.B.D. 71; 6 Mor. 282; but compare *Re Erskine* (1893) 10 T.L.R. 32. Very probably he would be held to reside. This view is supported by decisions in Income Tax Cases; see *Levene v. Inland Revenue Commissioners*, [1928] A.C. 217; *Inland Revenue Commissioners v. Lysaght* [1928] A.C. 234. And see Farnsworth, *The Residence and Domicile of Corporations* (1939), pp. 1-28, at pp. 24-25; Konstam, *The Law of Income Tax* (10th ed., 1946), pp. 221-222, 265-268.

²² I.e., on the ground that X, though in France, and though generally living in France, has a place of residence in England. Compare *Re Nordenfelt* [1895] 1 Q.B. (C.A.) 151. Compare the Income Tax cases, *Re Young* (1875) 2 R. 925; 1 Tax Cas. 57; 12 S.L.R. 602; *Rogers v. I.R.C.* (1879) 6 R. 1109; 16 S.L.R. 682; 1 Tax Cas. 225; *I.R.C. v. Cadwallader* (1904) 7 F. 146; 5 Tax Cas. 101; 42 S.L.R. 117; *Loewenstein v. de Salis* (1926) 10 Tax Cas. 424.

6 X is a French citizen, ordinarily residing and having a place of business in England. Knowing that he is on the point of bankruptcy for debts incurred in England amounting to £10,000, X goes to France, and there borrows from a friend, who knows his circumstances, £2,000. X gambles therewith at Monte Carlo and wins £20,000. He gives £5,000 to the friend who lent him the £2,000, and with the residue of the money goes to the United States with the intention of speculating there on the stock exchange. *Semble*, the court has jurisdiction.²³

7. X is a Frenchman who lives in England and carries on business there. He appeals against assessment in respect of unpaid excess profits tax. On the day when the assessments are confirmed he leaves England for Eire and does not return. He sends his wife a power of attorney in exercise of which she sells the business. The court has jurisdiction.^{23a}

8. X is a Frenchman who generally resides in England, but he keeps up a connection with France, where he has relatives and landed property. X contracts in England large debts to A. A brings an action against X and serves X with a writ. X subsequently leaves England for France. A presents a bankruptcy petition against X. The alleged act of bankruptcy is that X has departed out of England with intent to defeat his creditors. *Semble*, the court has no jurisdiction.²⁴

9. X is a Frenchman domiciled in and living in France. He visits London, where he incurs debts amounting to £10,000. X, being unable to pay these debts, while resident at Paris, presents a bankruptcy petition to the court. The court has no jurisdiction.²⁵

10. X is a French citizen domiciled in France, but having a place of business in England. At the moment when he makes a conveyance of his property to a trustee for the benefit of his creditors he is in France. The conveyance is intended to operate in France according to French law. The court has no jurisdiction.²⁶

²³ On the wording of the Bankruptcy Act, 1914, s. 1 (1) (b), (c) and (d) this may be an act of bankruptcy. X is no doubt a debtor within the Bankruptcy Act, 1914, s. 1 (2) (b). X's conduct does obviously inflict damage upon English creditors, but it may be doubted whether the transfer of his property in France was intended to operate according to English law. See *ante*, p. 280 and note 11. See also *Ex p. Crispin* (1873) L.R. 8 Ch. 734, and *Cooke v. Charles A. Vogeler Co.* [1901] A.C. 102, 108, 109, and note that they are good authorities for the proposition that an assignment abroad by a person domiciled abroad is not an act of bankruptcy, notwithstanding s. 1 (1) and (2) of the Bankruptcy Act, 1914, unless the assignment is intended to operate according to English Law. See now *Re Debtors* (No. 836 of 1935) [1936] Ch. 622.

^{23a} *Re a Debtor* (No. 335 of 1947) [1948] 2 All E.R. 533. X is a debtor in the sense of s. 1 (2) (c) on the ground that he is deemed to carry on business in England inasmuch as he has unpaid debts there (*ibid.*, p. 537). He has committed an act of bankruptcy in the sense of s. 1 (1) (d) inasmuch as, being out of England, he remained out of England. But see *ante*, n. 13, p. 280; *post*, n. 24.

²⁴ X indeed is a debtor within Rule 40, p. 276, *ante*, but in the circumstances it is not clear that he has committed an act of bankruptcy, i.e., that he has departed out of England with a view to defeat his creditors. See *Ex p. Crispin* (1873) L.R. 8 Ch. 374; *Ex p. Brandon* (1884) 25 Ch.D. 500, 503, *per* Lord Selborne, C.; *Ex p. Langworthy* (1887) 3 T.L.R. (C.A.) 544; contrast *Ex p. Campbell* (1887) 4 Mor. 193. See *ante*, notes 13 and 23a.

²⁵ X has clearly committed an act of bankruptcy, the presentation of the petition being under the Bankruptcy Act, s. 1 (1), an act of bankruptcy (see Rule 40 (3) (f)). But he is not a debtor within Rule 40 (2), for he is not personally present in England when he presents his petition, nor does he ordinarily reside or carry on business in England, nor is he a member of a firm or partnership carrying on business in England.

²⁶ *Re Debtors* (No. 836 of 1935) [1936] Ch. 622, 632 (C.A.); compare *Re Pilkington's Will Trust* [1937] Ch. 574.

RULE 42.²⁷—A creditor is not entitled to present a bankruptcy petition against a debtor, and the court has no jurisdiction to adjudicate a debtor a bankrupt unless—

- (a) the debt owing by the debtor to the petitioning creditor or, if two or more creditors join in the petition, the aggregate amount of debts owing to the several petitioning creditors amounts to fifty pounds ; and
- (b) the debt is a liquidated sum payable either immediately or at some future time ; and
- (c) the act of bankruptcy on which the petition is grounded has occurred within three months before the presentation of the petition ; and
- (d) the debtor is domiciled in England, or within a year before the date of the presentation of the petition has ordinarily resided, or had a dwelling-house or place of business, in England, or (except in the case of a person domiciled in Scotland or Northern Ireland or a firm or partnership having its principal place of business in Scotland or Northern Ireland) has carried on business in England, personally or by means of an agent or manager, or (except as aforesaid) is or within the said period has been a member of a firm or partnership of persons which has carried on business in England, by means of a partner or partners or an agent or manager.

Provided that in any case where under the Debtors Act, 1869, s. 5, application is made by a judgment creditor to a court having bankruptcy jurisdiction for the committal of a judgment debtor, the court may, if it sees fit, decline to commit, and, in lieu, with the consent of

²⁷ See the Bankruptcy Act, 1914, s. 4 (1). The restriction to Northern Ireland follows from s. 2 of the Irish Free State (Consequential Adaptation of Enactments) Order, 1923. But note that the reference in s. 122 of the Bankruptcy Act, 1914, to Ireland must be construed as including Eire. See *post*, p. 326, note 3 ; p. 437, note 5.

the judgment creditor, make a receiving order as against the debtor.²⁸

Comment

The aim of this Rule is to impose some restrictions on a creditor's right to present a petition in bankruptcy against a debtor, even in cases in which the debtor comes within the terms of Rule 40, *i.e.*, even where the debtor is under the Bankruptcy Act, 1914, a person properly subject to the English bankruptcy law. Our Rule 42 achieves this aim by adding as one of several alternative requirements for a creditor's petition that the debtor must be domiciled in England. It does not add to the cases in which a person who commits an act of bankruptcy is a 'debtor' as defined in Rule 40, the further case of a person domiciled in England. The two Rules 41 and 42, if read carefully together with Rule 40, aim at different objects. The object of Rule 41, taken together with Rule 40, is to ensure that the court shall not adjudicate bankrupt any person unless he in strictness falls within the definition of a 'debtor' given in Rule 40 *at the time when the act of bankruptcy was committed*, and also shall have committed an indubitable act of bankruptcy. The aim of Rule 42 is not further to define the meaning of the word 'debtor', but to ensure that *no creditor shall be entitled to present a bankruptcy petition against a debtor*, unless (1) the petitioning creditor fulfils certain conditions mentioned in Rule 42, *e.g.*, bases his petition upon a debt owing by the debtor amounting to fifty pounds, and further (2) unless the debtor either is domiciled in England and falls under any one of the conditions enumerated in Rule 40 (2) (a)—(d),²⁹ or not being domiciled in England, *within a year before the date of the presentation of the petition* has fulfilled one or other of the conditions necessary for constituting a debtor as defined in Rule 40 (2) (b)—(d).

The most important practical result of Rule 42 is that a creditor may not present a petition against a debtor *merely* because the debtor, not being domiciled in England, has committed an act of bankruptcy while present on a passing visit in England.³⁰

²⁸ Bankruptcy Act, 1914, s. 107 (4); *Ex p. Clark* [1898] 1 Q.B. (C.A.) 20. There is some doubt whether the benefit of s. 107 (4) is limited to judgment creditors strictly speaking. See *Re Hallman, ex p. Ellis and Collier* [1909] 2 K.B. 430, order for divorce costs. But contrast *Ex p. Fryer* (1886) 17 Q.B.D. 718; *Ex p. Muirhead* (1876) 2 Ch.D. 22; *Re Otway* (1888) 58 L.T. 885; 5 Mor. 115.

²⁹ The burden of proving domicile rests on the creditor, but he may adduce such *prima facie* evidence as to shift the burden on the debtor. See *Re Barnes* (1886) 16 Q.B.D. (C.A.) 522. Compare *Ex p. Cunningham* (1884) 13 Q.B.D. (C.A.) 418; *Ex p. Langworthy* (1887) 3 T.L.R. 544; *Re Duleep Singh, ex p. Cross* (1890) 7 Mor. 228.

³⁰ Compare *Re Clark, ex p. Beyer, Peacock & Co.* [1896] 2 Q.B. 476, 479. See now s. 1 (2) of the Bankruptcy Act, 1914, and *ante*, p. 278 and Rule 40 (2). Provision is made by the Bankruptcy Rules, 1915, s. 155, for the service of a petition out of the jurisdiction against a debtor who is not in England, and by s. 183 of the receiving order and subsequent proceedings, while under

The difference between the two Rules will be seen from the following illustrations :—

Illustrations

1. X is a debtor domiciled in France. X owes A £100. At the time when he commits an act of bankruptcy, X resides or has a place of residence in England, *i.e.*, X comes within the definition of a 'debtor'. The act of bankruptcy, moreover, on which the petition is grounded occurs within three months before the presentation of the petition. The court has (*semble*) jurisdiction.³¹

2. X, at the time when an act of bankruptcy is committed or suffered by him, has a domicile in England, but does not otherwise fulfil any of the conditions requisite to his being a debtor within the terms of Rule 40 (2). The court has no jurisdiction to adjudicate X a bankrupt.³²

3. X, domiciled in France, while on a visit to London, notified A of his intention to suspend payment of his debts. He was not ordinarily resident in England, nor did he carry on business there, nor was he a member of a firm or partnership carrying on business there. The court has no jurisdiction on application by A to adjudicate X a bankrupt.³³

4. X is an alien, not domiciled in England. He incurs a debt in England to A, who recovers judgment in England against him for £1,000. At the time X is residing in France, and has not ordinarily resided or had a dwelling-house or place of business in England or been a member of a firm or partnership carrying on business there within the preceding year. Subsequently he returns to England in order to pay a short visit to a friend. The court has, in the circumstances, jurisdiction to commit him to prison as a judgment debtor under the Debtors Act, 1869, s. 5. The court has jurisdiction to adjudge X a bankrupt.³⁴

5. X is an alien not domiciled or resident in England who carries on business in England by means of a manager. X makes a conveyance abroad of his property for the benefit of his creditors, but this conveyance is not intended

s. 156, substituted service can be allowed where evasion is attempted, provided always the debtor is a debtor as defined by s. 1 (2). See *ante*, p. 279 and note 7, and see *Re Debtors* (No. 836 of 1935) [1936] Ch. 622. Compare *Re a Judgment Debtor* (No. 1589 of 1936) [1937] Ch. 137 (C.A.); and see *Re a Debtor* (No. 419 of 1939) [1939] 3 All E.R. 429 (C.A.). See *Re Nelson* [1918] 1 K.B. (C.A.) 459, 466, *per* Swinfen Eady, L.J., and compare *Re Urquhart* (1890) 24 Q.B.D. (C.A.) 723, decided under s. 154 of the Rules under the Act of 1883. See also Ord. XI, r. 8A (July, 1920). Note that notice of motion seeking personal relief against a person resident abroad cannot be served out of the jurisdiction. *Re Gay* (1932) 101 L.J.Ch. 127; *Re Alderson*, *ex p. Kirby* (No. 2) (1891) 8 Mor 95; see, however, *Ex p. Robertson, re Morton* (1875) L.R. 20 Eq. 733. But notice of motion for leave to disclaim can be served: *Re Curzon Brothers* (1915) 84 L.J.K.B. 1000; *Re Rathbone*, *ex p. Paterson* (1887) 56 L.J.Q.B. 504; 4 Mor. 270. But note that under s. 122 of the Bankruptcy Act, 1914, British courts having jurisdiction in bankruptcy must act in aid of the English Bankruptcy Court. See *Re Maundy Gregory* (1934) 103 L.J.Ch. 267. This provision is of course only effective in those parts of British territory where s. 122 of the Bankruptcy Act still applies.

³¹ The conditions of Rules 40 and 42, pp. 276, 284, *ante*, are satisfied.

³² *I.e.*, within the Bankruptcy Act, 1914, s. 1 (2).

³³ It is true that X is a debtor within Rule 40 (2), p. 276, *ante*, but he does not fall within the terms of Rule 42.

³⁴ This is an illustration of the proviso to Rule 42, and is the result of the combined effect of the Debtors Act, 1869, s. 5, and the Bankruptcy Act, 1914, s. 107 (4). Compare *Re Clark*, *ex p. Clark* [1898] 1 Q.B. (C.A.) 20, which was decided under the Bankruptcy Act, 1883, s. 103 (5). And see *ante*, p. 285, note 28.

to operate according to English law. The court has no jurisdiction to adjudicate X a bankrupt.³⁵

(2) WHERE COURT HAS JURISDICTION

(a) *On Creditor's Petition.*

RULE 43.³⁶—Subject to the effect of Rules 41 and 42, the court, on a bankruptcy petition being presented by a creditor, has jurisdiction to adjudge bankrupt any debtor (being otherwise liable to be adjudged bankrupt)³⁷ who has committed the act of bankruptcy on which the petition is grounded within three months before the presentation of the petition.

The jurisdiction of the court is not affected

- (1) by the fact that the debt owing to the petitioning creditor was not contracted in England³⁸ ;
or
- (2) by the absence of the debtor from England at the time of the presentation of the petition³⁹ ;
or
- (3) by the fact that either the creditor or the debtor is an alien.⁴⁰

Comment

The exercise of the court's bankruptcy jurisdiction is to a certain extent discretionary. The Court may, on the petition of a creditor or of a debtor, decline to exercise jurisdiction which it undoubtedly possesses. Such refusal, for example, may be based on the ground that the debtor has been made bankrupt in another country,⁴¹ or generally on the existence of 'any of those equitable considerations which have induced the Court . . . to say that, although the legal requisites to an adjudication were in

³⁵ *Re Debtors* (No. 836 of 1935) [1936] Ch. 622.

³⁶ See Bankruptcy Act, 1914, ss. 3, 4 and 18.

³⁷ These Rules are not concerned either with the steps which must be taken before a debtor can be adjudged bankrupt (see Bankruptcy Act, 1914, s. 18), or with the question whether proceedings should be taken in the High Court or in a county court. (Bankruptcy Act, 1914, ss. 96, 98, 102, 105).

³⁸ See *Ex p. Pascal* (1876) 1 Ch.D. (C.A.) 509, 512, 513, judgment of James, L.J.

³⁹ *Ex p. Crispin* (1873) L.R. 8 Ch. 374.

⁴⁰ *Ibid.*; *Ex p. Blain* (1879) 12 Ch.D. 522, 527, 528, 531; *Re a Debtor* (No. 385 of 1947) [1948] 2 All E.R. 538.

⁴¹ *Ex p. Robinson* (1883) 22 Ch.D. (C.A.) 816. Compare *Ex p. McCulloch* (1880) 14 Ch.D. (C.A.) 716.

all respects perfect, it was not equitable that the bankruptcy should proceed'.⁴²

The jurisdiction of the court is, as already pointed out, based, not on the petition, but on the commission of an act of bankruptcy by a debtor subject to the English bankruptcy law.⁴³ Some circumstances, therefore, such for example as the place where the debt is contracted, which might *prima facie* appear to affect the jurisdiction of the court, are irrelevant. These circumstances are enumerated in clauses 1 to 3 of our Rule.

But, although the fact that the debtor or the creditor is an alien does not, if an act of bankruptcy has been committed, affect the jurisdiction of the court, the domicile, the residence, or even the nationality of the debtor may affect the question whether the debtor has committed an act of bankruptcy. Thus the departure from England of a person domiciled in England may be an act of bankruptcy within Rule 40 (3), clause (d), where the departure from England of a foreigner, whether an alien or not, whose home is in a foreign country, would not be an act of bankruptcy.⁴⁴

Illustrations

1. X, a Portuguese domiciled in Portugal, contracts a debt⁴⁵ to A in England. He commits an act of bankruptcy in England, where he has been ordinarily resident up to the time of committing the act of bankruptcy. X then leaves England for Portugal. A, within three months after the commission of the act of bankruptcy by X, presents a bankruptcy petition against X, grounded on the act of bankruptcy. X, at the time when the petition is presented, is resident in Portugal. The court has jurisdiction to adjudge X bankrupt.⁴⁶

2. X is a Peruvian citizen domiciled in Peru, where he contracts a debt to A, an Italian citizen domiciled in Italy. X comes to reside in England, and resides there ordinarily for three months. X commits an act of bankruptcy in England. A, within a year from the time when X has ordinarily resided in England, and within three months from the commission of the act of bankruptcy, presents a petition against him grounded on such act. The court has jurisdiction.⁴⁷

3. X, an Irishman domiciled in Eire, carries on business at Dublin, and also at Liverpool, where he has a house of business. He commits an act of

⁴² *Ex p. McCulloch* (1880) 14 Ch.D. (C.A.) 716, 719, judgment of Bacon, C.J., 716, 723, judgment of James, L.J. *Re Artola Hermanos* (1890) 24 Q.B.D. (C.A.) 640; *Ex p. Gibson* (1865) 34 L.J. (Bankruptcy), 31, 32, where an adjudication was refused when the debtor left his place of domicile when he could not obtain a discharge and tried to secure adjudication in England.

⁴³ See pp. 278-281, *ante*.

⁴⁴ See *Ex p. Crispin* (1873) L.R. 8 Ch. 374, and see *ante*, p. 280, note 13. But see *Re a Debtor* (No. 335 of 1947) [1948] 2 All E.R. 533 and see *ante*, p. 233, notes 23a, 24.

⁴⁵ It is assumed in these illustrations that the debt amounts to at least £50.

⁴⁶ Compare *Ex p. Crispin* (1873) L.R. 8 Ch. 374, where the court had no jurisdiction, because under the circumstances there was no evidence of X having committed an act of bankruptcy. But see *Re a Debtor* (No. 335 of 1947) [1948] 2 All E.R. 533, and see *ante*, pp. 280, 283, notes 13, 23a, 24.

⁴⁷ Compare *Ex p. Pascal* (1876) 1 Ch.D. (C.A.) 509. The case (*semble*) would have been otherwise decided if it had come under the Bankruptcy Act, 1914. Cf. *Re a Debtor* (737 of 1928) [1929] 1 Ch. (C.A.) 362.

bankruptcy in England. A bankruptcy petition is immediately presented by a creditor against X. The court has jurisdiction.⁴⁸

4. X is an American citizen and carries on business as a financial agent. His wife and family reside at Brussels. In November, 1886, X takes a room at a London hotel. He keeps the room until the time when a bankruptcy petition against him is presented. During the period for which he takes the room he addresses his letters from the hotel, and goes backwards and forwards from the hotel. Under these circumstances X ordinarily resides in England. X commits an act of bankruptcy in England. A, within three months after the commission of the act of bankruptcy, presents a bankruptcy petition. The court has jurisdiction.⁴⁹

(b) *On Debtor's Petition.*

RULE 44.⁵⁰—The court has, on a bankruptcy petition being presented by a debtor, alleging that the debtor is unable to pay his debts, jurisdiction to adjudge the debtor bankrupt provided that he is a debtor within the meaning of Rule 40 (2).

Comment

It will be observed that in this Rule no reference is made to the restrictions on the jurisdiction of the court which are stated in Rule 42.⁵¹ The omission is intentional.

Rule 42 applies only to the case where a debtor is to be made bankrupt on the petition of a creditor. The jurisdiction, therefore, of the court to adjudge a debtor bankrupt on his own petition is unaffected by the restrictions stated in that Rule, or, to put the same thing in other words, the Bankruptcy Act, 1914, s. 4 (1) (d), on which Rule 42 is grounded, applies only where a debtor is to be made bankrupt on a creditor's petition. But the court has, in strictness, jurisdiction to make any debtor, as defined in Rule 40 (2), bankrupt on his own petition. The court, however, may,⁵² and no doubt would, decline to exercise this jurisdiction whenever it would work injustice, and the absence of all local connection with England on the part of a petitioning debtor would be a strong reason for the court's refusing, on grounds of equity and fairness, to make him bankrupt.

Illustrations

1. X, domiciled in England, incurs a debt in France, and on his return to

⁴⁸ *Ex p. McCulloch* (1880) 14 Ch.D. (C.A.) 716.

⁴⁹ *Re Norris* (1888) 4 T.L.R. 452 (C.A.). Whether X's room at the hotel also constitutes a place of business depends upon the way in which it is used. See also *Re Nordenfjelt* [1895] 1 Q.B. (C.A.) 151; *Re Hecquard* (1889) 24 Q.B.D. (C.A.) 71.

⁵⁰ Bankruptcy Act, 1914, ss. 3, 6, 18.

⁵¹ See pp. 284, 285, *ante*.

⁵² *Re Betts, ex p. Official Receiver* [1901] 2 K.B. 39; see p. 288, note 42, *ante*. See also *Ex p. McCulloch* (1880) 14 Ch.D. 716, 719, *per* Bacon, C.J., 723 (C.A.); *Ex p. Robinson* (1883) 22 Ch.D. 816, 818 (C.A.); *Re Behrends* (1865) 12 L.T. 149.

England presents a petition alleging that he is unable to pay his debts. The court has jurisdiction to adjudge X a bankrupt.⁵³

2. X is domiciled in Victoria, Australia. He has at no time been ordinarily resident or had a dwelling-house or place of business in England. He has incurred debts both in Australia and in England. X personally presents a petition in England alleging that he is unable to pay his debts. Whether the court has jurisdiction to adjudge X a bankrupt? *Semble*, the court has jurisdiction, but may refuse to exercise it.

3. X is domiciled in England, but lives abroad, his domicile being merely one of origin. He presents from Paris a petition alleging that he is unable to pay his debts. *Semble*, the court has no jurisdiction.⁵⁴

RULE 45.⁵⁵—The jurisdiction of the court to adjudge bankrupt a debtor on the petition of a creditor, or on the petition of the debtor, is not excluded by the fact of the debtor being already adjudged bankrupt by the court of a foreign country, whether such country forms part of British territory or not.

Comment

A debtor's bankruptcy, under the law of a foreign country, does not deprive the English court of jurisdiction to adjudge him a bankrupt. But the fact of his having been made bankrupt in a foreign country (*e.g.*, Scotland or France) may be a reason against the court's exercising its jurisdiction. Thus, where the debtor had already been made bankrupt in Scotland, the law was laid down as follows: 'About the jurisdiction to make an adjudication I have no doubt. . . . Of course there must be some reason for exercising it, and the mere existence of a bankruptcy in Scotland or in Ireland would, *prima facie*, be a reason for not exercising it. Here the Scotch sequestration is not closed; it does not appear that there are any subsequent debts, or any assets in England, and there is no reason for exercising the jurisdiction. . . . There ought not to be an adjudication'.⁵⁶

But, even when adjudication is held proper, the court has, of course, control of the proceedings and may stay them in so far as may be necessary in the interests of justice.⁵⁷

Illustrations

1. A carries on business in Northern Ireland and in England. On May 8 a bankruptcy petition is presented against him in England. On May 4 he is

⁵³ Bankruptcy Act, 1914, ss. 3, 6.

⁵⁴ He does not fall within the definition of debtor in the Bankruptcy Act, 1914, s. 1 (2), Rule 40 (2). See *ante*, p. 279, note 8; p. 283, note 25; and see p. 288. Note that presenting a petition does not involve personal presence in England.

⁵⁵ *Ex p. McCulloch* (1880) 14 Ch.D. (C.A.) 716; *Ex p. Robinson* (1888) 22 Ch.D. (C.A.) 816; *Re Artola Hermanos* (1890) 24 Q.B.D. (C.A.) 640; *Re O'Reardon* (1874) L.R. 9 Ch. 74.

⁵⁶ *Ex p. Robinson* (1888) 22 Ch.D. (C.A.) 816, 818, *per* Jessel, M.R.

⁵⁷ *Re a Debtor* (787 of 1928) [1929] 1 Ch. (C.A.) 362, 370.

adjudicated bankrupt on his own petition in Northern Ireland. On May 5 the English court has jurisdiction to adjudicate him bankrupt in England though the Northern Irish bankruptcy is known to and brought before the attention of the court.⁵⁸

2. On July 27, 1881, there is an unclosed sequestration against X in Scotland. In 1882 A in England presents a bankruptcy petition against X. The court has jurisdiction to adjudge X bankrupt, though it is a matter of discretion whether the court shall or shall not exercise its jurisdiction.⁵⁹

3. A petition is presented in England against X who forthwith after the serving on him of a bankruptcy notice in England applies for sequestration in Scotland, which is at once accorded. The court has, nevertheless, jurisdiction to adjudge X bankrupt, and, as there are English assets which cannot be reached under a Scottish sequestration, it will exercise its power.⁶⁰

4. X carries on business in England and in Switzerland. His creditors are mainly Swiss and a bankruptcy order is there made against him. The English court may properly adjudge X bankrupt, as he resides in England and there are creditors here.⁶¹

2. WINDING-UP OF COMPANIES ⁶²

(1) WHERE COURT HAS NO JURISDICTION

RULE 46.—The court has no jurisdiction to wind up

- (1) any company registered in Scotland or in Northern Ireland ⁶³; or
- (2) any unregistered company having a principal place of business situate in Scotland or in Northern Ireland, but not having a principal place of business situate in England ⁶⁴; or
- (3) any unregistered foreign company which, though carrying on business in England, has no place of business in England.⁶⁵

⁵⁸ *Ex p. McCulloch* (1880) 14 Ch.D. (C.A.) 716. Though the English court has jurisdiction, X's whole assets have already vested in the assignee under the Irish bankruptcy. See Rules 97, 100, *post*.

⁵⁹ *Ex p. Robinson* (1883) 22 Ch.D. (C.A.) 816.

⁶⁰ *Re a Debtor* (No. 199 of 1922) [1922] 2 Ch. (C.A.) 470. See *post*, Chapter 17, p. 441, note 24.

⁶¹ *Re a Debtor* (787 of 1928) [1929] 1 Ch. (C.A.) 362, 370.

⁶² Cheshire, pp. 632-36; Wolff, ss. 85, 287; Westlake, ss. 131-133; Palmer, *Company Law*, 18th ed., 1948, pp. 399-401; Stiebel, *Company Law*, 3rd ed., II, pp. 740-750; Companies (Consolidation) Act, 1908, ss. 131, 267, 268; Companies Act, 1929, ss. 337, 338; Companies Act, 1948, ss. 393-400. Note that orders and proceedings in the winding up of companies can be served outside England under Order XI, r. 8A. For special powers in respect of enforcing calls and examining witnesses in Scotland, see ss. 275 and 349 of the Act of 1948.

⁶³ Compare Companies Act, 1948, ss. 220, 461.

⁶⁴ Companies Act, 1948, s. 399 (2) and (3). The definition of an unregistered company is to be found in s. 398. For winding up a foreign partnership in special circumstances, see *Maunders v. Lloyd* (1862) 2 J. & H. 718.

⁶⁵ *Re Lloyd Generale Italiano* (1885) 29 Ch.D. 219, 220. Compare *Re Tosari-shestvo Manufactur Liudvig-Rabenek* [1944] Ch. 404.

The term 'the court', in this Rule and in Rule 47, means any court in England having jurisdiction to wind up a company under the Companies Act, 1948, and includes the High Court and any other court in England having such jurisdiction.

Comment

1. *Registered in Scotland, etc.*—A company cannot be registered in more than one part of the United Kingdom, and jurisdiction to wind up a company registered in Scotland or in Northern Ireland is given by the Companies Act to the proper Scottish and Northern Irish court exclusively.⁶⁶

2. *Unregistered.—Principal place of business in Scotland, etc.*—An unregistered company is to be wound up in that part of the United Kingdom where its principal place of business is situate. Hence a company which has not its principal place of business in England, but has its principal place of business, *e.g.*, in Scotland, must be wound up by the Scottish court. But a company may have a 'principal place of business' at the same time in more than one part of the United Kingdom, *e.g.*, both in England and in Scotland. In this case the proper English and Scottish courts respectively have each jurisdiction to wind up the company.⁶⁷

3. *Unregistered.—Foreign company without office, etc.*—A foreign unregistered company may carry on business in England through agents without having any English office of its own. In this case the court has no jurisdiction to wind it up.⁶⁸

Though the definition of unregistered company in section 398 of the Companies Act, 1948, is extremely wide in terms, the adoption in s. 399 of the place of business as the criterion of the choice of the court by which jurisdiction in the United Kingdom is to be exercised is clear proof that only such societies are dealt with as exist for purposes of trading, or some form of business activity such as is carried on by friendly or building societies. Such bodies as municipal corporations, ecclesiastical corporations aggregate, learned societies incorporated by Royal Charter, and ordinary clubs, are exempt from the jurisdiction of the court.⁶⁹

⁶⁶ Companies (Consolidation) Act, 1908, ss. 134, 135. The Act of 1948, s. 220, deals with Scotland; Northern Ireland remains *in statu quo* since the Act of 1948 applies only in specific points to that territory: s. 461. Similarly the Companies (Consolidation) Act, 1908, still applies in Eire and neither the courts of Eire nor of Northern Ireland can wind up English companies; see *Re Portarlinton Electric Light and Power Co.* [1922] 1 Ir.R. 100.

⁶⁷ See Rule 47, *post*; and Companies Act, 1948, s. 399 (3). For the meaning of the term 'principal place of business' see note 74, *post*, p. 293.

⁶⁸ *Re Lloyd Generale Italiano* (1835) 29 Ch.D. 219, 220; compare *Re Tonarishestoo Manufactur Liudvig-Rabenek* [1944] Ch. 404; *Re Commercial Bank of India* (1868) L.R. 6 Eq. 517; *Re Matheson* (1884) 27 Ch.D. 225.

⁶⁹ See Stiebel, *Company Law*, II, pp. 740-750.

Illustrations

1. X is a Scottish banking company having an office and registered in Scotland, but also having an office in London and carrying on a large business in England. The court has no jurisdiction to wind up the company.

2. X is an unregistered company having a principal place of business in Edinburgh and a subordinate place of business in London. The court has no jurisdiction to wind up the company.⁷⁰

3. X is a société anonyme for the carrying on of marine insurance. It is established in Genoa, in accordance with Italian law. It is not registered under the Companies Act, 1948. It carries on business in Italy and also in England. The business in England is carried on by means of agents, and X has no branch office of its own in England. The court has no jurisdiction to wind up the company.⁷¹

4. X is an ordinary club. The court has no jurisdiction to wind it up.

(2) WHERE COURT HAS JURISDICTION

RULE 47.—Subject to the effect of Rule 46, the court has jurisdiction to wind up

- (1) any company registered in England⁷²; or
- (2) any unregistered company having a principal place of business in Scotland or Northern Ireland and also in England⁷³; or
- (3) any unregistered foreign company having a place of business⁷⁴ in England.

Comment

There are three classes of companies which, subject to certain limited exceptions, the court has jurisdiction to wind up.

1. *Registered in England.*—The court has jurisdiction to wind up any company registered in England. The jurisdiction is not taken away by the fact that the company is formed to carry on business abroad, nor by the fact of its consisting of foreigners,

⁷⁰ Companies Act, 1948, s. 399 (3).

⁷¹ *Re Lloyd Generale Italiano* (1885) 29 Ch.D. 219; distinguished in *Re Tovarishestvo Manufactur Liudvig-Rabenek* [1944] Ch. 404; and see *ante*, p. 292, note 68; Companies Act, 1948, ss. 218, 399.

⁷² Companies Act, 1948, s. 218. *Reuss v. Bos* (1871) L.R. 5 H.L. 176. If the court orders winding up it will restrain actions in any part of the United Kingdom or abroad. See *post*, p. 334, note 44, and p. 335, note 47.

⁷³ Companies Act, 1948, s. 399 (2) and (3).

⁷⁴ *Re Commercial Bank of India* (1868) L.R. 6 Eq. 517; *Re Maikeson* (1884) 27 Ch.D. 225; *Re Tovarishestvo Manufactur Liudvig-Rabenek* [1944] Ch. 404. The petition to wind up the company in England must be served at the principal place of business in England: Companies (Winding up) Rules, 1929, r. 28. It is irrelevant that the company may also have a principal place of business abroad and that the latter may, on comparison, be the place of business to which major importance ought to be attached. See *Re Naamlooze Vennootschap Handelsmaatschappij Wokar* [1946] Ch. 96.

nor by the consideration that the registrar might have rightly declined to register the company.⁷⁵

2. *Unregistered and having a principal place of business, etc.*—An unregistered company which has a principal place of business in England is, though it may also have another principal place of business in Scotland or in Northern Ireland, precisely within the terms of the Companies Act, 1948, s. 399 (1), (2) and (3), and the court clearly has jurisdiction to wind it up.

3. *Unregistered foreign companies.*—These companies fall within the definition of unregistered company in the Companies Act, 1948,⁷⁶ and may be wound up by the court if they have branch offices in England. Such companies may be wound up (i) if the company is dissolved, or has ceased to carry on business, or is carrying on business only for the purpose of winding up its affairs; (ii) if the company is unable to pay its debts; (iii) if the court is of opinion that it is just and equitable that the company should be wound up. This power of the English courts to wind up a company incorporated outside Great Britain if it ceases to carry on business there, subsists even though the company has been dissolved or has ceased to exist under the law of its country of incorporation.⁷⁷ But it must be noted that the exercise of this jurisdiction is discretionary, and the fact that the company was being wound up in the country under the law of which it is constituted might be a valid reason for the court declining to exercise jurisdiction.⁷⁸ Moreover, the effect of the winding up of such a company by the court is merely to terminate its existence as a company in so far as England is concerned.

Effective means of exercising jurisdiction over these unregistered companies are provided by the Companies Act, 1948. They must

⁷⁵ *Reuss v. Bos* (1871) L.R. 5 H.L. 176. Compare *Re Madrid, etc., Railway* (1849) 3 De G. & Sm. 127; *Re Factage Parisien* (1864) 34 L.J.Ch. 140; *Re Tumacacori Mining Co.* (1874) L.R. 17 Eq. 534, 540.

⁷⁶ S. 398 of the Companies Act, 1948. See also *Re Matheson Bros.* (1884) 27 Ch.D. 225; *Re Mercantile Bank of Australia* [1892] 2 Ch. 204; *Re Commercial Bank of South Australia* (1886) 33 Ch.D. 174; *Re Syrian Ottoman Ry.* (1904) 20 T.L.R. 217; *Re Federal Bank of Australia* [1893] W.N. 77 (C.A.); *Re Queensland National Bank* [1893] W.N. 128; *Re English, Scottish and Australian Chartered Bank* [1893] 3 Ch. 385, 394.

⁷⁷ Companies Act, 1948, ss. 399 and 400. See *Russian and English Bank v. Baring Bros.* [1932] 1 Ch. 435; *Re Russian and English Bank* [1932] 1 Ch. 663; *Re Tea Trading Co. K. and C. Popoff Bros.* [1933] Ch. 647; *Re Russian Bank for Foreign Trade* [1933] Ch. 745; *Re Tovarishstvo Manufactur Liudovg-Rabensk* [1944] Ch. 404; *Re Naamlouze Vennootschap Handelsmaatschappij Wokar* [1946] Ch. 98; see also *Dairen Kisen Kabushiki Kaisha v. Shuang Kee* [1941] A.C. 373 (P.C.). For the relation between ss. 399 and 400 of the Companies Act, 1948, see *Russian and English Bank v. Baring Bros.* [1936] A.C. 405, 424; *Re Russian and English Bank* [1932] 1 Ch. 663, 669.

⁷⁸ See *Re Matheson Bros.* (1884) 27 Ch.D. 225; *Re English, Scottish and Australian Chartered Bank* [1893] 3 Ch. 385, 394, per Vaughan Williams, J.; *Re Commercial Bank of South Australia* (1886) 33 Ch.D. 174. This process is strictly auxiliary to that in the place where the company is domiciled, but is governed by English rules of procedure. Compare *Allen v. Hanson* (1890) 18 S.C.R. 667; *United Service Insurance Co., Ltd. v. Lang* (1935) 35 S.R. (N.S.W.) 487.

register the name and address of a person resident in Great Britain authorised to accept service of process and any notices. If this is not done, or the person dies or ceases to reside or refuses to accept service or for any reason cannot be served, process may be served by leaving it at or sending it by post to any place of business established by the company in Great Britain. By establishing a branch, the company becomes bound by statute to accept the jurisdiction of the court, and cannot evade it by withdrawing authority from any person to represent it, nor is it open to the person registered for service of process to have his name removed so as to terminate the jurisdiction of the court.⁷⁹

Illustrations

1. X is a company duly registered in England under the Companies Act, 1862. The subscribers to the articles of association are all foreigners resident abroad. The objects of the company are mainly the transaction of business abroad, and the company has in fact carried on little or no business in England. The court has jurisdiction to wind up the company.⁸⁰

2. X is a company formed for making a railway in Spain, and has a board of directors in Madrid and in London; the seat of the company is to be Spain, and its affairs are to be regulated by Spanish law. It is registered in England. The court has jurisdiction to wind up the company.⁸¹

3. X is an unregistered company, having a principal place of business both in Edinburgh and in London. The court has jurisdiction to wind up the company.⁸²

4. An Anglo-Belgian company is constituted a société anonyme, with domicile at Brussels and a board of directors there and in London, where it has a branch office. The object of the company is to make a railway in Belgium. The court has jurisdiction to wind up the company.⁸³

5. X is a joint-stock company formed in India and incorporated by registration under Indian law. It has a principal place of business in India, but has a branch office and agent in England. The court has jurisdiction to wind up the company.⁸⁴

6. X is an unregistered joint-stock company, formed and having its principal place of business in New Zealand, but has a branch office, agent, assets and liabilities in England. The court has jurisdiction to wind up the company.⁸⁵

7. X is a banking company incorporated and carrying on business in Australia and is not registered in England but has a branch office in London. The company has English creditors and assets in England. The court has jurisdiction to wind up the company.⁸⁶

8. X, a banking company registered in India, has branch offices in

⁷⁹ Companies Act, 1948, ss. 407 (1), 409, 412; *Employers' Liability Assurance Corporation v. Sedgwick, Collins & Co.* [1927] A.C. 95; *Sabatier v. The Trading Co.* [1927] 1 Ch. 495. For service under r. 28 of the Companies (Winding-up) Rules, 1929, see *Re Naamloze Venmoetschap Handelsmaatschappij Wokar* [1946] Ch. 98.

⁸⁰ *Re General Co. for Promotion of Land Credit* (1870) L.R. 5 Ch. 363; *Reuss v. Bos* (1871) L.R. 5 H.L. 176.

⁸¹ *Re Madrid, etc., Co.* (1849) 3 De G. & Sm. 127; *Re The Factage Parisien* (1864) 34 L.J.Ch. 140; *Re Peruvian Railways* (1867) L.R. 2 Ch. 617.

⁸² Companies Act, 1948, s. 399 (3).

⁸³ Suggested by *Re Dendre Valley Co.* (1850) 19 L.J.Ch. 474.

⁸⁴ *Re Commercial Bank of India* (1868) L.R. 6 Bq. 517.

⁸⁵ *Re Matheson* (1884) 27 Ch.D. 225.

⁸⁶ *Re Commercial Bank of South Australia* (1886) 33 Ch.D. 174.

Edinburgh and in London. The London office is worked in subordination to that in Edinburgh. The court has no jurisdiction.^{86a}

9. X is a banking company, incorporated in Russia, and carrying on business by a branch in London. The company is dissolved in Russia by decrees confiscating all private businesses dealing with banking to the State. The court has jurisdiction to wind up the company.⁸⁷

^{86a} Companies Act, 1948, s. 399 (3).

⁸⁷ Companies Act, 1948, s. 399 (5), which allows winding up by the court of an unregistered company 'if the company is dissolved'. See *Russian and English Bank v. Baring Bros.* [1936] A.C. 405; *Russian and English Bank v. Baring Bros.* [1932] 1 Ch. 435; *Re Russian and English Bank* [1932] 1 Ch. 668; *Re Tea Trading Co. K. and C. Popoff Bros.* [1938] Ch. 647; *Re Russian Bank for Foreign Trade* [1933] Ch. 745; *Re Tovarishstvo Manufactur Liudvig-Rabenek* [1944] Ch. 404; *Re Naamlooze Vennootschap Handelmaatschappij Wokar* [1946] Ch. 98; *Dairen Kisen Kabushiki Kaisha v. Shiang Kee* [1941] A.C. 373 (P.C.) Compare *Russian Commercial and Industrial Bank v. Comptoir d'Escompte de Mulhouse* [1925] A.C. 112, 148; *Banque Internationale de Commerce de Petrograd v. Goukassow* [1925] A.C. 150; *Employers' Liability Assurance Corporation v. Sedgwick, Collins & Co.* [1927] A.C. 95. See also *Allen v. Hanson* (1890) 18 S.C.R. 667; distinguishing *Merchant Bank of Halifax v. Gillespie* (1884) 10 S.C.R. 812. For the relation between sections 399 and 400 of the Companies Act, 1948, see *Russian and English Bank v. Baring Bros.* [1936] A.C. 405, 424; *Re Russian and English Bank* [1932] 1 Ch. 668, 669. The Crown, of course, can claim any *bona vacantia* if a company disappears from existence.

JURISDICTION IN MATTERS OF ADMINISTRATION AND SUCCESSION¹*Interpretation of Terms.*

RULE 48.—In this Digest, unless the context or subject-matter otherwise requires,

- (1) 'Property'² means and includes :—
 - (i) any immovable ;
 - (ii) any movable.
- (2) 'Administrator' includes an executor.
- (3) 'Personal representative' includes an administrator, and also any person who, however designated, is under the law of any country entitled in such country to represent a deceased person, and, as his representative, to deal with the property of the deceased by way of administration.
- (4) 'Foreign personal representative' means the personal representative of the deceased under the law of a foreign country.
- (5) 'Administration' means the dealing according to law with the property of a deceased person by a personal representative.
- (6) 'Succession' means beneficial succession to the property of a deceased person.
- (7) 'Grant' means a grant of letters of administration, or of probate of a will.
- (8) 'English grant' means a grant made by the court.

¹ See Cheshire, 668-670; Wolff, ss. 580-585; Breslauer, Part IV; Halsbury's *Laws of England*, 2nd ed., Vol. 14, *sub tit.* Executors and Administrators; Falconbridge, Chap. 22; Goodrich, Chap. 14; Restatement, Chap. 11.

² See, for the definition of immovable and movable, and as to division of property into immovables and movables, and as to its relation to the division into realty and personalty, pp. 40, 41, 45, 46, *ante*; *post*, Chap. 21.

- (9) 'Assets' means such property of a deceased person as an administrator who has obtained an English grant is bound to account for or is chargeable with.

Comment

(1) *Property*.—The division of property, or, in strictness, of the objects of property or ownership, which is generally followed in this Digest, is the division into immovables and movables. With the different division of property followed by English lawyers into realty (or real property), and personalty (or personal property), we need not, for the purpose of this treatise, in general, concern ourselves. In some, however, of the Rules in this Digest, and certainly in the Rules which concern the jurisdiction of the High Court in matters of administration, it is necessary or convenient to keep in view the mode of division adopted by English law, and to understand clearly its relation to the division into immovables and movables; it is well also to keep before one's mind the meaning of certain terms of English law, *e.g.*, land,³ goods, and *choses in action*, which are closely connected with the division of property into real property and personal property.

(2) *Administrator*.—Under English law, the representative of a deceased person, in respect of his property, is, apart from cases where in an administration action a receiver is appointed by the Chancery Division,⁵ always either an 'administrator', *i.e.*, a person entitled to represent an intestate (or at any rate a deceased person who is not represented by an executor) or an 'executor', *i.e.*, a person appointed by the will of a testator to represent him in respect of his property, and to deal with such property in accordance with the terms of the will. Thus, according to the usual terminology of English law, an 'administrator', in the technical sense of the term, is opposed to an 'executor'. For the purposes of this Digest, however, it is convenient to make the term 'administrator' include an executor, and thus to give it a somewhat wider sense than it usually receives in English law books.

(3) *Personal representative*.—The term 'personal representative' is here used in a very wide sense; it includes a person who, under any legal system, represents an intestate, or a testator, in regard to his property.

³ For definitions see Co. Litt. 4a; compare Law of Property Act, 1925, s. 205 (1) (ix).

⁵ See Supreme Court of Judicature Act, 1925, s. 45; Ord. L, r. 16; Kerr, *Treatise on the Law and Practice as to Receivers*, 11th ed., Chap. 6. It is not necessary for the purpose of this Digest to treat specially this case, nor that of the administration of the estate of a deceased insolvent under the Bankruptcy Act, 1914, s. 180, replaced by the Administration of Estates Act, 1925, s. 34, but re-enacted by the Expiring Laws Act, 1925, as the principles of administration and bankruptcy apply to these cases.

As applied, however, to England, it denotes 'executor' and 'administrator' under the Administration of Estates Act, 1925. s. 55 (1), and thus is equivalent to an administrator in the sense given to that term in this Digest.

(5) *Administration*, (6) *Succession*.—The terms 'administration' and 'succession' are purposely so defined as to be applicable to foreign countries (e.g., to France) no less than to England. The two things are essentially different, for the one means the dealing with a deceased person's property according to law, the other the succeeding to it beneficially. And English law, in common with the systems which follow the law of England, emphasises the distinction between administration and beneficial succession.

'Administration'⁶ means in England the dealing according to law with the property of an intestate, or testator, by the person who has authority under English law so to deal with it.

No one can fully represent the deceased, or has a right in all respects to deal with his property, e.g., to distribute it, who has not obtained authority to do so from the court.⁷ If the deceased has made a will appointing an executor who consents to act, then the necessary authority is acquired by the executor obtaining from the court probate of the will. In such executor will vest all personal property of the deceased immediately upon the death and, in case of a death occurring after 1897, also all real property,⁸ with the exception of settled land, which passes to special statutory executors.⁹ If the deceased died intestate, or, having made a will, has either appointed no executor or has appointed an executor who declines to act, the necessary authority is acquired by the proper person (e.g., the husband, wife, or child of the deceased) obtaining from the court a grant of letters of administration. Where there is a will but no executor the grant is made *cum testamento annexo*; otherwise a general¹⁰ grant of administration is normally made. Upon a death intestate personal property of the deceased vests pending a grant of administration in the probate judge.¹¹ Since 1925 the same is the case with real property.¹²

⁶ As to some ambiguities of the word 'administration', see language of Lord Selborne in *Ewing v. Orr-Ewing* (1885) 10 App. Cas. 453, 504.

⁷ See *Johnson v. Warwick* (1856) 17 C.B. 516, 522; *New York Breweries Co. v. Att.-Gen.* [1899] A.C. 62; *Fidelity Trust Co. v. Fenwick* (1921) 51 O.L.R. 23, 25. But as to a statutory exception in regard to life insurance policies see *post*, p. 311.

⁸ Land Transfer Act, 1897, s. 1; now Administration of Estates Act, 1925, s. 1.

⁹ Administration of Estates Act, 1925, ss. 22-24.

¹⁰ As to limited grants see Tristram & Coote, *Probate Practice*, 19th ed., Chap. 11. See also *In Goods of Henley* [1886] W.N. 184; *Re Estate of Von Brentano* [1911] P. 172; *Patteson v. Hunter* (1861) 30 L.J.P. & M. 272; *In Goods of Tréfond* [1899] P. 247; *In Goods of Smith* [1904] P. 114; *In Goods of Da Cunha* (1828) 1 Hag. Ecc. 237.

¹¹ Court of Probate Act, 1856, s. 19.

¹² Administration of Estates Act, 1925, s. 9.

The authority of an administrator (in this restricted sense of the term), though upon appointment his title dates back to the death,¹³ depends strictly upon his having obtained letters of administration, whilst that of an executor derives ultimately from the will and is recognised rather than conferred by the grant of probate to him.¹⁴ The duty of an administrator, including in that term an executor, is to pay the duties¹⁵ and debts due from the property of the deceased intestate or testator, and, having thus 'cleared' the estate, to hand over what remains to the person or persons entitled to succeed to it according to law.

'Succession' means the succeeding beneficially to the property of a deceased person, *i.e.*, to the portion which remains in the hands of the administrator after the estate has been cleared. There can be no distribution without prior administration, but administration does not imply participation in the succession. In this respect English law differs very much from Roman and modern romanesque law.¹⁶ Nevertheless, also in England the grant commonly follows the interest.¹⁷

(7) *Grant*, (8) *English grant*.—The court, as already pointed out, where the deceased person dies intestate, grants letters of administration, and, where he has made a will and appointed an executor who acts, grants probate. The word 'grant', as used in these Rules, includes a grant of either kind. The expression 'English grant', which is not a technical one, is used only for the sake of brevity, and to distinguish a grant made by the court from a grant of administration or probate made by some foreign court.

A grant is, in the usual course of things, made by the court as the result of proceedings which are non-contentious, or, as they are technically called, in 'common form.'¹⁸ But if the right to represent an intestate or testator is, or may be, disputed, it becomes the subject of an action in the Probate Division of the High Court, called a 'probate action', and a grant is made by the court as a result of such action.

¹³ *In Goods of Pryse* [1904] P. 301, 305. See also *Re Barnett's Trusts* [1902] 1 Ch. 847, 857.

¹⁴ *Woolley v. Clark* (1822) 5 B. & Ald. 744; *Thompson v. Reynolds* (1827) 3 C. & P. 123.

¹⁵ Also on foreign personalty in the hands of the English administrator: see *Duncannon v. Manchester* [1912] 1 Ch. 540.

¹⁶ See Wolff, s. 273; Breslauer, p. 203; Cheshire, 666-667.

¹⁷ For the priority of persons entitled to a grant, see the Probate Non-Contentious Rules, ss. 119-120. But note that though a foreign administrator may be entitled to claim an English grant *qua* next-of-kin the practice is to make the grant to him *qua* representative under the *lex domicilii*: *In Estate of Humphries* [1984] P. 78.

¹⁸ See Tristram & Coote, *Probate Practice*, 19th ed.; the Probate Non-Contentious Rules, 1863, as amended.

1. ADMINISTRATION

RULE 49.¹⁹—The court has jurisdiction to make a grant²⁰ in respect of the property of a deceased person, either

- (1) where such property is locally situate in England at the time of his death; or
- (2) where such property has, or the proceeds thereof have, become locally situate in England at any time since his death;

but the circumstance that the deceased left no property whatsoever in England is not by itself a bar to a grant.²¹

The locality of the deceased's property under this Rule is not affected by his domicile at the time of his death.²²

Comment

The foundation of the jurisdiction of the court traditionally was that there was property of some kind of the deceased to be distributed within its jurisdiction, *i.e.*, in England. It did not make any difference that goods of the deceased which, at the time of his death or after his death, had been in England, had been subsequently removed; in such a case there would be a right of action against any person who wrongfully removed them. The exercise, however, of the court's jurisdiction has always been to a certain extent a matter of discretion, at any rate where a grant is applied for only by a legatee as opposed to one of the relatives normally entitled to a grant and there are executors elsewhere, duly administering the great bulk of the effects.²³

Where on the other hand, there was not or had not been in England any property (using that term in its very widest sense) of the deceased, the court had no jurisdiction to make a grant.²⁴

¹⁹ *Preston v. Melville* (1840) 8 Cl. & F. 1; *Enohin v. Wylie* (1862) 10 H.L.C. 1; *Att.-Gen. v. Bouwens* (1838) 4 M. & W. 171; *In Goods of Tucker* (1864) 3 Sw. & Tr. 585; *In Goods of Goode* (1867) L.R. 1 P. & D. 449; *Att.-Gen. v. Hope* (1884) 1 C.M. & R. 530; 2 Cl. & F. 84. Compare *In Goods of Fittock* (1863) 32 L.J.P. & M. 157; *In Goods of Lord Howden* (1874) 43 L.J.P. & M. 26; *In Goods of De la Saussaye* (1873) L.R. 3 P. & D. 42; *In Goods of Harris* (1870) L.R. 2 P. & D. 83; *Estate of Cocquerel* [1918] P. 4; *In Goods of De la Rue* (1890) 15 P.D. 185; *In Goods of Seaman* [1891] P. 253; *In Goods of P. A. Fraser* [1891] P. 286; *In Goods of Tamplin* [1894] P. 39; *Robinson v. Palmer* [1901] 2 Ir.R. 489; *Meyappa Chetty v. Supramanian Chetty* [1916] 1 A.C. 603, 609.

²⁰ For the meaning of 'grant', see Comment to Rule 48, *ante*.

²¹ See Administration of Justice Act, 1932, s. 2 (1).

²² *Att.-Gen. v. Hope* (1884) 1 C.M. & R. 530; 2 Cl. & F. 84; *Fernandes' Executors' Case* (1870) L.R. 5 Ch.App. 314; *In Goods of Ewing* (1881) 6 P.D. 19; *Laidlay v. Lord Advocate* (1890) 15 App.Cas. 468, 483.

²³ *In Goods of Ewing* (1881) 6 P.D. 19.

²⁴ As to grants made in case of property *in transitu* to England or virtually so see *Att.-Gen. v. Pratt* (1874) L.R. 9 Ex. 140; *Wyckoff's Case* (1862) 3 Sw. & Tr. 20; Story, ss. 519-520.

Thus a will disposing only of property in a foreign country was not admitted to probate, unless it confirmed, or was confirmed by an English will.²⁵ The reason for this was that the jurisdiction of the Ecclesiastical Courts, from which the probate jurisdiction of the High Court has been inherited, was based upon the presence of movables. A further reason was that a grant would be ineffective if there were no assets within the control of the court, whose function is not to determine abstract questions as to who is the proper representative of a deceased person.²⁶

But where a person died domiciled in a British possession leaving no estate in England the court might, for the convenience of the personal representatives, allow the foreign grant to be resealed.²⁷ Further, administration might be granted *ad litem* if there was a question as to title to a fund in court.²⁸

The former rule, was, however, abrogated by the Administration of Justice Act, 1932.²⁹ The purpose of the provision is to enable English grants to be made in respect of persons dying abroad domiciled in England but leaving no property here where such grants of the *forum domicilii* are insisted upon by the foreign court as a necessary preliminary to a foreign grant.³⁰ Its effect is to render the probate jurisdiction universal. But, as pointed out already, its exercise depends in some measure upon discretion, so that the rules as to the *situs* of assets developed as corollaries to the earlier rule are still of importance.

It should be noted that the Act of 1932 is in terms absolute. It does not confine jurisdiction where there is no property in England to the case where the deceased died domiciled in England, as is

²⁵ *In Goods of Fraser* [1891] P. 285; *In Goods of Smart* (1884) 9 P.D. 64; *In Goods of Tamplin* [1894] P. 39; *In Goods of Cotton* [1923] 2 Ir.R. 52; *In Goods of Ruffhead* (1864) 1 W.W. & A.B. 70. If the foreign will incorporates the English will, then, of course, it will be admitted to probate as it covers English property, *In Goods of Lord Howden* (1874) 43 L.J.P. & M. 26; *In Goods of Lockhart* (1893) 69 L.T. 21; *In Goods of De la Saussaye* (1873) L.R. 3 P. & D. 42; *In Goods of Meatyard* [1903] P. 125. Otherwise probate is granted of the English will only and a reference to the foreign will made therein: *In Goods of Seaman* [1891] P. 253. See also *In Estate of Schenley* (1904) 20 T.L.R. 127; *In Goods of Astor* (1876) 1 P.D. 150; *In Estate of White Todd* [1926] P. 173; *In Goods of De la Rue* (1890) 15 P.D. 185; *In Goods of Callaway* (1890) 15 P.D. 147. If the foreign original cannot be made available probate may be granted of a notarial copy, *In Goods of Von Linden* [1896] P. 148; *In Goods of Lemme* [1892] P. 89. Analogously when a will is required to be proved in England as inter-dependent (*Sheldon v. Sheldon* (1844) 1 Rob.Ecc. 81), an examined and sealed copy may be retained and the original released to be proved in America, *In Estate of White Todd* [1926] P. 173.

²⁶ *In Goods of Tucker* (1864) 3 Sw. & Tr. 585, 586; Cheshire, 668. For a possible exception to the former rule, see as to policies of life assurance, *post*, p. 311.

²⁷ *In Goods of Sanders* [1900] P. 292; *sed dub.* As to the extension under statute of English grants to other parts of the United Kingdom and other British territories, and the extension to England of grants of courts of such parts or territories, see Rules 61-63, and 108-110, *post*.

²⁸ *In Goods of Turner* (1864) 33 L.J.P. & M. 180.

²⁹ S. 2 (1).

³⁰ Compare *In the Goods of Tucker* (1864) 3 Sw. & Tr. 585.

often assumed³¹ and as would be logical. It may be, however, that the Act is not intended to alter the general rule that there is no jurisdiction over foreign immovables.³²

Further, it is to be noticed that the Act of 1932 does not in any way apply to foreign administrations, so that it effects no change in the rule that by English law the courts of a foreign country have jurisdiction when, and only when, there are assets situated in that country.³³

*The 'situation' of property.*³⁴—In most instances the situation of property, *i.e.*, whether it is or is not situate in England, does not admit of doubt; but it sometimes happens that there is a real difficulty in affixing to property, especially where it consists of debts or other *choses in action*, its due local position. Of the latter, it was formerly said *mobilia sequuntur personam*—that they had no locality.³⁵ But this view is not now generally accepted in English law. In the determination of the locality properly assignable to the different kinds of personalty which have been owned by a testator or intestate, the High Court is in the main guided by maxims derived from the practice of the ecclesiastical tribunals. These maxims, as modified by statutory enactments, are based on two considerations: the first is, that property, so far as it consists of tangible things, must in general be held situate at the place where at a given moment it actually lies; the second is, that property may in some instances, and especially where it consists of debts or *choses in action*, be held to be situate at the place where it can be effectively dealt with. From these two considerations flows the following general maxim, *viz.*, *that whilst lands, and generally, though not invariably, goods, must be held situate at the place where they at a given moment actually lie, debts, choses in action, and claims of any kind must be held situate where the debtor or other person against whom a claim exists resides; or, in other words, debts or choses in action are generally to be looked upon as situate in the country where they are properly recoverable or can be enforced.* Thus English lands, whether freehold or leasehold, sums charged on them and rents of leaseholds, are situate in England; and so goods, lying in a warehouse in England, are to be held situate in England, and debts due from debtors resident in England, such as deposits in banks, are also to be held there situate; French lands, on the other hand—goods in

³¹ Wolff, s. 582; Breslauner, 201; compare Cheshire, 668; see also R. S. C., Ord. II, r. 1 (d) and r. 3.

³² See Breslauner, p. 201, note 7. See also Rule 20, *ante*. But see p. 313, *post*.

³³ See Rule 74, *post*.

³⁴ See Falconbridge, Ch. 20.

³⁵ See *Sill v. Worswick* (1791) 1 H.Bl. 665, 690; *Re Ewin* (1880) 1 Cr. & J. 156; *Lee v. Abdy* (1896) 17 Q.B.D. 309; *Smelting Co. of Australia, Ltd. v. Commissioners of Inland Revenue* [1897] 1 Q.B. 175; *Velasquez, Ltd. v. Commissioners of Inland Revenue* [1914] 3 K.B. 458; *Danubian Sugar Factories v. Commissioners of Inland Revenue* [1901] 1 Q.B. 245 (*overruled English, etc., Bank v. Inland Revenue Commissioners* [1932] A.C. 239).

French warehouses, and, in general, debts due from debtors resident in France—are to be held situate in France.³⁶ But where a simple contract debt may be held in law to be situate in more than one place, the court will consider in which place it is more properly payable under English law, though a foreign court might take a different view.³⁷ If the place of payment of a debt be stipulated it will be there situate, the general rule notwithstanding.³⁸ A cause of action in contract or tort is situate where action may be brought upon it.³⁹

The considerations on which our general maxim is grounded introduce some real or apparent exceptions to its operation :

(1) *Ships*. Any British ship, belonging to a deceased person, which is registered at any port of the United Kingdom, is to be held, for some purposes at any rate, to be situate at that port.⁴⁰ Such a ship is incapable of voluntary transfer save under the law prevailing at the port of registry, even though she be in a foreign port.⁴¹ But the involuntary transfer of a British ship,⁴² or the sale of a cargo⁴³ under foreign law will be recognised in England. *Semble*, the same rule applies to foreign vessels.⁴⁴ Goods on the high seas which are capable of being dealt with in England by means of bills of lading in this country are, wherever actually situate, to be held situate in England⁴⁵; and goods which at the death of the deceased owner are *in transitu* to this country, and arrive here after his death, are apparently to be held situate in England at his death.⁴⁶

(2) *Bonds and bills of exchange*. When bonds, again, or other

³⁶ As to the locality of a simple contract debt, see *Yeomans v. Bradshaw* (1695) Holt K.B. 42; *Att.-Gen. v. Higgins* (1857) 2 H. & N. 339, 348; *Att.-Gen. v. Bouwens* (1838) 4 M. & W. 171, 192; *Re Maudslay, Sons & Field* [1900] 1 Ch. 602; *Payne v. R.* [1902] A.C. 552; *Att.-Gen. v. Sudeley* [1896] 1 Q.B. 364, 360; *Clare & Co. v. Dresdner Bank* [1915] 2 K.B. 576, 578; *Joachimson v. Swiss Bank Corporation* [1921] 3 K.B. 110, 127; *Swiss Bank Corporation v. Behnmasche Industrial Bank* [1923] 1 K.B. 673; *Republic of Guatemala v. Nunez* [1927] 1 K.B. 669, 687; *Richardson v. Richardson* [1927] P. 228; *New York Life Insurance Co. v. Public Trustee* [1924] 2 Ch. 101; *R. v. Lovitt* [1912] A.C. 212; *In Goods of Smith* [1904] P. 114; *Re Russian Bank for Foreign Trade* [1933] Ch. 745; *English, etc., Bank v. Commissioners of Inland Revenue* [1932] A.C. 239; *Bitter v. Secretary of State of Canada* [1944] 3 D.L.R. 483; as to mortgage and specialty debts, see *post*, pp. 305-6.

³⁷ *New York Life Insurance Co. v. Public Trustee* [1924] 2 Ch. 101, 117, 118; compare 119-122; *R. v. Lovitt* [1912] A.C. 219.

³⁸ See *Re Russo-Asiatic Bank* [1934] Ch. 720 and *post*, p. 307.

³⁹ *Sutherland v. Administrator of German Property* [1934] 1 K.B. 428.

⁴⁰ Revenue Act, No. 2, 1864, ss. 4, 5.

⁴¹ Merchant Shipping Act, 1894, s. 44 (11); compare the Merchant Shipping Act, 1906, s. 51, and *The Polzeath* [1916] P. 241.

⁴² *Castrique v. Imrie* (1870) L.R. 4 H.L. 414; contrast *Simpson v. Fogo* (1868) 1 H. & M. 195; *The Segredo* (1853) 1 Spinks Eccl. & Adm. 36.

⁴³ *Cammell v. Sewell* (1860) 5 H. & N. 728; compare *The Gratitude* (1801) 3 C. Rob. 240, 259 and *Freeman v. East India Co.* (1822) 5 B. & Ald. 617.

⁴⁴ See *Hooper v. Gumm* (1867) L.R. 2 Ch. App. 282.

⁴⁵ *Att.-Gen. v. Hope* (1834) 1 C.M. & R. 530; but see *North-western Bank v. Poynter* [1895] A.C. 66.

⁴⁶ *Att.-Gen. v. Pratt* (1874) L.R. 9 Ex. 140; *Wyckoff's Case* (1862) 3 Sw. & Tr. 20.

securities, e.g., bills of exchange, forming part of the property of a deceased person, are in fact in England and are marketable securities in England, saleable and transferable there by delivery only, with or without indorsement, without its being necessary to do any act out of England in order to render the transfer valid, not only the bonds or bills themselves, but also, what is a different matter, the debts or money due upon such bonds or bills, are to be held situate in England, and this though the debts or money are owing from foreigners out of England.⁴⁷ The reason manifestly is that the bonds or bills, though they may from one point of view be looked upon as mere evidence of debts which, being due from persons resident abroad, should be considered situate in a foreign country, are in reality chattels of which the representative of the deceased owner can obtain the full value in England, and this without doing any act in a foreign country. Such bonds differ essentially from any foreign stock which cannot be fully transferred by the representative of the deceased without doing some act in a foreign country. The certificates or other documents, if any, held by the owner of such stock, may be in England, but they are mere evidence of a debt due from a foreign government, or, in other words, from a debtor not resident in England, and this debt, i.e., the stock, must apparently be held to be situate out of England.⁴⁸ But a certificate of shares in a foreign company which are marketable in England, on which a form of transfer and power of attorney has been indorsed and executed, is property situate there.⁴⁹

(3) *Specialties*. It was the view of the ecclesiastical tribunals that a debt due on a deed or other specialty was to be considered as situate, not where the debtor resided, but at the place where the deed itself was situate.⁵⁰ This doctrine was modified, in so far as concerns stamp duty on grants, by statute.⁵¹ Thus a debt due on a deed situate in England from a debtor resident abroad,⁵² and also a debt due on a deed situate abroad from a debtor resident in England,⁵³ must each be held situate in England. But a debt due

⁴⁷ *Att.-Gen. v. Bouwens* (1838) 4 M. & W. 171; *Winans v. The King* [1908] 1 K.B. (C.A.) 1022; *Winans v. Att.-Gen.* (No. 2) [1910] A.C. 27; see also *Provincial Treasurer of Manitoba v. Bennett* [1937] 2 D.L.R. 1; *Re Aschroft, Clifton v. Strauss* [1927] 1 Ch. 313; *Re Moore* [1937] 2 D.L.R. 746. Compare *Re Clark* [1904] 1 Ch. 294; *In Goods of Agnese* [1900] P. 60; *Att.-Gen. v. Glendinning* (1904) 92 L.T. 87; *Crosby v. Prescott* [1923] S.C.R. 446. See also *Favorke v. Steinkopff* [1922] 1 Ch. 174. American views differ; see Goodrich, s. 178.

⁴⁸ Compare *Att.-Gen. v. Bouwens* (1838) 4 M. & W. 171, 192, 193, with *Att.-Gen. v. Dimond* (1881) 1 Cr. & J. 356; *Att.-Gen. v. Hope* (1834) 1 C.M. & R. 590; *Pearse v. Pearse* (1838) 9 Sim. 430.

⁴⁹ *Stern v. R.* [1896] 1 Q.B. 211. Cf. *Re Brookfield* [1948] 4 D.L.R. 210.

⁵⁰ See *Commissioner of Stamps v. Hope* [1891] A.C. 476; *Gurney v. Rawlins* (1886) 2 M. & W. 87; *Re Deane* [1836] Ir. R. 556.

⁵¹ See Revenue Act, 1862, s. 39.

⁵² *Commissioner of Stamps v. Hope* [1891] A.C. 476.

⁵³ Revenue Act, 1862, s. 39.

on a deed situate abroad from a debtor resident abroad is, like any other debt due from such debtor, to be held situate out of England.⁵⁴ A further statutory anomaly exists in connection with specialties: where a system of land registration is in force and a deed is retained in the registry it is treated as there situate.⁵⁵ A mortgage debt must normally be a specialty. But if by a foreign system of law a foreign mortgage debt is treated as an immovable, *semble*, it will be treated in England as a foreign immovable.⁵⁶ A government obligation, issued under statutory authority and signed but not sealed, is treated as a specialty.⁵⁷ A British *imperial* obligation, however, is differently treated.⁵⁸ A share certificate under seal is not a specialty.⁵⁹

(4) *Judgment debts* are assets, for the purposes of jurisdiction, where the judgment is recorded; this rule, though it sounds technical, is in substantial conformity with the principle regulating the locality of debts, for a judgment debt is enforceable by execution, or some similar process, in the country where the judgment is recorded.⁶⁰

(5) *A share in a partnership business* is to be held situate, not where the surviving partners reside, but where the business is carried on.⁶¹ A share in land of the partnership may, however, also be considered to be situate where it in fact is.⁶² A partnership debt is situate where the partnership business is carried on, not where any individual partner lives.

(6) *Shares in companies* are situate at the place where they can be transferred, which is normally the registered office.⁶³ So shares in a company registered in England are situated in England.⁶⁴ Anomalously, the same is the case with shares in an English company registered in a Dominion register if the owner dies domiciled in England.⁶⁵ But, apart from this exception, if the shares are registered not at the head office of a foreign company

⁵⁴ See pp. 303, 304, *ante*, and *Winans v. Att.-Gen.* (No. 2) [1910] A.C. 27.

⁵⁵ *Toronto General Trust Corporation v. The King* [1919] A.C. 679.

⁵⁶ See *Lawson v. Commissioners of Inland Revenue* [1896] 2 Ir.R. 418, 435; and compare *Re Fitzgerald* [1904] 1 Ch. 573, 583; *Winans v. Att.-Gen.* (No. 2) [1910] A.C. 27; *Re Hoyles* [1911] 1 Ch. 179.

⁵⁷ *Royal Trust Co. v. Att.-Gen. for Alberta* [1930] A.C. 144.

⁵⁸ See *Cunningham's Trustees v. Cunningham* [1924] S.C. 581; compare *Drysdale's Trustees v. Drysdale* [1922] S.C. 741.

⁵⁹ See *R. v. Williams* [1942] A.C. 541.

⁶⁰ *Att.-Gen. v. Bouwens* (1888) 4 M. & W. 171, 191, judgment of Abinger, C.B.

⁶¹ *In Goods of Ewing* (1881) 6 P.D. 19, 23. Compare, however, *Att.-Gen. v. Sudeley* [1895] 2 Q.B. 526, 530, judgment of Russell, L.C.J.: see *Beaver v. Master in Equity of Victoria* [1895] A.C. 251; *Commissioner of Stamp Duties v. Salting* [1907] A.C. 449; *Laidlay v. Lord Advocate* (1890) 15 App.Cas. 468.

⁶² *Boyd v. Att.-Gen. for British Columbia* (1916) 54 S.C.R. 532.

⁶³ *Brassard v. Smith* [1925] A.C. 371, 376; *Treasurer of Ontario v. Blonde* [1947] A.C. 24. But see *Braun v. The Custodian* [1944] 4 D.L.R. 209.

⁶⁴ *New York Breweries Co. v. Att.-Gen.* [1899] A.C. 62; *Commissioners of Inland Revenue v. Maple & Co., Ltd.* [1908] A.C. 22; *Re Aschrott* [1927] 1 Ch. 313.

⁶⁵ *Companies Act*, 1948, s. 121.

but at a branch office in another country, and are transferable at the branch office, then they are situate where the latter is.⁶⁶

(7) *Patents and trade marks.* On the same principle as shares in companies, patents⁶⁷ and trade marks⁶⁸ are situate where they can be transferred.

(8) *Goodwill* of a business is situate where the business premises are.⁶⁹

(9) *A share in a trust estate* when the trustees reside in the country of domicile of the testator will be regarded as there situate; a share in an undivided trust estate is situate where the trustees reside.⁷⁰

(10) *Debts payable at a defined place* must be regarded as situate there. Policies of insurance are frequently expressed to be so payable. Where this is the case they are treated as situate at the place of payment.⁷¹ But the decisions concerning insurance policies are likely to be found confusing since, such policies being generally specialties, the rule stated above regarding the *situs* of specialty contracts may apply to them.⁷² A bank deposit, also, is situate where the branch of deposit is, because, although the bank may be suable elsewhere, e.g., where its head office is, a demand must first be made at the branch where the account is kept before action lies.⁷³

Most of the reported decisions and of the enactments with regard to the local situation of a deceased person's personalty have immediate reference, not to jurisdiction, but to the liability of the deceased's property to the payment of probate duty.^{73a} The two matters, however, are closely connected. The jurisdiction of the

⁶⁶ *Brassard v. Smith* [1925] A.C. 371; *London and South American Investment Trust v. British Tobacco Co. (Australia)* [1927] 1 Ch. 107; *Erie Beach Co. v. Att.-Gen. for Ontario* [1930] A.C. 161; *R. v. Williams* [1942] A.C. 541; *Treasurer of Ontario v. Blonde* [1947] A.C. 24. But see *Braun v. The Custodian* [1944] 4 D.L.R. 209.

⁶⁷ *Wilderman v. Berk & Co.* [1925] Ch. 116.

⁶⁸ Compare *Lecouturier v. Rey* [1910] A.C. 262.

⁶⁹ *C. I. R. v. Muller, etc.*, [1901] A.C. 217.

⁷⁰ *Sudeley v. Att.-Gen.* [1897] A.C. 11; *Re Smyth* [1898] 1 Ch. 89; *Att.-Gen. v. Johnson* [1907] 2 K.B. 885; *Commissioner of Stamp Duties (N. S. W.) v. Perpetual Trustee Co., Ltd.* (1926) 38 Com.L.R. 12; *Archer-Shee v. Garland* [1931] A.C. 212; compare *Kelly v. Selwyn* [1905] 2 Ch. 117. Compare also *Re Cigala's Settlement Trusts* (1878) 7 Ch.D. 351; *Favorke v. Steinkopff* [1922] 1 Ch. 174; *In Goods of Ewing* (1881) 6 P.D. 19, 22, 23, per Sir James Hannen, P.; *Att.-Gen. v. Belilos* [1928] 1 K.B. (C.A.) 798; *Re Pollak's Estate* [1937] T.P.D. 91.

⁷¹ *New York Life Insurance Co. v. Public Trustee* [1924] 2 Ch. 101; compare *Re Lawton* [1945] 4 D.L.R. 8 (group life insurance).

⁷² *Gurney v. Rawlins* (1836) 2 M. & W. 87; *Re Deane* [1936] Ir.R. 556.

⁷³ *Richardson v. Richardson, National Bank of India, Ltd. (Garnishees)* [1927] P. 228. See also *Re Russo-Asiatic Bank* [1934] Ch. 720.

^{73a} See *Att.-Gen. v. Bouwens* (1838) 4 M. & W. 171, 191, 192, judgment of Abinger, C.B.; *Att.-Gen. v. Hope* (1834) 1 C.M. & R. 530, especially pp. 560, 561, language of Lord Brongham. The technical and somewhat artificial distinctions as to the situation of personal property in reference to the incidence of probate duty may still occasionally be of importance in reference to the incidence of estate duty. See Finance Act, 1894, ss. 2 (2), and 8 (1); *Winnans v. Att.-Gen.* (No. 2) [1910] A.C. 27.

High Court in matters testamentary formerly depended on there being property of the deceased situate within the limits of a district in England over which an ecclesiastical court used to exercise jurisdiction, and probate duty, whilst it existed,⁷⁴ was imposed only on such personal property of the deceased as at the time of his death was situate within such limits.⁷⁵

The inference, however, must not be drawn that, because no personal property of the deceased would be liable to the payment of probate duty if such duty still existed, therefore there is nothing belonging to the deceased so situate in England as to give the court jurisdiction to make a grant; and this for two reasons: (1) Probate duty was chargeable only on property situate in England at the time of the deceased's death; (2) the character of the thing or the property, on the situation whereof liability to probate duty depended, was not always exactly the same as the character of the thing or property on the situation whereof the jurisdiction of the ecclesiastical courts depended, and the jurisdiction of the High Court still mainly depends. The liability to duty used to depend on the situation in England of a thing of some pecuniary value on which the tax could operate, *e.g.*, a debt owing to the deceased. The jurisdiction of the court depended on there being in England some thing—if the word ‘thing’ be used in a very wide sense—for the dealing with which the representative of the deceased required a grant. These two things may, but they may not, coincide. Thus the deceased dies in France and leaves debts due to him from Frenchmen living in France. The only things he has left in England are letters, of a merely nominal value in themselves, but needed by his representatives as evidence of the French debts; the holder of the letters will not give them up to anyone who has not constituted himself in England the representative of the deceased. Under these circumstances there is no property of the deceased in England which would have been liable to probate duty, but there is property of the deceased, *viz.*, the letters, to which the representative of the deceased has a right, and the presence of which in England gave the court jurisdiction to make a grant.

Further, revenue cases are not always safe guides as to the *situs* of property from the point of view of jurisdiction because it is

⁷⁴ It is for all practical purposes abolished as regards property passing on the death of a person dying after August 1, 1894. See the Finance Act, 1894, s. 1, and First Schedule.

⁷⁵ *I.e.*, in so far as the duty fell on *English* property. Probate duty fell on property situate in other parts of the United Kingdom, but all reference to it as a tax on movable or personal property in Scotland or Ireland is here purposely omitted. The English cases refer to duty payable in respect of property alleged to be situate in England, and therefore in these cases the decision that property is or is not liable to probate duty is a decision that it is or is not situate in England. The principles, however, for determining its locality were the same whatever was the part of the United Kingdom in which it was alleged to be situate. Hence a Scottish decision, such as *Laidlay v. Lord Advocate* (1890) 15 App.Cas. 468, gives us guidance in deciding whether given property is or is not situate in England.

natural for revenue purposes, for instance, to take debts as situated where the creditor is.⁷⁶ Again, for income tax purposes the place of residence or trading of a foreign company determines the locality of its shares, not the place where they can be transferred.⁷⁷

Domicile.—The fiction embodied in the often misleading maxim, *mobilia sequuntur personam*, under which the movables of a deceased person are for some purposes, e.g., distribution of and succession to movables upon intestacy,⁷⁸ and liability to legacy duty, regarded as situate in the country where he has his domicile at the time of his death, has no application to the local situation of personal property as regards the jurisdiction of the court to make a grant. But so much of the maxim remains as to justify this general warning: Any rule as to the *situs* of a chose in action must be to a certain extent artificial. That which has been in general adopted in England is based upon the principle of effectiveness. Thus, in the words of Pollock, M.R., 'debts or choses in action are generally to be looked upon as situate where they are properly recoverable or can be enforced'.⁷⁹ But this is only *generally* the case. There exist anomalies caused by Parliamentary intervention for the protection of the revenue. Further, the rule requires the location of choses in action where they are *properly* recoverable. It takes no account of the wide extension of the power of English courts under R.S.C., Ord. XI,⁸⁰ the operation of which would render the *situs* of any chose in action dependent on various incidental factors affecting the right to bring an action in England and which would in practice deny any real *situs* for debts. And, finally, under this modern rule, all that occurs is that debts and choses in action are in England *looked upon for certain purposes* as situate in particular countries. They may well, for other purposes, both elsewhere and in England, be looked upon as situate in other countries.

Illustrations

1. T,⁸¹ a Frenchman domiciled in France, dies in France leaving book debts

⁷⁶ See the decisions in *Smelting Co. of Australia v. Commissioners of Inland Revenue* [1897] 1 Q.B. 175; *Danubian Sugar Factories v. Commissioners of Inland Revenue* [1901] 1 Q.B. 245; *Velasquez, Ltd. v. Commissioners of Inland Revenue* [1914] 8 K.B. 458 (now overruled by *English, etc., Bank v. Commissioners of Inland Revenue* [1932] A.C. 239). But compare *Braun v. The Custodian* [1944] 4 D.L.R. 209.

⁷⁷ *Bradbury v. English Sewing Cotton Co.* [1923] A.C. 744; *Egyptian Delta Land Co. v. Todd* [1929] A.C. 1; *Waterloo Pastoral Co. v. Federal Commissioner of Taxation* (1946) 72 C.L.R. 262.

⁷⁸ See Ch. 81, *post*.

⁷⁹ *New York Life Insurance Co. v. Public Trustee* [1924] 2 Ch. 101, 109.

⁸⁰ See Rule 28, *Exceptions, ante*; see also judgment of Atkin, L.J., in *New York Life Insurance Co. v. Public Trustee* [1924] 2 Ch. 101, 118-122.

⁸¹ In previous editions of this work the illustrations to this Rule concluded with the words 'The Court has [or has not] jurisdiction'. In view of the Administration of Justice Act, 1932 (*ante*, p. 302) the court now has jurisdiction irrespective of whether the deceased left any property in England. In this edition, therefore, the illustrations are retained as indications of the working of the *situs* Rules. 'T' in the illustrations to this Rule stands for testator, but for the purpose of the Rule it makes no difference whether the deceased died testate or intestate.

due to him from X, a Frenchman residing in England. The debts are situate in England.⁸²

2. T dies in Australia leaving money due to him from an incorporated banking company having its head office or a branch office at which his claim is normally payable in London. The claim is situate in England.⁸³

3. T dies in France. X, who resides in England, owes T £100 on a bond which is in France. The debt is situate in England.⁸⁴

4. T dies in France. X, who resides in France, owes T a debt under a deed which is in England. The debt is situate in England.⁸⁵

5. T dies in Paris. Before his death he has purchased at New Orleans a cargo of cotton. At the time of his death it is on the high seas on board an American ship, and bills of lading under which the cotton can be disposed of are in London in the hands of T's broker. The asset is in England.⁸⁶

6. T, a British subject, dies in France. He is owner of a British ship registered at the port of Liverpool. She is, at the time of T's death, at New York. The ship is (*semble*) to be treated as being in England.⁸⁷

7. T dies domiciled in France. Two months after his death, goods purchased by him in the United States, and ordered by him to be sent to London, arrive at the house in London where he had ordered them to be sent. They are (*semble*) to be treated as English assets.

8. T is a member of a partnership carrying on business in England, and is entitled to a share in the partnership assets; he dies abroad domiciled in France. His share is situate in England.⁸⁸

9. T dies abroad domiciled in England. He leaves money in a bank in Chile. The money cannot be treated as situate in England.⁸⁹

10. T dies domiciled in England, but resident in New Zealand. He is at his death possessed of large sums of money invested on mortgages of real estate in New Zealand. The mortgagors are resident, and the mortgage deeds are in New Zealand. T bequeaths the whole of his property to his wife who is resident in England. The assets are not to be treated as situate in England.⁹⁰

11. T dies domiciled in England. His estate consists of an insurance policy in a New York company whose head office is in New York, but which has a branch in London. The policy can be paid only at the head office. It cannot be treated as situate in England.⁹¹

12. The wife of an Englishman residing and domiciled in England is separated from him and living in France. She dies there intestate, leaving movables in France, but leaving no property in England. The husband cannot

⁸² *Preston v. Lord Melville* (1840) 8 Cl. & F. 1; *Enohin v. Wylie* (1862) 10 H.L.C. 1; *Ewing v. Orr-Ewing* (1883) 9 App.Cas. 34; *Josef Inwald Actiengesellschaft v. Pfeiffer* (1927) 43 T.L.R. (C.A.) 399.

⁸³ *R. v. Lovitt* [1912] A.C. 212.

⁸⁴ Revenue Act, 1862, s. 39.

⁸⁵ *Commissioner of Stamps v. Hope* [1891] A.C. 476, 481, *per* Lord Field. Compare *Toronto General Trusts Corporation v. The King* [1919] A.C. 679.

⁸⁶ And this for two reasons (1) The cotton itself is to be considered as situate in England because it can be dealt with there. (Compare *Att.-Gen. v. Hope* (1834) 1 C.M. & R. 530; *Att.-Gen. v. Pratt* (1874) L.R. 9 Ex. 140; *Wyckoff's Case* (1862) 3 Sw. & Tr. 29.) (2) The bills of lading are actually in England. Compare *Att.-Gen. v. Bouwens* (1838) 4 M. & W. 171; *Inglis v. Robertson* [1898] A.C. 616, 626, 627; *North-Western Bank v. Poynter* [1895] A.C. 56; *Grosby v. Prescott* [1923] S.C.R. 446.

⁸⁷ See Revenue Act, No. 2, 1864, s. 4.

⁸⁸ Compare *In Goods of Ewing* (1881) 6 P.D. 19, 23, judgment of Sir Jas. Hannen; and *Laidlay v. Lord Advocate* (1890) 15 App.Cas. 468.

⁸⁹ See *In Goods of Coode* (1867) L.R. 1 P. & D. 449.

⁹⁰ Compare *Sudeley v. Att.-Gen.* [1897] A.C. 11. See also *Commissioner of Stamps v. Hope* [1891] A.C. 476: see p. 305, 306.

⁹¹ Contrast *New York Life Insurance Co. v. Public Trustees* [1924] 2 Ch. (C.A.) 101.

establish his claim in France to her property without an English grant. The court has jurisdiction to make a grant notwithstanding that there is no property in England.⁹²

13. A British subject residing and domiciled in a foreign country dies there intestate leaving no property in England. His widow cannot obtain a grant of administration in the foreign country without producing an English grant. Whether the court has jurisdiction?

2. SUCCESSION

RULE 50.⁹³—The court has no jurisdiction with regard to the succession to the property of a deceased person unless there is before the court some person authorised under an English grant to deal with such property, and in respect thereof to represent the deceased.

Comment

English courts will not discuss, and have no jurisdiction to adjudicate upon, the claim of any man to succeed beneficially to, or indeed to derive any benefit from, the property of a deceased person, in the abstract. Even the representative under the law of a foreign country of a foreigner who dies domiciled abroad has no *locus standi*⁹⁴ before an English court until he has obtained an English grant or unless there is before the court some person holding an English grant.⁹⁵

The validity, indeed, of a will—a matter which affects succession—can be decided, and indeed can be decided only, in an action of which the object is to determine a person's claim to an English grant, *i.e.*, in a probate action. But this fact in no way invalidates Rule 50. A probate action involves or implies the authority of the court to make a grant.

By statute there exists an apparent exception to the above Rule (and to the rule that no one can fully represent the deceased who has not obtained authority to do so from the court).⁹⁶ For beneficiaries under insurance policies on their own lives taken out by persons domiciled abroad need no English grant to obtain or enforce payment of the policy moneys.⁹⁷ The exception, however, is surely

⁹² Administration of Justice Act, 1932, s. 2 (1). For the position before the Act, see *In Goods of Tucker* (1864) 3 Sw. & Tr. 585.

⁹³ See *Att.-Gen. v. Hope* (1834) 1 C.M. & R. 580, and especially p. 540, *per* Brougham, L.C., and pp. 562–564. See, for meaning of 'grant', pp. 297, 300, *ante*.

⁹⁴ *Att.-Gen. v. Hope* (1834) 1 C.M. & R. 580, 540, 562–564; *Re Lorillard* [1922] 2 Ch. (C.A.) 638. Compare *Vanquelin v. Bouard* (1863) 15 C.B.(N.S.) 341; *Cheshire* 676.

⁹⁵ As to extension of a Northern Irish grant, of a Scottish grant, or of a Colonial or Indian grant to England, see Chap. 17, Rules 108–110, *post*. As to claim by a foreign administrator for balance of assets in hands of English ancillary administrator, see *post*, p. 812.

⁹⁶ *Ante*, p. 299.

⁹⁷ Revenue Act, 1884, s. 11 as amended by Revenue Act, 1889, s. 19; see *Haas v. Atlas Assurance Co., Ltd.* [1918] 2 K.B. 209; *Re Loir's Policies* [1916] W.N. 87.

more apparent than real because the policy moneys are assets of the beneficiaries rather than the deceased.⁹⁸ An appropriate analogy would be a claim by dependants under the Fatal Accidents Act, 1846, in respect of the death of a foreigner killed in England, but leaving no property here. It would seem that action may be brought and judgment recovered without an English grant because the cause of action does not belong to the estate.⁹⁹

Illustration

T dies domiciled in England. By his will, made in accordance with the English Wills Act, he appoints X his executor. T leaves no property whatever in England. He leaves goods and money in France and in Germany. A claims a legacy of £10,000 under T's will. The court has no jurisdiction to determine whether A is entitled to the legacy.¹

RULE 51.—Where the court exercises its jurisdiction² to make a grant, the court has, in general, jurisdiction to determine any question with regard to the succession to and claims against the assets of a deceased person.

Comment

The jurisdiction of the court is in no way restricted to dealing with the property the presence of which in England is the normal inducement for it to make a grant. Where a grant is made, the court has (in general) jurisdiction to determine every question whatever connected with succession to movables, including the question of what charges are allowable against the assets of the deceased,³ and to provide for the succession to the assets, or rather to the distributable residue thereof. With regard to such distributable residue the court, for example, has authority to decide whether the will or alleged will of the deceased is a valid testamentary disposition,⁴ what is the construction or effect of the will,⁵ who are the persons entitled to succeed to the movable property of an intestate,⁶ and the like, and generally to provide for the due succession to the assets of the deceased.

The words 'in general' in our Rule point out that the jurisdiction of the court under that Rule is not absolutely unrestricted.

⁹⁸ See Nussbaum, p. 886; Breslauer, pp. 221-222. But see *Haas v. Atlas Assurance Co.* [1918] 2 K.B. 209, 216-7, per Scrutton, J., on the historical origin of the exception.

⁹⁹ Compare *Byrn v. Paterson Steamships, Ltd.* [1936] 3 D.L.R. 111; see also *Davidsson v. Hill* [1901] 2 K.B. 606, and Goodrich, s. 177.

¹ Compare *In Goods of Coode* (1857) L.R. 1 P. & D. 449.

² As to when the court has jurisdiction to make a grant, see Rule 49, p. 301, *ante*. Note that the effect of this Rule is modified by Rules 75 and 94, *post*, which prescribe the principle that foreign courts have the primary right to determine the succession to persons dying domiciled in the view of English law in the area of their jurisdiction.

³ *Re Lorillard* [1922] 2 Ch. (C.A.) 638; *Re Achillopoulos* [1928] Ch. 433.

⁴ *Bremer v. Freeman* (1857) 10 Moore P.C. 306.

⁵ *Enohin v. Wylie* (1862) 10 H.L.C. 1.

⁶ *Dogliani v. Crispin* (1866) L.R. 1 H.L. 301.

The court's jurisdiction may be exercised in a probate action but is in practice more often invoked by an administration action in the Chancery Division being brought by someone, *e.g.*, a legatee, or next of kin, interested in the distribution of a deceased testator's or intestate's estate.⁷ For the maintenance of such an action, it is necessary that the personal representative, who has obtained an English grant, should be made a party to it.⁸ The court has extremely wide powers to administer the property of a deceased person in such an action.⁹ But it is no longer bound to make an order for general administration if it is possible to decide the issue without so doing.¹⁰

Though it is commonly said that the general rule that English courts have no jurisdiction to determine the title to foreign land extends to the law of succession, it is to be noticed that quite often in administration actions they in fact do so. It may be suggested tentatively, therefore, that in the administration of an estate including immovables abroad limited to devolve in the same manner as immovables or movables in England, the court has jurisdiction to determine questions of title to such foreign immovables.¹¹

There is observable a similar tendency on the part of the English courts, in cases where there is comprised in a single trust, especially a will trust, both property in England and property abroad, to assume jurisdiction to administer the whole property, even including foreign immovables.¹² The excuse for this extension of the jurisdiction is that the existence of the trust gives power *in personam* over the single set of trustees.¹³ The reason for its first being undertaken was probably the rigidity of the former rule already referred

⁷ See as to an administration action; Supreme Court of Jurisdiction (Consolidation) Act, 1925, s. 56; and as to proceedings on an originating summons, R. S. C. Ord. LV, rr. 3-14, and note that an originating summons could not formerly be served out of England. (*Re Busfield* (1886) 32 Ch.D. (C.A.) 123.) But leave can now be obtained under Ord. XI, r. 8a (1909), which, as altered in 1920, is applicable not only to foreign countries but also to Scotland or Ireland (contrast *Re Campbell* [1920] 1 Ch. 35, decided under the older form of the rule), on the same conditions as prescribed in Ord. XI, r. 1 (see Rule 28, pp. 171, 180, *ante*). For substituted service under Ord. LXVII, r. 5, of an originating summons to be served out of England, see *Townend v. Brandenburg* (1895) 39 S.J. 151.

⁸ *Cary v. Hills* (1872) 15 Eq. 79; *Re M'Sweeney* [1919] 1 Ir.R. 16.

⁹ See *Ewing v. Orr-Ewing* (1883) 9 App.Cas. 39; (1885) 10 App.Cas. 453; *Re Clinton* (1903) 88 L.T. 17.

¹⁰ R. S. C. Ord. LV, r. 10.

¹¹ See *Re Piercy* [1895] 1 Ch. 83; *Re Ross* [1930] 1 Ch. 377; *Re Duke of Wellington* [1948] Ch. 118; and compare *Nelson v. Bridport* (1846) 3 Beav. 547; *Re Stirling* [1908] 2 Ch. 344; *Re Pearse's Settlement* [1909] 1 Ch. 305; *ante*, p. 149.

¹² See, in addition to the authorities referred to in the foregoing footnote, especially *Ewing v. Orr-Ewing* (1883) 9 App.Cas. 34. Compare *Ewing v. Orr-Ewing* (1885) 10 App.Cas. 453. And see *Stirling-Maxwell v. Cartwright* (1879) 9 Ch.D. 173; 11 Ch.D. 522; *Re Lane* (1886) 55 L.T. 149; *Re Clinton* (1903) 88 L.T. 17; also the Scottish cases *Campbell v. Rucker* (1809) Hume 258; *Peters v. Martin* (1825) 4 Stair 107.

¹³ See Rule 20, Exception 2, *ante*, and *Penn v. Lord Baltimore* (1750) 1 Ves. Sen. 444.

to, namely that a judgment for the administration of a trust or estate was a necessary incident to the determination of any dispute as to any interest therein.¹⁴ But the authority for the extension cannot now be doubted. The domicile of a testator is immaterial in relation to it.¹⁵

But an administration action, like every other, commences with the issue of a writ, which must be served upon the personal representative, or, using the word 'administrator' in a wide sense, upon the administrator. And any restriction on the service of the writ is, as we have already pointed out,¹⁶ a restriction on the exercise of the court's jurisdiction. When the administrator is in England, the court has jurisdiction to entertain the action, for it is always possible for the administrator to be served with the writ. When the administrator is not in England, the rule still is that he cannot be served with the writ, and therefore that the court has no jurisdiction to entertain an action against him.¹⁷ To this rule the exceptions are, it is true, extremely wide. Whenever an 'action is for the administration of the personal estate of any deceased person, who at the time of his death was domiciled' in England,¹⁸ the court has jurisdiction to allow service of a writ, and therefore to entertain an action against the administrator though he is out of England; so, again, the court has jurisdiction to entertain an administration action against an administrator who is out of England in any of the exceptional cases, in so far as they can possibly be applicable to such an action, in which the court has jurisdiction to entertain an action *in personam* against a defendant who is out of England.¹⁹ But, wide as are the exceptions to the principle that the court has no jurisdiction to entertain an administration action against an administrator who is not in England, they do not apparently cover every case which can arise.²⁰

Illustrations

1. T, a Frenchman domiciled in England, dies there, leaving a house, of which he is tenant for years, household furniture, and other goods in England. T leaves a will, the construction of which is doubtful. The court has jurisdiction to determine whether the will is valid, and who are the persons entitled beneficially to T's property under the will.²¹

2. N, a Frenchman domiciled in England, dies in France intestate, leaving in England leasehold property, household furniture, and stock in trade. The

¹⁴ *Supra*. See now R. S. C. Ord. LV, r. 10.

¹⁵ *Ewing v. Orr-Ewing* (1888), 9 App.Cas. 84, 39.

¹⁶ See pp. 172, 180, *ante*.

¹⁷ See *Re Eager* (1882) 22 Ch.D. (C.A.) 86; compare *Re Lane* (1886) 55 L.T. 149.

¹⁸ Ord. XI, r. 1 (d). The words in the rule of court are not 'in England', but 'within the jurisdiction'. Compare p. 188, *ante*. See also Rule 28, Exception 2, p. 184, *ante*, under which the court has jurisdiction whenever any will affecting lands in England is sought to be construed, rectified, set aside, or enforced.

¹⁹ See Exceptions 1: to 11 (pp. 188-201, *ante*) to Rule 28, p. 180, *ante*.

²⁰ See *Wood v. Middleton* [1897] 1 Ch. 151.

²¹ Compare *Enohin v. Wylie* (1862) 10 H.L.C. 1; *Re Bonnefoi* [1912] P. (C.A.) 233.

court has jurisdiction to determine who are the persons beneficially entitled to N's property.²²

3 T dies domiciled in Italy, leaving money in the English funds. Under a will made in the form required by Italian law, T appoints X his executor. X is recognised as T's executor by the Italian courts, and consequently the will can be proved here by him. A question arises under T's will whether T did or did not die intestate as to his English property. The court has jurisdiction to determine the construction of T's will, and to divide T's property in England among the persons who, on a right construction of the will, are beneficially entitled to it; but as a general rule the court, having granted probate to X, will leave the persons claiming succession to T's personal property to enforce their rights before the Italian tribunals.²³

4. N, domiciled in New York, dies there intestate, leaving goods and lands in New York, and money and stock in trade in England. A obtains letters of administration in New York. B, in England, claims to be entitled to the whole of N's movable property as next of kin. A, as the representative of N under the law of N's domicile, claims to have N's movable estate in England handed over to him. The court has jurisdiction to determine what are the rights of B, but will, in general, grant administration to A, and leave B to enforce his rights (if any) before the courts of New York.²⁴

5. T dies domiciled in Egypt, Greek law being applicable to the distribution of his estate, which includes personal property in England. His daughters are his heirs under his will and his estate by Greek law vests directly in them. X as their attorney is granted administration with the will annexed in England, and pays all English debts. The court authorises him to transfer the surplus to the heirs to whom primarily belongs the duty of meeting foreign claims on the assets.²⁵

6. T, a British subject, dying domiciled in Italy, by her testamentary dispositions, excludes her son and only child from participation in her estate, which consists in immovable property in Italy and in movable property in England and Italy. The court has jurisdiction to decide the succession to the whole estate.²⁶

²² *Re Goodman's Trusts* (1881) 17 Ch.D. (C.A.) 266; *Doucet v. Geoghegan* (1878) 9 Ch.D. (C.A.) 441.

²³ Compare *Enohin v. Wylie* (1862) 10 H.L.C. 1; *Re Bonnefoi* [1912] P. (C.A.) 238; see also *Hames v. Hacon* (1880) 16 Ch.D. 407, 409; (1881) 18 Ch.D. (C.A.) 347.

²⁴ See *Enohin v. Wylie* (1862) 10 H.L.C. 1. For a case where the court preferred to distribute, see *Re Lorillard* [1922] 2 Ch. (C.A.) 638.

²⁵ *Re Achilopoulos* [1928] Ch. 453. There were no beneficiaries in England to be considered. Contrast *Re Lorillard* [1922] 2 Ch. (C.A.) 638.

²⁶ *Re Ross* [1930] 1 Ch. 377.

STAYING ACTION¹—*LIS ALIBI PENDENS*— ARBITRATION PROCEEDINGS

RULE 52.—The court has jurisdiction to interfere, whenever there is vexation and oppression, to prevent the administration of justice being perverted for an unjust end, and for this purpose to stay or dismiss an action or other proceeding, or to restrain the institution or continuation of proceedings or enforcement of judgments in foreign courts.

But this jurisdiction will not be exercised against a party to an action unless his proceedings are clearly shown to be vexatious and oppressive.²

Comment

The court has jurisdiction to prevent the abuse of its process by staying an action or otherwise; it has an even wider discretion to refuse leave³ for service out of the jurisdiction.⁴ The court will restrain the institution or continuation⁵ of proceedings

¹ *Cheshire*, p. 160-166; *Wolff*, s. 229; *McHenry v. Lewis* (1882) 22 Ch.D. (C.A.) 397, 408, judgment of Bowen, L.J.; *Peruvian Guano Co. v. Bockwoldt* (1883) 23 Ch.D. (C.A.) 225, 232, judgment of Lindley, L.J.; and p. 233, judgment of Bowen, L.J. Compare *Limerick Corporation v. Crompton* [1910] 2 Ir.R. (C.A.) 416; *Richardson v. Army, Navy, and General Assurance Association, Ltd.* [1924] 2 Ir.R. 96; *The Hagen* [1908] P. 189. Staying proceedings is a statutory power; see the Supreme Court of Judicature (Consolidation) Act, 1925, s. 41; Ord. XXV, r. 4, but is also an inherent right.

² *The Christiansborg* (1885) 10 P.D. (C.A.) 141; *Cohen v. Rothfield* [1919] 1 K.B. (C.A.) 410; *Hay v. Jackson & Co.* [1911] S.C. 876; *St. Pierre v. S. American Stores* [1936] 1 K.B. (C.A.) 382; *Re Vocalion (Foreign), Ltd.* [1932] 2 Ch. 197. See also *Law v. Garrett* (1878) 8 Ch.D. (C.A.) 26; *The Peshawur* (1883) 8 P.D. 32; *The Manor* [1903] P. 95; *Chaney v. Murphy* (1948) 64 T.L.R. 489.

³ See Exceptions to Rule 28, *ante*, p. 180.

⁴ *Per Scott, L.J.*, in *St. Pierre v. S. American Stores* [1936] 1 K.B. 382 at p. 398 *ad fin.*

⁵ See *Armstrong v. Armstrong* [1892] P. 98; *Jamieson v. Jamieson* (1864) 38 L.J.N.C. (C.A.) 98; *Lett v. Lett* [1906] 1 Ir.R. 618, 629; *Re Derwent Rolling Mills Co.* (1905) 21 T.L.R. (C.A.) 701; *Jopson v. James* (1908) 77 L.J.Ch. (C.A.) 824; *Pena Copper Mines, Ltd. v. Rio Tinto Co., Ltd.* (1912) 105 L.T. 846. A Scottish or Irish court is, of course, for this purpose a foreign court: *Ainslie v. Sims* (1854) 28 L.J.Ch. 161. A defendant will not be restrained from proceedings to establish a later will in the court of the testator's domicile because an action is pending in England for probate in solemn form: *Dawkins v. Simonetti* (1880) 50 L.J.P. & M. (C.A.) 30. For restraining proceedings before suit instituted abroad, see *Love v. Baker* (1665) 1 Cas. in Ch. 67;

or enforcement of judgments ⁶ in a foreign court, to hinder vexation or oppression. What is vexatious or oppressive, and whether the administration of justice is being perverted for an unjust end or not, is a matter in each case for the decision of the court, in accordance with the circumstances of the particular case.

'I agree', says Bowen, L.J., 'that it would be most unwise, unless one was actually driven to do so for the purpose of deciding this case, to lay down any definition of what is vexatious or oppressive, or to draw a circle, so to speak, round this court unnecessarily, and to say that it will not move outside it. I would much rather rest on the general principle that the Court can and will interfere, whenever there is vexation and oppression, to prevent the administration of justice being perverted for an unjust end. I would rather do that than attempt to define what vexation and oppression mean; they must vary with the circumstances of each case. . . . The kind of jurisdiction which the court exercises over litigation is, as I have said, to prevent what is vexatious and an abuse of its own process. There are many classes of cases in which the Court acts on that principle, which I will not attempt now to enumerate.'⁷

These cases may, of course, have nothing to do with the conflict of laws, or with the fact that a cause of action or ground of defence arises in a foreign country. Still, the cases in which a party to an action applies to have it stayed or dismissed are very often, in some way or other, connected with transactions taking place in a foreign country.

'(1) A mere balance of convenience is not a sufficient ground for depriving a plaintiff of the advantages of prosecuting his action in an English Court if it is otherwise properly brought. The right of access to the King's Court must not be lightly refused.

'(2) In order to justify a stay two conditions must be satisfied, one positive and the other negative : (a) the defendant must satisfy the Court that the continuance of the action would work an injustice because it would be oppressive or vexatious to him or would be an abuse of the process of the Court in some other way ; and (b) the stay must not cause an injustice to the plaintiff. In both the burden of proof is on the defendant.'⁸

Illustrations

1. A, a Scotsman, is domiciled in Scotland. He brings an action in respect of a cause of action arising wholly in Scotland against W. & Co., a company whereof the head office is in Scotland, though it has a branch office in England, X, a director resident in Scotland, who does not appear, and Y, a director

Portarlington v. Souby (1884) 8 My. & K. 104; refused, *Liverpool Marine Credit Co. v. Hunter* (1868) L.R. 3 Ch. 479; *Fletcher v. Rodgers* (1878) 27 W.R. (C.A.) 97.

⁶ *Ellerman Lines, Ltd. v. Read* [1928] 2 K.B. (C.A.) 144.

⁷ *McHenry v. Lewis* (1882) 22 Ch.D. (C.A.) 397, 407, 408, judgment of Bowen, L.J.; compare *Peruvian Guano Co. v. Bockwoldt* (1883) 23 Ch.D. (C.A.) 325.

⁸ *Per Scott, L.J., in St. Pierre v. South American Stores* [1936] 1 K.B. 382, 396.

resident in London, but also an undischarged bankrupt. The decision of the case depends wholly upon Scottish law, and mainly upon the evidence of persons resident in Scotland. The court has jurisdiction to stay, and stays the action.⁹

2. A is the wife of an American domiciled in British India. In 1902 a deed of separation is executed between A and her husband, under which he covenants to pay A a certain allowance. X, a solicitor, practising in Madras, is a trustee under the separation deed. A's husband makes default in payment of the allowance, and, as alleged by A, wilfully and negligently neglects to take proceedings against X, whereby A is unable to recover the money due by way of allowance from her husband. While A and X are each temporarily resident in England, A brings an action against X for negligence, and X is, whilst in England, served with a writ. Since the issue of the writ A has left England for America, and X has returned to India. The court, on an application on X's behalf, dismisses the action.¹⁰

3. W, the wife of H, an officer in the Indian army, stationed in Bombay, goes to England. Within two months H takes proceedings in the Bombay court against W for divorce. Two days after the petition is served upon her in England, W begins a suit against H, who is then in England on short leave, for restitution of conjugal rights. H applies to the court to stay proceedings in W's suit till the determination of the proceedings by H in Bombay. The court refuses to stay W's proceedings.¹¹

4. A and B reside in Honduras. X and Y are partners, and carried on business under the name of G & Co. in London. They are resident in England. A, B and X had carried on business as partners in Honduras. The London firm are agents of the Honduras firm. On the dissolution of the Honduras partnership X obtains a decree in Honduras for taking partnership accounts. Before the accounts are taken A and B bring an action in England against X and Y for an account of the dealings between the two firms, alleging that X and Y have made improper profits of agency. X and Y deny having made improper profits, and counterclaim to have the accounts of the Honduras firm, A, B and X, taken. Application to have counterclaim struck out. Application refused.¹²

5. A and X are engaged in moneylending transactions in Scotland and England, though both of them reside normally in England. A dispute arises between them as to the state of accounts between them, and almost simultaneously actions are started by X against A in Scotland, and by A against X in England. A asks that the court shall restrain X from proceeding

⁹ *Logan v. Bank of Scotland* (No. 2) [1906] 1 K.B. (C.A.) 141. Contrast *Re Bonnefoi* [1912] P. (C.A.) 233, in which the court refused to stay proceedings, the point involved being the interpretation of a holograph will in English of a domiciled Italian.

¹⁰ *Egbert v. Short* [1907] 2 Ch. 205. The *ratio decidendi* seems to be the unfairness and inconvenience to X of his being compelled to defend the action, the decision of which would depend to a great extent on the Indian rules of procedure, in England, and to return to England for that purpose. As A knew of her alleged grievance before she left India, it looks as if A were using her right of suing X in England as a means of extortion. The case which is followed in *Re Norton's Settlement* [1908] 1 Ch. (C.A.) 471, nevertheless goes a very long way towards limiting the right to sue in England, for a foreign cause of action, any person whatever who is served with a writ in England.

¹¹ *Thornton v. Thornton* (1886) 11 P.D. (C.A.) 176. The *ratio decidendi* is (*semble*) that W has *prima facie* a right to prosecute the suit, and that it was not made clear that her doing so would work oppression, or waste, or vexation. In *Von Eckhardstein v. Von Eckhardstein* (1907) 28 T.L.R. 589 (C.A.) 593, a stay was refused when a judicial separation was asked for by the wife, and the husband had commenced divorce proceedings in Germany where he was domiciled.

¹² See *Mutrie v. Binney* (1887) 35 Ch.D. (C.A.) 614, 635.

with his action in Scotland. At the time when this application is made, X's action in Scotland has been actively prosecuted, while no statement of claim has yet been delivered in A's action in England. The court declines to restrain X from proceedings in Scotland.¹³

6 A brings an action against X in England. A judgment is delivered by the Court in X's favour. A commences an action on the same issues in Ireland or Scotland. A may be restrained from continuing the proceedings.¹⁴

7 A collision takes place in a Dutch river between A, a British ship, and X, a Finnish ship. To avoid the arrest of A its owners enter reciprocally with the owners of X into bonds to provide bail if proceedings are begun within three months. Before the expiry of the time X is arrested in England and immediately after its owners commence proceedings in Holland and ask the court to stay the English action. The court declines to stay the action.¹⁵

8. As a result of a collision in the Red Sea, X, the owner of the steamship *Janera*, claims damages in the Egyptian courts, and obtains bail from A, the owner of the *Masconomo*, who institutes a cross action there. A later issues a writ *in personam* in England against X. X moves to have the writ set aside. Before notice is served A discontinues the cross action in Egypt. The court declines to stay the action.¹⁶

9. A's Greek vessel collides with and sinks B's Argentine vessel in the River Parana. B sues A in the Argentine. A sues B in England. B seeks to stay the proceedings on the grounds, (1) that there is an action pending in the Argentine, where all the witnesses reside, and (2) that by Argentine law A

¹³ See *Cohen v. Rothfield* [1919] 1 K.B. (C.A.) 410; *Rothfield v. Cohen* [1919] 1 Sc.L.T. 138. Compare *Re Derwent Rolling Mills Co.* (1904) 21 T.L.R. 81; 701; *Jopson v. James* (1908) 77 L.J.Ch. 824; *Re Warrand* (1892) 93 L.T.J. 82; *Carter v. Hungerford* (1915) 59 S.J. 428; *Re Connolly* [1911] 1 Ch. 731, 746. In *Heilman v. Falkenstein* (1917) 33 T.L.R. 383, the defendant was restrained from proceedings in the United States, the question being one of an English settlement to be construed by English law. So in *Vardopulo v. Vardopulo* (1909) 25 T.L.R. 410, (C.A.) 518, the court refused to restrain proceedings for divorce in the country of domicile as the appropriate forum. In *Christian v. Christian* (1897) 67 L.J.P. 86, 88, a husband was restrained from proceeding with an action for divorce in Scotland pending the trial of his wife's action for judicial separation in England, on the ground that the question of domicile could be settled at once in the English action. Where an administration action is proceeding in England, and the deceased was domiciled in England, beneficiaries or creditors subject to English jurisdiction may be restrained from proceedings abroad. *Hope v. Carnegie* (1866) L.R. 1 Ch. 320; *Graham v. Maxwell* (1849) 1 Macn. & G. 71; *Carron Co. v. MacLaren* (1855) 5 H.L.C. 416, 441, 442; *Baillie v. Baillie* (1867) L.R. 5 Eq. 175; *Re Boyse* (1880) 15 Ch.D. 591. Jurisdiction to restrain may similarly be exercised to secure equality in the distribution of assets in company liquidation, see Rule 56, p. 333, *post*, as regards bankruptcy proceedings, Rule 54, *post*, and administration proceedings, Rule 176, *post*.

¹⁴ *Booth v. Leicester* (1837) 1 Keen 579.

¹⁵ *The Juno* (1923) 128 L. T. 671; *The Mannheim* [1897] P. 13. Distinguish *The Christiansborg* (1885) 10 P.D. 141; *The Golaa* [1926] P. 103, where the same plaintiff arrested the same ship both abroad and in England and the action was stayed; *The Cattarina Chiazzare* (1876) 1 P.D. 368, actions by same plaintiff in Ireland and England; the latter stayed. In *The Challenge and the Duc d'Aumale* [1904] P. 41, proceedings in England were not barred by proceedings in France and ancillary proceedings in Belgium.

¹⁶ *The Janera* [1928] P. 55. Nor does it make any difference that it is in Scotland that the plaintiffs in the English action *in rem* are defendants to an action *in personam*; the matter remains one of discretion; see *The London* [1931] P. 14, and note that the decision in *The Pashawur* (1883) 8 P.D. 32, where English proceedings were stayed in favour of proceedings in a Vice-Admiralty Court at Colombo, was unfavourably commented on by Lord Esher in *The Christiansborg* (1885) 10 P.D. 141, 149.

has no remedy because liability is limited to the property available and B's ship is a total loss. The court declines to stay the action.¹⁷

10. X, a naturalised British subject, enters into an English contract. He breaks it and by fraud obtains a foreign judgment against A. The court has jurisdiction to grant and does grant an injunction forbidding X to enforce the judgment thus obtained.¹⁸

SUB-RULE 1.—The court has jurisdiction to stay an action or restrain proceedings in a foreign court, as vexatious or oppressive, if proceedings¹⁹ are taken by the same plaintiff in respect of the same subject and against the same defendant²⁰ both in the court and in a court of a foreign country.

- (1) If such foreign court is a court of the United Kingdom or (*semble*) of any country forming part of British territory, the plaintiff's proceedings are *prima facie* vexatious.²¹
- (2) If such foreign court is a court of any country not forming part of British territory, the plaintiff's proceedings are *prima facie* not vexatious.²²

¹⁷ *The Madrid* [1937] P. 40; cf. *The Ithaka* [1939] 3 All E.R. (C.A.) 630.

¹⁸ *Ellerman Lines, Ltd. v. Read* [1928] 2 K.B. (C.A.) 144, 152, 153, *per* Scrutton, L.J., 155, *per* Atkin, L.J., 158, *per* Eve, J. Compare *Bushby v. Munday* (1821) 5 Madd. 297, 308, *per* Leach, V.-C., where defendant's action in Scotland was stayed because of superior facilities for acquiring knowledge of facts in English court. Cheshire, p. 163, remarks that this 'is the only case in which a defendant to an action in England has been restrained from continuing an action which he has instituted abroad'.

¹⁹ Not necessarily of exactly the same type; see *Re Derwent Rolling Mills Co.* (1904) 21 T.L.R. 81 (C.A.) 701; *The Jasep* (1896) 12 T.L.R. 375 (C.A.) 434; *Moore v. Moore* (1896) 12 T.L.R. 221; *Armstrong v. Armstrong* [1892] P. 98. What constitutes a proceeding abroad is considered in *The Mannheim* [1897] P. 13; *The Juno* (1923) 128 L.T. 671.

²⁰ There is no presumption if the actions are brought one by a plaintiff in England, and the other by the defendant in the English action in a foreign court, or *vice versa*; see *Carter v. Hungerford* (1915) 59 S.J. 428; *Hyman v. Helm* (1883) 24 Ch.D. 531; *Dawkins v. Simonetti* (1881) 50 L.J.P. & M. 30; *The Challenge and the Duc d'Aumale* [1904] P. 41, where a plaintiff in England was allowed to proceed, ignoring a judgment by default in France and ancillary proceedings to enforce it in Belgium in which the English plaintiff was seeking to set aside the order; *The Delta* (1876) 1 P.D. 393, where an action was brought against the *Delta* in England and one against the Italian *Erminia* in France, and the former was not stayed, even when a judgment was rendered abroad; *The London* [1931] P. 14. A decision of a foreign court, on an action commenced later than an action in England, is no ground for a stay, *Houston v. Shgo* (1885) 29 Ch.D. 448, 454; otherwise if the foreign action is begun first, *Mutrie v. Binney* (1887) 35 Ch.D. 614.

²¹ *McHenry v. Lewis* (1882) 22 Ch.D. (C.A.) 397, 408, judgment of Bowen, L.J.; but compare *Cohen v. Rothfield* [1919] 1 K.B. (C.A.) 410; criticised by Cheshire, p. 165. For Scotland see *Hawkins v. Wedderburn* (1842) 4 D. 924; *Fordyce v. Bridges*, *ibid.*, 1334.

²² *Ibid.*; *Cox v. Mitchell* (1859) 7 C.B. (N.S.) 55; *Pena Copper Mines, Ltd. v. Rio Tinto, Ltd.* (1912) 105 T.L.R. 846; *The Cap Blanco* [1913] P. 130;

Comment

'I think', said Bowen, L.J., 'that *Cox v. Mitchell*²³ . . . simply lays down the proposition that the mere pendency of an action abroad is not a sufficient reason for staying an action at home, although the causes of action and the parties may be the same. So understood, it seems to me to be common sense. . . . This particular application is based on the suggestion that the Court ought to interfere to prevent what is called multiplicity of suits—litigation in various quarters of the world on the same subject-matter between the same parties and at the same time. [1.] Where there is more than one suit being carried on in the Queen's Courts [in England], it is obvious that the case is wholly different. The remedy and the procedure are the same, and a double action on the part of the plaintiff would lead to manifest injustice. [2.] When you get to the case of concurrent litigation both in the Queen's Courts in England and in the Queen's Courts in Ireland and Scotland, the law has probably varied a little. At a time when it was difficult to enforce the judgments of an English Court in other parts of the United Kingdom, it was not unreasonable that the case of *Lord Dillon v. Alvares*²⁴ should have been decided as it was. At present I think that case can no longer be cited as conclusive law. [3.] With regard to the Queen's Courts abroad, the Consular Courts abroad, the same sort of principle no doubt applies. They are Courts of co-ordinate jurisdiction, sufficiently in the nature of English Courts to render it probable that it may be true, as Sir Robert Phillimore says, that an English Court would not favour the institution and the prosecution of litigation both in the Consular courts and at home. [4.] But when you come to the Courts of the United States of America [or of any country not forming part of British territory], it seems to me the case is wholly different, and for the reasons which have been pointed out at length by the Master of the Rolls and Lord Justice Cotton. The fact that no English action has ever yet been stayed on the ground of concurrent litigation in America is a strong argument to prove that such concurrent American litigation is not by itself a sufficient reason why an English action should be stayed. That the court has power to do it I agree. It is clear, not merely from reason, but from the language of Lord Cottenham²⁵ and Lord Cranworth,²⁶ referred to by Lord Justice Cotton, that this Court could do it if necessary for the purposes of justice, but some special circumstances ought surely to be brought to the attention of the Court beyond the mere fact that an action

Kirchner & Co. v. Gruban [1909] 1 Ch. 413; and compare Rule 52, p. 316, *ante*.

²³ (1859) 7 C.B. (N.S.) 55.

²⁴ (1798) 4 Ves. 357.

²⁵ *Wedderburn v. Wedderburn* (1837) 4 My. & Cr. 596.

²⁶ *Carron Iron Co. v. McLaren* (1855) 5 H.L.C. 416, 437.

is pending between the parties on the same subject-matter in America.²⁷

Illustrations

1. A, who has commenced an action against X in a Scottish court, also commences an action against him for the same cause of action in the High Court. A's proceedings are *prima facie* vexatious.²⁸

2. A brings an action against X in Victoria, and also for the same cause of action brings an action against X in the High Court. A's proceedings are (*semble*) *prima facie* vexatious.²⁸

3. A brings an action against X in the court for breach of contract committed at New York. He has already commenced an action in a New York court against X for the same breach of contract. A's proceedings are not *prima facie* vexatious.²⁹

4. A & Co., an English company, brings an action against X and Y, a firm of French merchants, for non-delivery of the cargo of certain ships, and in the alternative for damages and for an injunction. When the action began the ships were in British waters. They have since been removed to ports in France and taken possession of by X and Y. Proceedings have been commenced by A & Co. in a French court for the recovery of the cargoes. The claim in the English action comprises the cargo of a ship which is not claimed in the French action. The proceedings of A & Co. are not vexatious.³⁰

5. A, a salvage contractor, is entitled to a maritime lien on a ship for work done in the Bosphorus. At Alexandria the ship is seized by the trustee of the owner who had become bankrupt. A claims in the Egyptian court from the trustee the amount of the salvage, but also issues a writ *in rem* against the ship which the trustee has sold and which has been taken to England by X, the purchaser. A's proceedings in England are not vexatious, for the claim in the bankruptcy proceedings affords only a partial remedy, if any, and is entirely different from the relief obtainable in England.³¹

SUB-RULE 2.—When an agreement for the submission to arbitration of differences on commercial or other matters, capable of settlement by arbitration, has been entered into by subjects or citizens of two or more of the

²⁷ *McHenry v. Lewis* (1882) 22 Ch.D. (C.A.) 397, 408, 409, judgment of Bowen, L.J. Compare judgment of Cotton, L.J., *ibid.*, pp. 405, 406.

It may happen that A, who is plaintiff in an action in a foreign country against X in respect of a particular claim, makes the same claim here in England in the shape of a counterclaim in an action brought by X against A. Such a counterclaim will not *prima facie* be treated as vexatious, but under peculiar circumstances the plaintiff may be treated as one who has, in effect, brought concurrent actions in respect of the same cause of action both in England and in a foreign country. *Mutrie v. Binney* (1887) 35 Ch.D. (C.A.) 614.

²⁸ See Sub-Rule, clause 1; *Logan v. Bank of Scotland* (No. 2) [1906] 1 K.B. (C.A.) 141; *Huntly v. Gaskell* [1905] 2 Ch. 656.

²⁹ See Sub-Rule, clause 2.

³⁰ *Peruvian Guano Co. v. Bockwoldt* (1883) 23 Ch.D. (C.A.) 225, 232, 233. In *Pena Copper Mines v. Rio Tinto Co., Ltd.* (1912) 105 L.T. 846, an injunction was issued restraining the defendants, who had brought an action unsuccessfully in England on a contract containing a clause providing that it was to be construed as an English contract, from proceeding with an action in Spain on the contract. The contract provided for recourse to arbitration, and the Court of Appeal held that the defendants could not by proceedings abroad defeat the intention of the clause, relying on *Hamlyn & Co. v. Talisker Distillery Co.* [1894] A.C. 202.

³¹ *The Goulandris* [1927] P. 182, 196, *per* Bateson, J.

contracting States which have ratified the International Protocol on Arbitration Clauses of 1923, then on the application of any party to such a submission, the court shall, unless satisfied that the agreement or arbitration has become inoperative or cannot proceed, stay any legal proceedings which may have been commenced against that party by any other party to the agreement.

Comment

This Sub-Rule is based on the Arbitration Clauses (Protocol) Act, 1924, which was passed in order to permit the carrying out of the Protocol on Arbitration Clauses signed at the meeting of the Assembly of the League of Nations on September 24, 1923, and duly ratified by a large number of States. Under this Protocol the parties to it recognise in Article 1 the validity of agreements made between parties, subject to the jurisdiction of different contracting States, for the submission to arbitration of differences which may arise with reference to commercial contracts or any other matter capable of settlement by arbitration, even if the arbitration is to take place in a country to whose jurisdiction none of the parties are subject. Any contracting State may, however, limit its acceptance to contracts deemed commercial by its national law. The arbitral procedure including the constitution of the tribunal shall be governed by the will of the parties and the law of the country in which the arbitration takes place, and the contracting States agree to facilitate procedure in accordance with their arbitration laws. They also agree to secure the execution by their authorities, and under the terms of their national laws of arbitration, of awards thus made.³² It is, however, expressly provided by Article 4 that 'the tribunals of the contracting parties, on being seized of a dispute regarding a contract made between persons to whom Article 1 applies, and including an arbitration agreement whether referring to present or future differences which is valid in virtue of the said Article and capable of being carried into effect, shall refer the parties on the application of either of them to the decision of the arbitrators. Such reference shall not prejudice the competence of the judicial tribunals in case the agreement or arbitration cannot proceed or becomes operative'.

The provision for reference to the arbitrators was clearly not in full harmony with the Arbitration Act, 1889; for English law, unlike Scottish law, does not regard an arbitration agreement as effectively ousting the jurisdiction of the courts.³³ Hence the Act

³² See the Arbitration (Foreign Awards) Act, 1930, and Rule 95, *post*, p. 433.

³³ Contrast s. 4 of the Act of 1889, where a stay of proceedings is only facultative if the court is 'satisfied that there is no sufficient reason why the matter should not be referred'.

of 1924 was necessary to overrule the Arbitration Act, 1889, in so far as this point was concerned. The Act applies also to Scotland and to Northern Ireland.

Illustration

A, resident in France, and X, resident in England, enter into a commercial contract, and agree that any disputes arising under it shall be referred to arbitration by a defined body in England. Difficulties arise, and A commences an action in England against X, claiming rescission of the contract. X applies to the court for a stay of the proceedings. The court must grant a stay, unless it is satisfied that the agreement is inoperative, or that it is no longer possible that arbitration should proceed, *e g*, through the death of the arbitrator named in the agreement.

SUB-RULE 3.—When a foreign judgment is capable of registration under the Foreign Judgments (Reciprocal Enforcement) Act, 1933,³⁴ then the court must stay any legal proceedings in England for the recovery of money due under such foreign judgment.³⁵

Comment

The object of the Act of 1933 is to insist that where execution can be obtained by the simple procedure of registration, an action on the judgment must not be brought. The Administration of Justice Act, 1920, does not deprive the plaintiff of his common law right to sue upon the foreign judgment, though it may cause him to lose costs if he so sues.³⁶

³⁴ Section 6; Order XLI B, for which see *Annual Practice*.

³⁵ See *post*, p. 426.

³⁶ See *post*, Rule 89, p. 417.

EXTRA-TERRITORIAL EFFECT OF ENGLISH JUDGMENT; ENGLISH BANKRUPTCY; ENGLISH GRANT OF ADMINISTRATION

1. ENGLISH JUDGMENT

RULE 58.—A judgment of the court (called in this Digest an English judgment) has, subject to the Exceptions hereinafter mentioned, no direct operation out of England.

The extra-territorial effect (if any) of an English judgment is a question of foreign law.

Comment

The judgment, or in other words the command of a court, cannot of itself operate beyond the limits of the territory over which the court has jurisdiction. An English judgment, therefore, has, *proprio vigore*, no operation in any country but England. The courts of a foreign country may, and no doubt in some cases will, give effect to an English judgment.¹ But whether, to what extent, and by what means, a foreign, *e.g.*, a French or Victorian court, will enforce an English judgment, or recognise the effect of such a judgment on the status of persons affected by it, is a question not of English but of foreign law.

Exception 1.—An English judgment for any debt, damages, or costs may be rendered operative in Northern Ireland or Scotland by registration of a certificate thereof in accordance with the provisions of Rule 88.²

See Intro., pp. 23, 26, 32, *ante*; Wolff, ss. 231–33, 250. Effect is freely given in Scottish courts, and those of other parts of British territory. See Chap. 16, and compare the Foreign Judgments (Reciprocal Enforcement) Act, 1933, as to the effect of an English judgment in the courts of a country not forming part of the British Commonwealth, provided a treaty has been concluded with the foreign country. Such treaties have been made with France (S. R. & O. 1936, I, p. 1503) and Belgium (S. R. & O. 1936, I, p. 1447). For India see S. R. & O. 1938, No. 1363. In general, less regard is paid to English judgments abroad than is shown to foreign judgments in England.

² See Chap. 16, Rule 88, *post*, as to the extension of certain judgments *in personam* throughout the United Kingdom; and Judgments Extension Act, 1868. See also Rule 89, *post*, as to the extension to other parts of British territory of judgments of courts of the United Kingdom.

Exception 2.—Any order of an English Bankruptcy Court shall be enforced in Scotland and Northern Ireland and is enforced in Eire in the courts having jurisdiction in bankruptcy there in the same manner as if the order had been made by the court which is required to enforce it.³

Exception 3.—Any order made by the court in England having jurisdiction to wind up a company in the course of such winding-up shall be enforced in Scotland and Northern Ireland in the courts that would respectively have jurisdiction in respect of that company if registered in Scotland or Northern Ireland, and in the same manner in all respects as if the order had been made by these courts.⁴

Exception 4.—The powers and authority with regard to the administration and management of the estate of a lunatic or defective conferred by the Lunacy Act, 1890, and amending Acts on the Judge in Lunacy shall apply to the property of a lunatic or defective, whether immovable or movable, situate in any British territory.⁵

Exception 5.—The powers of the court in England to make vesting orders under the Trustee Act, 1925,

³ See the Bankruptcy Act, 1914, s. 121. Similar provision is made for the enforcement in England of orders of the Scottish and Northern Irish Bankruptcy Courts. This Act still applies in Eire. See with regard to s. 122 *Re Bullen* [1930] Ir.R. 82; *Re Corballis* [1929] Ir.R. 266; and as regards s. 18 (1): *Re Reilly* [1942] Ir.R. 416, 420. And see *post*, p. 437, note 5.

⁴ See the Companies Act, 1948, s. 276. Similar provision is made for the enforcement in England of orders made by the courts in Scotland and Northern Ireland in the course of the winding up of companies registered in Scotland or Northern Ireland. The position of Eire is the same as in the case of bankruptcy, i.e., the rule no longer rests on the Imperial Act (the Companies Act, 1948), and is a mere matter of foreign law, subject to one distinction. S. 122 of the Bankruptcy Act, 1914, which virtually provides for the co-operation of all British courts in bankruptcy proceedings still applies to Eire, but there is no similar provision in the Companies Act, 1948, and the Companies (Consolidation) Act, 1908, s. 180 still in force in Eire no longer applies in England. Compare *Re Portarlinton Electric Light and Power Co.* [1922] 1 Ir.R. 100. Hence the slight difference in the statement of Exceptions 2 and 3. See also *Re Bank of Egypt* [1913] 1 Ir.R. 502.

⁵ See the Lunacy Act, 1890, s. 110. Compare s. 181 as to Scotland, Northern Ireland and Eire. The powers conferred by that Act are extended by the Lunacy Act, 1908, s. 1, the Mental Deficiency Act, 1913, s. 64, and the Mental Treatment Act, 1930, s. 5 (16). See Rule 124, p. 515, *post*.

shall extend to all property in British territory except Scotland.⁶

2. ENGLISH BANKRUPTCY AND WINDING-UP OF COMPANIES⁸

(1) BANKRUPTCY

(a) *As an Assignment.*⁹

RULE 54.¹⁰—An assignment of a bankrupt's property to the trustee in bankruptcy under the Bankruptcy Act, 1914 (English bankruptcy), is, or operates as, an assignment of the bankrupt's

(1) immovables¹¹ (land);

(2) movables¹²;

whether situate in England or elsewhere.

⁶ See the Trustee Act, 1925, s. 56. For the cases in which vesting orders may be made by the court, see especially ss. 44 and 51 of the Act. Similar powers were given to the Irish courts by the Trustee Act Amendment Act, 1894, s. 2, which is not repealed by the Act of 1925, and is in effect continued in force as regards Eire by Article 73 of the Constitution of 1922 and Article 50 (1) of the Constitution of 1937, and the Trustee Acts, 1888 to 1931 (see Act No. 20 of 1931, s. 6 (2)). S. 2 of the Act of 1894 is made effective as regards Northern Ireland in respect of orders made in Eire by s. 8 of the Irish Free State (Consequential Adaptation of Enactments) Order, 1923; see also s. 3 of the Adaptation of Enactments Act, 1922 (No. 2). Compare *Re Hewitt* (1858) 6 W.R. 537; *Re Lamotte* (1876) 4 Ch D. 325.

Under ss. 34 and 54 of the Trustee Act, 1850, vesting orders were made of lands in Canada, *Re Groom Trust Estate* (1864) 11 L.T. 336.

In the case of Scotland recourse is necessary by English trustees to the *nobile officium* of the Court of Session: see *Re Forrest* (1910) 54 S.J. 737, *Re Georges* (1921) 65 S.J. 311; *Re Carruthers' Trustees* (1896) 24 R. 238; *Re Allan's Trustees* (1896) 24 R. 238; (1897) 24 R. 718; *Re Pender's Trustees* (1903) 5 F. 504, (1907) 9 F. 207.

⁷ For the court's jurisdiction in Bankruptcy, see Chap. 7, p. 276, *ante*.

⁸ For the court's jurisdiction in Winding-up of Companies, see Chap. 7, p. 291, *ante*.

⁹ See the Bankruptcy Act, 1914, s. 18 (1), with which read ss. 37-45, 53, and 167. See, generally, as to the extra-territorial effect of bankruptcy as an assignment, Cheshire, pp. 639-47; Wolff, ss. 531-538; Westlake, Chap. 6, pp. 162-183; Phillimore, ss. 765-779; Foote, pp. 265, 266, 333, 334; Goudy, *Law of Bankruptcy in Scotland*, 4th ed., Chap. 43; Story, ss. 403-422; Baldwin, pp. 281-283. And see p. 437, note 1.

¹⁰ See the Bankruptcy Act, 1914, ss. 38, 53, 167; *Re Anderson* [1911] 2 K.B. 896; *Re Temple* [1947] Ch. 345. For the rights of English and foreign trustees in successive bankruptcies as regards property in England accruing after the first bankruptcy, see Rule 99, *post*, p. 440.

¹¹ For definition of 'immovables', see pp. 40, 45, 46, *ante*.

¹² For definition of 'movables', see pp. 40, 41, 45, 46, *ante*.

Comment

Under the Bankruptcy Act, 1914, s. 167, the bankrupt's 'property'¹³ 'includes money, goods, things in action, land, and every description of property, whether real or personal, and whether situate in England or elsewhere; also obligations, easements, and every description of estate, interest and profit, present or future, vested or contingent, arising out of or incident to property as above defined'.¹⁴

Hence, speaking generally, the bankruptcy (*i.e.*, the debtor's being adjudicated a bankrupt) transfers to the trustee, as far as an Act of Parliament can accomplish this result, all the bankrupt's property, whatever its situation, and this irrespective of the bankrupt's domicile or nationality.¹⁵ The bankruptcy, moreover (except in the case of certain bona fide transactions without notice specially protected by the bankruptcy law),¹⁶ relates or dates back, as far as the title of the trustee is concerned, to the 'commencement of the bankruptcy', and by this term is meant the time of the act of bankruptcy, or (if the bankrupt is proved to have committed more acts of bankruptcy than one) of the first act of bankruptcy proved to have been committed by the bankrupt within three months next preceding the date of the presentation of the bankruptcy petition.¹⁷ And this doctrine of relation applies to all property of the bankrupt, wherever situate, at any rate within British territory.¹⁸

The property so vested must be in strictness 'property of the bankrupt'; and property which once belonged to the bankrupt, if it has before the commencement of the bankruptcy become already vested in some other person, *e.g.*, in the trustee under a Scottish bankruptcy,¹⁹ is not the property of the bankrupt, and does not vest in the trustee under the English bankruptcy.²⁰

¹³ With certain limited exceptions, which have nothing to do with the rules of private international law, *e.g.*, property held by the bankrupt in trust for another person, or tools or wearing apparel of the bankrupt, his wife and children. See Bankruptcy Act, 1914, s. 38.

¹⁴ See Bankruptcy Act, 1914, s. 167. See as to the interpretation of this section in Scotland, *Salaman v. Tod* [1911] S.C. 1214.

¹⁵ Under the Bankruptcy Act, 1914, English courts give to an English bankruptcy a wider effect than they would independently of Acts of Parliament (see Rule 97) give to a foreign bankruptcy. (See Rules 98 and 99, *post*.) See *Sill v. Worswick* (1791) 1 H.B.L. 665; *Selkrig v. Davis* (1814) 2 Rose 291; *Royal Bank of Scotland v. Cuthbert* (1813) 1 Rose 462. Compare *Re Artola Hermanos* (1890) 24 Q.B.D. (C.A.) 640.

¹⁶ Bankruptcy Act, 1914, s. 45.

¹⁷ Bankruptcy Act, 1914, s. 37.

¹⁸ See Chap. 29, for the application of special rules of bankruptcy as against foreign creditors.

¹⁹ See Bankruptcy (Scotland) Act, 1913, s. 97.

²⁰ Compare *Re A Debtor* [1922] 2 Ch. (C.A.) 470, where this proposition was not questioned; see *post*, p. 444, Rule 100, n. 36. A judgment *in rem* in a foreign court even after the commencement of the bankruptcy would apparently defeat the trustee's title. Compare *Minna Craig Steamship Co. v. Chartered etc., Bank* [1897] 1 Q.B. (C.A.) 460 (company liquidation), and note 21, *post*.

Moreover, if a bankruptcy in one country operates as an assignment of property situate in another, the property passes, speaking generally, subject to any charges which are recognised as pertaining to it under the law of the country in which it is situated.²¹

The exact extent, however, to which an English bankruptcy operates outside the United Kingdom in respect of immovable and movable property is a matter of some difficulty. It is submitted that the proper construction of the Act of 1914, as of the Act of 1883, is as follows:—

(1) An English bankruptcy operates as an assignment to the trustee of all immovable and movable property of the bankrupt situated in any part of British territory, subject, however, to the carrying out of any formalities requisite under the local law in respect of conveyances or assignments of property.²²

However, s. 53 (4) of the Bankruptcy Act of 1914 provides that 'the certificate of appointment of a trustee shall, for all purposes of any law in force in any part of the British dominions requiring registration, enrolment, or recording of conveyances or assignments of property, be deemed to be a conveyance or assignment of property, and may be registered, enrolled, and recorded accordingly'. The trustee has, therefore, the right to secure control of the whole of the bankrupt's property of any kind, and may invoke, if necessary, the assistance of the local court exercising bankruptcy jurisdiction under s. 122 of the Act.²³

(2) An English bankruptcy operates as an assignment to the trustee of immovable or movable property situate outside British territory, only in so far as the law of the country where the property is situate makes provision to this effect. But the trustee is under the duty of obtaining, so far as the law of such country permits, control of the bankrupt's property, and the bankrupt must render him all possible assistance in this regard.

It is clear that under the recognised principles of the interpretation of British Acts of Parliament it cannot be assumed that it is the purpose of the Act of 1914 to operate so as to effect of itself an assignment of the bankrupt's property outside British territory, and no judicial decision supports such an interpretation of the Act. On the other hand, it is equally clear

²¹ See *Re Some, ex p. De Lemos* (1896) 3 Mans. 131; *Galbraith v. Grimshaw* [1910] A.C. 508; *Singer & Co. v. Fry* (1915) 84 L.J.K.B. 2025. So in Scotland: *Hunter v. Palmer* (1825) 3 S. 586; *Goetze v. Aders* (1874) 2 R. 150. See *post*, p. 441, Rule 99, n. 24. As regards real estate under a Scottish bankruptcy, see s. 97 (3) of the Bankruptcy (Scotland) Act, 1913. *White v. Briggs* (1843) 5 D. 1148.

²² See *Callender v. Colonial Secretary of Lagos* [1891] A.C. 460; *Ex p. Rogers* (1881) 16 Ch.D. (C.A.) 665, 666. See also Rule 97 *post*; and compare *New Zealand Loan and Mercantile Agency Co. v. Morrison* [1898] A.C. 349, 358.

²³ Compare *Lafleur, Conflict of Laws*, p. 236, with regard to Quebec. As regards Eire, see *Re Bullen* [1930] Ir.R. 82; *Re Corballis* [1929] Ir.R. 266; *Re Reilly* [1942] Ir.R. 416, 420; *Re Sykes* (1932) 101 L.J.Ch. 298. And see *post*, p. 437, Rule 97, n. 5

that it is the intention of the Act so far as possible to secure that the property of a bankrupt situate outside British territory shall be made available for the payment of his debts, and there can be no doubt that, if the debtor is personally within the jurisdiction of the court, he may be ordered to execute in the proper form any instruments which may be necessary under the law of the country, in which his property is situate, to transfer the ownership of the property to the trustee.²⁴ The trustee is clearly under an obligation to make every reasonable effort by application to the courts or otherwise to realise the debtor's property for the benefit of the creditors, and he may in a suitable case be able to obtain decrees from the courts restraining creditors from proceedings against property of the bankrupt abroad which tend to interfere with the equal distribution of the assets of the bankrupt.²⁵

From a practical point of view the question is of importance in those instances in which a creditor of the bankrupt who has obtained possession of property of the bankrupt in some country outside British territory comes within the sphere of jurisdiction of the English courts. Unfortunately there is extremely little judicial authority of recent date bearing on this topic. The older cases²⁶ were decided at a time when the bankruptcy law was in a state of imperfect development and when the conflict of laws had been little studied. The following principles, however, may be laid down with a fair amount of certainty:—

(1) A creditor who receives abroad any part of the bankrupt's property will not be allowed to prove under the English

²⁴ *Re Harris* (1896) 74 L.T. 221; Bankruptcy Act, 1914, s. 22 (2). Contrast *Selkirk v. Davis* (1814) 2 Rose 97, 291; 2 Dow 280; *Cockerell v. Dickens* (1840) 3 Moo.P.C. 98, 133. As to Scotland, see the Bankruptcy (Scotland) Act, 1913, s. 77.

²⁵ The courts will not restrain proceedings abroad by a foreigner in a foreign country which is not bound by the Bankruptcy Act, 1914: *Re Chapman* (1873) L.R. 15 Eq. 75; but they will restrain English creditors: *Re Distin, ex p. Ormiston* (1871) 24 L.T. 197; and proceedings in an Irish court by an Irish creditor who had proved in the English bankruptcy: *Ex p. Tait, re Tait* (1872) L.R. 13 Eq. 311; and proceedings in a colony: *Re Spalding, ex p. Official Receiver* (1889) 61 L.T. 83. Foreign creditors may, of course, be restrained from suits in English courts: *Ex p. Lovering, re Thorpe* (1873) 27 L.T. 863. Compare, as regards winding-up of a company *Re Central Sugar Factories of Brazil* [1894] 1 Ch. 369; *Re Oriental Steam Co., ex p. Scinde Ry. Co.* (1874) 9 Ch. 557; *Re International Pulp and Paper Co.* (1876) 3 Ch.D. 594, 599; *Re North Carolina Estate Co.* (1889) 5 T.L.R. 328; *Re South-Eastern of Portugal Ry. Co.* (1869) 17 W.R. 982; *Re Belfast Ship Owners' Co.* [1894] 1 Ir.R. 321. But an English mortgagee was not restrained from proceeding abroad to enforce a mortgage on land given by an English company which was being wound up: *Moor v. Anglo-Italian Bank* (1879) 10 Ch.D. 681. Compare *Ex p. Rogers, re Boustead* (1881) 16 Ch.D. 665. See *Minna Craig Steamship Co. v. Chartered Mercantile Bank of India* [1897] 1 Q.B. 460, 468-470 (C.A.).

²⁶ *Hunter v. Potts* (1791) 4 T.R. 182; *Sill v. Worswick* (1791) 1 H.Bl. 665; *Philips v. Hunter* (1795) 2 H.Bl. 402; Cheshire, pp 640-47; Wolff, s. 535; Westlake, ss. 142, 143, pp. 133, 134.

bankruptcy, unless he brings into the common fund the part so acquired.²⁷ The Act aims at securing that all the property of the bankrupt shall be available in payment of his debts, and it seems clear that any person who seeks to prove under the bankruptcy must be subject as regards his claim to this principle. The rule will, accordingly, apply whatever the nature of the property or the means by which the creditor obtained possession of it, and whatever the nationality of the creditor.

(2) If the creditor has recovered property of the bankrupt, whether under the judgment of a court abroad or without legal process, the trustee can by an action in England compel him to refund the value of the property thus obtained, provided the creditor is subject to the jurisdiction of the English courts. The extent of this jurisdiction is not quite certain.²⁸

The fact that the Act gives extra-territorial validity throughout British territory to an English bankruptcy raises the question whether any court in British territory can treat an English bankruptcy as invalid, on the ground, *e.g.*, that in the opinion of a Scottish or Victorian court the English court has exceeded the jurisdiction conferred upon it by the Act of 1914. The answer to this question seems clearly to be that any court in British territory must treat the English bankruptcy as valid, and that any person who asserts that the English court has exceeded its jurisdiction, *e.g.*, by adjudging bankrupt a person not subject to the English bankruptcy law, must appeal to the proper tribunal in England and cannot ask a court in British territory to

²⁷ *Ex p. Wilson* (1872) L.R. 7 Ch. 490; *Banco de Portugal v. Waddell* (1880) 5 App.Cas. 161. See also the Scottish cases, *Lindsay v. Paterson* (1840) 2 D. 1373; *Stewart v. Auld* (1851) 13 D. 1337; *Clydesdale Bank v. Anderson* (1890) 27 Sc.L.R. 493. In view of the decision in *Cockerell v. Dickens* (1840) 3 Moo.P.C. 98 it has been suggested that a creditor need not bring into account what he may have received from real estate in a foreign country, but *Cockerell v. Dickens* only shows that this rule might apply where the bankruptcy could not purport to affect foreign immovables and it is inapplicable since the Act of 1914 shows clearly that so far as the legislation can provide it extends to such immovables, *i.e.*, it will not allow creditors to secure part payment thence and yet claim in England. Thus while English bankruptcy law cannot directly affect the proceeds of foreign land, it will do so indirectly. If a foreign creditor proves in an English bankruptcy, he may be ordered to restore property of the debtor improperly in his possession: *Ex p. Robertson, re Morton* (1875) L.R. 20 Eq. 733. But see *Re Bowes* [1889] W.N. 53.

²⁸ Compare *Cheshire*, pp. 641-47; Wolff, s. 535; Westlake, ss. 142, 143. It is submitted, following *Cheshire*, pp. 646-47, that jurisdiction must be understood in the sense of bankruptcy jurisdiction under s. 4 (1) (d) of the Bankruptcy Act, 1914. Dicey (5th ed., p. 372) stated that the trustee cannot compel a creditor to refund, if the creditor has recovered property of the bankrupt (1) under the judgment of a court abroad delivered with knowledge of the English bankruptcy; or (2) without legal process or under the judgment of a court abroad, but without notice of the bankruptcy to the foreign court, provided that the law of the country where the property was recovered does not recognise the title of the trustee under the English bankruptcy. Other writers have suggested that jurisdiction is determined by the domicile or the nationality of the creditor. For a detailed criticism, see *Cheshire, loc. cit.* See *Sill v. Worswick* (1791) 1 H.Bl. 665, 693; *Hunter v. Potts* (1791) 4 T.R. 182; *Phillips v. Hunter* (1795) 2 H.Bl. 402.

review the decision of the English court.²⁹ This would appear to be the case even if the person aggrieved alleges that the English court has acted under a misapprehension of fact, *e.g.*, as to his domicile, or that the adjudication in bankruptcy was obtained by fraud, and it is obvious that any other view would result in a serious impairment of the effectiveness of the principle of the operation throughout British territory of an English bankruptcy.

Illustrations

In the following illustrations N is a debtor made bankrupt under the English Bankruptcy Act, 1914:—

1. N, at the time of his being adjudicated bankrupt, possesses movables, *viz.*, money and debts, owing to him in Scotland, the Isle of Man, and Victoria. The bankruptcy is an assignment to the trustee in bankruptcy of such money and debts.³⁰

2. N, at the time of his being adjudicated bankrupt, possesses land in Scotland, Eire, the Isle of Man, and in Victoria. The bankruptcy is an assignment to the trustee of such land, and authorises the trustee to proceed to take such steps as may be necessary under the local law to obtain due registration and record of the transfer of ownership of the land from N to the trustee.³¹

3. N, at the time of his being adjudicated bankrupt, possesses shares in a railway company registered in Victoria. The bankruptcy is an assignment to the trustee of N's right to the shares, and authorises the transfer of these shares, on application by the trustee, from the name of N to that of the trustee in the company's register.

4. N, at the time of his being adjudicated bankrupt, possesses land and goods in Italy. The bankruptcy is an assignment of the land and goods to the trustee, in so far as the law of Italy permits it to operate as such an assignment, but not otherwise.³²

5. N, after the commencement of the bankruptcy, but a month before he is adjudicated bankrupt, possesses goods and money in Scotland and Victoria. The bankruptcy is an assignment to the trustee in bankruptcy of such goods and money to the same extent to which it would have been an assignment if the goods and money had been situate in England.³³

6. After N is adjudicated bankrupt, X recovers from him in New York, whether with or without legal process, £100 due from N to X. X then attempts to prove under N's bankruptcy for a sum of £500 also due by N to X. He will not be allowed to prove unless he pays over to A, the trustee, the £100 recovered.³⁴

7. After N is adjudicated bankrupt, X obtains by proceedings in a New York court, £1,000 due by N to X. X comes to England, and is sued by A,

²⁹ See the Bankruptcy Act, 1914, ss. 121, 122, the terms of which seem to exclude any discretion on the part of the courts in regard to the validity of English adjudications, and it has been so held in Scotland: *Wilkie v. Cathcart* (1870) 9 M. 168; *Salaman v. Tod* [1911] S.C. 1214, 1220. It should be noted that s. 122 still applies in Eire; see *ante*, p. 326, note 3. For facilities for enforcement see (India) Presidency-towns Insolvency Act, 1907, s. 126; Provincial Insolvency Act, 1920, s. 77.

³⁰ See p. 329 (1), *ante*.

³¹ See p. 329 (1), *ante*; *Re Bullen* [1930] Ir.R. 82; *Re Corballis* [1929] Ir.R. 266; *Re Reilly* [1942] Ir.R. 416, 420.

³² See p. 329 (2), *ante*.

³³ As to the effect of an English bankruptcy on antecedent transactions, see Bankruptcy Act, 1914, ss. 37, 40-47.

³⁴ See pp. 330, 331, *ante*.

the trustee, for the £1,000. A cannot recover, unless X is a creditor in the meaning of section 4 of the Act of 1914.³⁶

(b) *As a Discharge.*

RULE 55.³⁷—A discharge under an English bankruptcy from any debt or liability is in any British territory where the Imperial Bankruptcy Acts apply, a discharge from such debt or liability, wherever or under whatever law the same has been contracted or has arisen.

(2) WINDING-UP

RULE 56.—The winding-up of a company under the Companies Act, 1948,³⁸ impresses the whole of the property of the company in the United Kingdom with a trust for the application in the course of the winding-up, for the benefit of the persons interested in the winding-up.³⁹

Comment

The principles applicable to the winding-up of a company differ in essential respects from those affecting bankruptcy.⁴⁰ It is now definitely established⁴¹ that the Companies Acts do not, except when express provision is made to the contrary, affect the rights and liabilities which a company may possess outside the United Kingdom, and that in particular property outside the United Kingdom does not become vested in the liquidator by virtue of a winding-up order. On the other hand, the liquidator is empowered to take into his custody all the property and things in action to which the company is entitled in the United Kingdom,⁴² and any order made by the court in England in the course of

³⁶ See p. 331 *ante*. Compare *Ex p. Smith* (1862) 31 L.J.B. 60.

³⁷ See *Ellis v. M'Henry* (1871) L.R. 6 C.P. 223; *Edwards v. Ronald* (1830) 1 Knapp 359. And see Chap. 17, Rules 101–103, *post*.

³⁸ Part V, ss. 211–365, as to the powers of liquidators, see especially ss. 237–251.

³⁹ See Cheshire, pp. 632–36; Wolff, ss. 85, 287; Westlake, ss. 133, 141, 142; *New Zealand Loan and Mercantile Co. v. Morrison* [1898] A.C. 349, 357; *Moor v. Anglo-Italian Bank* (1879) 10 Ch.D. 681, 688; *Re Nelson* [1918] 1 K.B. (C.A.) 469 (a case of bankruptcy). Compare *Re Oriental Inland Steam Co., ex p. Scinde Ry. Co.* (1874) L.R. 9 Ch. 557; *Minna Craig Steamship Co. v. Chartered, etc., Bank* [1897] 1 Q.B. 55, 460 (C.A.).

⁴⁰ Rules 54, 55, pp. 327, 333, *ante*.

⁴¹ *New Zealand Loan and Mercantile Agency Co. v. Morrison* [1898] A.C. 349; *Re Vocalion (Foreign), Ltd.* [1932] 2 Ch. 196, 201. See also *Gibbs v. Société Industrielle* (1890) 25 Q.B.D. (C.A.) 399; *Queensland Mercantile and Agency Co. v. Australasian Investment Co.* (1888) 15 R. 935, 939, and *ante*, p. 326, n. 4. For Canada, see *Allen v. Hanson* (1890) 16 Q.L.R. 87, 18 S.C.R. 667; *Powis v. Quebec Bank*, R.J.Q. 2 Q.B. 566. Compare Johnson, *Conflict of Laws*, Vol. 2, p. 518, n. 1.

⁴² Companies Act, 1948, ss. 243–244.

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³⁹ See *Cheshire*, pp. 632–36; *Wolff*, ss. 85, 287; *Westlake*, ss. 138, 141, 142; *New Zealand Loan and Mercantile Co. v. Morrison* [1898] A.C. 349, 357; *Moor v. Anglo-Italian Bank* (1879) 10 Ch.D. 681, 688; *Re Nelson* [1918] 1 K.B. (C.A.) 459 (a case of bankruptcy). Compare *Re Oriental Inland Steam Co.*, *ex p. Scinde Ry. Co.* (1874) L.R. 9 Ch. 557; *Minna Craig Steamship Co. v. Chartered, etc., Bank* [1897] 1 Q.B. 55, 460 (C.A.).

⁴⁰ Rules 54, 55, pp. 327, 333, *ante*.

⁴¹ *New Zealand Loan and Mercantile Agency Co. v. Morrison* [1898] A.C. 349; *Re Vocation (Foreign), Ltd.* [1932] 2 Ch. 196, 201. See also *Gibbs v. Société Industrielle* (1890) 25 Q.B.D. (C.A.) 399; *Queensland Mercantile and Agency Co. v. Australasian Investment Co.* (1883) 15 R. 935, 939, and *ante*, p. 326, n. 4. For Canada, see *Allen v. Hanson* (1890) 16 Q.L.R. 87, 18 S.C.R. 667; *Powis v. Quebec Bank*, R.J.Q. 2 Q.B. 566. Compare *Johnson, Conflict of Laws*, Vol. 2, p. 518, n. 1.

⁴² Companies Act, 1948, ss. 243–244.

winding-up a company shall be enforced in Scotland and Northern Ireland in the courts that would respectively have jurisdiction in respect of that company if registered in Scotland or Northern Ireland.⁴³

Where any company registered in England is being wound up by or subject to the supervision of the court, any attachment, sequestration, distress, or execution, put in force against the estate or effects of the company after the commencement of the winding-up shall be void to all intents.⁴⁴ A difficult question, however, arises with regard to the case where a company, though registered in England, carries on business abroad, and after the commencement of the winding-up a creditor obtains judgment against the company and levies execution on its effects, while at the same time he claims repayment from the liquidator of sums due to him from the company in England. As regards the winding-up of an insolvent company registered in England, it is expressly provided in the Companies Act, 1948, s. 317, that the same rule shall be observed with regard to the respective rights of secured and unsecured creditors, and to debts provable, as are in force for the time being under the law of bankruptcy in England with respect to the estate of a bankrupt. It seems, therefore, to follow that a creditor who desires to benefit under the winding-up must give up for the benefit of other creditors any advantage which he may have obtained for himself by proceeding against the company after the commencement of the winding-up in any British possession, or other foreign country.⁴⁵

The case of the winding-up of a company not registered in England stands on a different footing. The winding-up can deal only with the corporate character of the company in England, and it does not appear that in such a case in the distribution of the

⁴³ *Ibid.*, s. 276, reproducing s. 180 of the Companies (Consolidation) Act, 1908 which still applies in Eire.

⁴⁴ *Ibid.*, s. 325, and as to estate or effects in Scotland, s. 327 (2); for proceedings after the petition and before the order, see s. 226; as to unregistered companies, see ss. 402 and 404. Leave of the Court having jurisdiction to wind up the company is required for bringing proceedings in another part of the United Kingdom. See Companies Act, 1948, s. 231; *Martin v. Port of Manchester Insurance Co.* [1934] S.C. 143. As to the power of the English courts to enforce by restraining proceedings in other parts of the United Kingdom, see *Re International Pulp and Paper Co.* (1876) 3 Ch.D. 594; *Re Hermann Loog, Ltd* (1887) 36 Ch.D. 502; *Re Thurso New Gas Co.* (1889) 42 Ch.D. 486. The power may also be exercised to restrain proceedings in any foreign country, provided the creditor to be restrained falls within the jurisdiction of the court. This jurisdiction may be exercised even if the creditor has not made any claim in the liquidation. *Re Central Sugar Factories of Brazil* [1894] 1 Ch. 369; but see *Re Vocation (Foreign), Ltd.* [1932] 2 Ch. 196. See also cases cited, p. 335, note 47 *post*, and p. 330, note 25 *ante*.

⁴⁵ Compare *Re Oriental Inland Steam Co.* (1874) L.R. 9 Ch. 557. Secured creditors and creditors who have obtained a judgment *in rem* in a foreign court are not affected by this rule: see *Moor v. Anglo-Italian Bank* (1879) 10 Ch.D. 681, 688-9; *Minna Craig v. Chartered, etc., Bank* [1897] 1 Q.B. 55, 460 (C.A.). See *ante*, p. 330, n. 25, and *post*, p. 335, n. 47.

effects any regard can be had to matters affecting the company outside the United Kingdom.⁴⁶

Illustrations

1 X & Co., a company registered in England, carries on its business largely in India. An order is made for the winding-up of the company. A, a customer of the company, has accounts outstanding against it at the date of the commencement of the winding-up for £27,000 in England, and £5,000 in India for goods supplied. After that date he brings an action against the company in India, and recovers by execution levied on the property of the company there, £2,000. A cannot (*seem*) retain this sum and prove for his claim in the winding-up in England.⁴⁷

2. X & Co., is a company incorporated under the English Companies Acts, and has its head office in England. X & Co. incurs in Victoria a debt of £3,000 to A. After the debt is incurred an order is made on the application of X and Co. by the High Court for winding-up the company. A scheme of arrangement is made in accordance with the Companies Acts, and under these Acts is binding upon all creditors. A, after the arrangement is arrived at, brings an action against X & Co. in a Victorian court for the amount due to him. The arrangement under the Companies Acts does not in Victoria discharge X & Co. from liability for the debt.⁴⁸

3. ENGLISH GRANT OF ADMINISTRATION

RULE 57.⁴⁹—An English grant has no direct operation out of England.

This Rule must be read subject to Rules 61 to 63.⁵⁰

Comment

An English grant of probate or of letters of administration does not, of course, confer upon the personal representative even of a

⁴⁶ See Rule 47, pp. 294, 295, *ante*. Compare *Employers' Liability Assurance Corporation v. Sedgwick, Collins & Co.* [1927] A.C. 95; *Re Russian Bank for Foreign Trade* [1933] Ch. 745, *Re Russo-Asiatic Bank* [1934] Ch. 720; *Re Vocalion (Foreign), Ltd.* [1932] 2 Ch. 196, 207. And see *Wortley* (1933) 14 B.Y.B.I.L., pp. 1-17.

⁴⁷ See *Re Oriental Inland Steam Co.* (1874) L.R. 9 Ch. 557; *Re North Carolina Estate Co.* (1889) 5 T.L.R. 328; *Re Belfast Shipowners' Co.* [1894] 1 Ir.R. 321; *Re International Pulp and Paper Co.* (1876) 3 Ch.D. 594; *Re Central Sugar Factories of Brazil* [1894] 1 Ch. 369; *Re Jenkins & Co., Ltd.* (1907) 51 S.J. 715; *Re Vocalion (Foreign), Ltd.* [1932] 2 Ch. 196; *Martin v. Port of Manchester Insurance Co.* [1934] S.C. 143. Contrast *Minna Craig Steamship Co. v. Chartered, etc., Bank* [1897] 1 Q.B. (C.A.) 460, in respect of creditors who have obtained a judgment *in rem* in a foreign court and *Moor v. Anglo-Italian Bank* (1879) 10 Ch.D. 681; *Re West Cumberland Iron and Steel Co.* [1893] 1 Ch. 713 in respect of secured creditors. For the restrictions on the right to proceed against property of a company in Scotland by arrestment or pouncing, see *Companies Act, 1948*, s. 327.

The effect of a mere appointment of receivers is quite different from that of a winding-up, and does not justify restraining creditors from proceeding abroad. Compare *Re Maudslay, Field & Sons* [1900] 1 Ch. 602.

⁴⁸ *New Zealand Loan and Mercantile Agency Co. v. Morrison* [1898] A.C. 349.

⁴⁹ *Atkins v. Smith* (1740) 2 Atk. 63.

⁵⁰ See especially, as to extension of English grant to Northern Ireland and to Scotland respectively, Rules 61, 62, pp. 342, 343, *post*, and as to extension to colonies, compare Rule 63, p. 343, *post*.

man who has died domiciled in England power to sue in a foreign court, except in so far as the law administered by that court concedes him the right.

RULE 58.⁵¹—An English grant extends to all the movables of the deceased, wherever situate, at the time of his death, at least in such a sense that a person who has obtained an English grant (who is hereinafter called an English administrator) may—

- (1) sue in an English court in relation not only to property in England, but also to movables of the deceased situate in any foreign country ;
- (2) legitimately take steps to receive ⁵² or recover in a foreign country movables of the deceased situate in such country.

Comment

Though the jurisdiction of the court to make a grant is commonly involved because there is property of the deceased situate in England,⁵³ an ordinary grant (*i.e.*, one which is not in any way limited ⁵⁴) constitutes the administrator the representative of the deceased, not only in respect of the property in England, but also in respect of the whole of the deceased's movable property. No doubt there is some difficulty in determining what is the precise effect of an English grant on property situate abroad, and the question what is its effect is further considered in the comment on Rule 60.⁵⁵ This much, however, appears to be certain. An English administrator can sue in an English court in respect of movables of the deceased situate abroad, *e.g.*, in Victoria or in France ; nor would it here be any answer to an action by the administrator in respect of such movables that the deceased did not die domiciled in England. But, if there is a foreign administrator, he can be sued only subject to the terms of Rule 107, and it will, of course, be an answer to any suit by the English administrator that the subject-matter has been claimed under the local administration. His right of suit may, however, be exercised by leave of the court, even as respects persons not in England, under Rule 28, Exceptions 2 and 4. The administrator, further, has, as far as English courts are concerned, the right to receive or recover in a foreign country movables of the deceased. But it of course depends on the law,

⁵¹ *Whyte v. Rose* (1842) 3 Q.B. 498, 507; *Scarth v. Bishop of London* (1828) 1 Hagg.Ecc. 625. Compare *Re Scott* [1916] 2 Ch. (C.A.) 268.

⁵² See *Atkins v. Smith* (1740) 2 Aik. 68.

⁵³ See Rule 49, p. 301, *ante*.

⁵⁴ See p. 299, note 10, *ante*.

⁵⁵ See p. 338, *post*.

not of England, but of the foreign country, whether he has there, in accordance with its law, the right to receive such movables, or whether he may not make himself an executor *de son tort* by taking possession of such property.⁵⁶

Illustrations

In the following illustrations A is the administrator of T under an English grant:—

1. X, a Frenchman resident in France, has before T's death made a contract with T, which was to be performed in England, and has broken it. A can bring an action against X in England for the breach of contract.

2. X, a Frenchman resident in France, converts in France goods of T. X comes to England. A can sue X in England for the conversion.⁵⁷

3. X, an American living in New York, owes £100 to T. A has a right⁵⁸ to receive payment of the debt from X, and A has also a right to recover payment of the £100 from X by any proceedings in the courts of New York which are allowed by the law of New York, *e.g.*, by obtaining in New York a grant of administration, and bringing an action there against X.

RULE 59.⁵⁹—When a person dies domiciled in England, the English administrator should apply to the court of any foreign country, in which there are situate movables of the deceased, in order to obtain authority, under a grant of administration⁶⁰ or otherwise, to act as personal representative of the deceased in such foreign country in regard to such movables.

Comment

An English court has no power to dictate to the tribunals of foreign countries what is the course which they ought to pursue. According, however, to the doctrines of English law, the beneficial succession to a deceased person's movables is governed by the law of his domicile (*lex domicilii*),⁶¹ and the courts of his domicile have primary, though not exclusive, jurisdiction to determine the succession to such movables.⁶² Virtually all countries take the same view and likewise observe the English principle that the grant should follow the interest. What, therefore, occurs in practice is that, although there cannot be a single administration of an estate comprising property in different countries, there is a principal administration in the country of the domicile (called the *principal* or

⁵⁶ For the American doctrine, see Goodrich, ss. 180-181, 186.

⁵⁷ *Whyte v. Rose* (1842) 3 Q.B. 493, 506.

⁵⁸ *I.e.*, according to English law. In America there is much authority permitting a domiciliary administrator to receive payments in other States without taking out administration: Goodrich, ss. 182-183.

⁵⁹ *Atkins v. Smith* (1740) 2 Atk. 63; *Burn v. Cole* (1762) Amb. 415.

⁶⁰ For meaning of 'grant', see Rule 48, *ante*.

⁶¹ See Chap. 31, Rules 178-186, *post*.

⁶² See Chap. 15, Rule 75, *post*; *Enohin v. Wylie* (1862) 10 H.L.C. 1; *Ewing v. Orr-Ewing* (1883) 9 App.Cas. 34; (1885) 10 App.Cas. 453.

domiciliary administration) to which administration in other countries is ancillary. It is in conformity with this principle that the English courts will, in a proper case, restrain persons within their jurisdiction from taking proceedings abroad against the estate of a deceased person domiciled in England in respect of which an administration action has been or is to be begun in England.⁶³ And it follows from it that the representative under an English grant of a deceased person who has died domiciled in England ought to take steps to arrange for the representation of the deceased in any foreign country in which there are movables of his, and ought, in the opinion of English judges, to be placed by the courts of any foreign country, where the deceased has left movable property, in a position there to represent the deceased. In several States in the United States statutory authority exists for suits by an administrator without requiring the taking out of administration there.⁶⁴ The obligation of such a representative to pay duty under the Finance Act, 1894, on the assets of the deceased, including property out of England, is a strong incentive to him to obtain control of these assets.⁶⁵ The claim, however, of the English administrator of a person who has died domiciled in England, to be made representative of the deceased in a foreign country, is by no means an absolute one. 'The grant of probate', it has been laid down, 'does not, of its own force, carry the power of dealing with goods beyond the jurisdiction of the court which grants it, though that may be the court of the testator's domicile. At most it gives to the executor a generally recognised claim to be appointed by the foreign country or jurisdiction. Even that privilege is not necessarily extended to all legal personal representatives, as, for instance, when a creditor gets letters of administration in the court of the domicile'.⁶⁶

RULE 60.—The following property⁶⁷ of a deceased person passes⁶⁸ to the administrator under an English grant:—

⁶³ See *Bunbury v. Bunbury* (1839) 3 Jur. 644; *Graham v. Maxwell* (1849) 1 Mac. & G. 71; *Carron Iron Co. v. Maclaren* (1855) 5 H.L.C. 416; *Maclaren v. Stanton* (1855) 26 L.J.Ch. 332; *Re Boyse* (1880) 15 Ch D. 591; *Hope v. Carnegie* (1866) L.R. 1 Ch.App. 320; *Baillie v. Baillie* (1867) 5 Eq. 175; *Re Low* [1894] 1 Ch. (C.A.) 147.

⁶⁴ Goodrich, s. 181.

⁶⁵ S. 6 (2); s. 8 (3); see *Winans v. Att.-Gen* (No. 2) [1910] A.C. 27.

⁶⁶ *Blackwood v. The Queen* (1832) 8 App.Cas. 82, 92, 93. See *Re Kloebe* (1884) 28 Ch D. 175, 179, judgment of Pearson, J.

⁶⁷ For definition of 'property', see Rule 48, *ante*.

⁶⁸ Since the word 'administrator' as here used includes an executor (see Rule 48, p. 297, *ante*), the term 'passes' is not strictly correct; for the property of the deceased does not pass to the executor under the grant, but rather vests in him on the death of the testator (see p. 300, *ante*). Still, the language employed in the rule is convenient and usual and expresses what is meant, *viz.*, that certain property belongs to, and must be accounted for by, the administrator or executor who has obtained a grant.

English administrator and his relation to the property of the deceased. It expects an administrator to account for all property of which he comes into possession, but it does not directly impose on him any duties outside England, since it cannot give him rights beyond England. If the deceased is domiciled in England, then the English administrator is, as laid down in Rule 59, the proper person to receive the net proceeds of any foreign administration, and to apply to a foreign court for grant of administration to him or his agent in order to recover movables of the deceased there situate, and his statutory obligation to pay duties is an incentive to perform this duty of securing assets. If the deceased is not domiciled in England, then he is in practice only concerned with English property.

In regard to the difficult question, what are the movables which do pass under an ordinary English grant, the following points may, it is submitted, be considered as fairly well established :—

(1) Any movable of the deceased, which at the time of his death is locally situate in England, passes to the English administrator.⁷⁵

(2) When any other movable of the deceased is in fact received or recovered by the English administrator as such, it of course passes to him and forms part of the fund to be administered in England; and this is so whether the property is received or recovered by action in England, or received or recovered by action in a foreign country,⁷⁶ provided always in the latter case that the property, *e.g.*, goods or debts, come into the hands of the administrator in his character of English administrator. This limitation should be noted, for movables, *e.g.*, goods or money, of which an English administrator obtains possession in a foreign country, in the character of foreign administrator, do not pass to him under the grant. Thus, if the deceased dies domiciled in England and his English administrator obtains a grant in Victoria and there recovers debts due to the deceased, the amount recovered comes into his hands as Victorian administrator; he must administer it according to the law of Victoria,⁷⁷ and the only portion which passes to him under the English grant is that part (if any) which under Victorian law comes to or remains in his hands for administration in England, *i.e.*, which he holds in his character of English administrator. In such a case, of course, any final balance of assets in his hands must be held by him in his capacity of English administrator, but not until his Victorian administration is complete.

⁷⁵ See *ante*, Rule 60 (1).

⁷⁶ *Dowdale's Case* (1605) 6 Rep. 46 b, *nom. Richardson v. Dowdale*, Cro Jac. 55; *Atkms v. Smith* (1740) 2 Atk. 63. Compare, as to the general effect of an English grant, *Stirling-Maxwell v. Cartwright* (1879) 11 Ch.D. (C.A.) 522; *Ewing v. Orr-Ewing* (1883) 9 App.Cas. 84; and consider especially, Westlake, s. 103, pp. 132, 133, compared with Story, s. 514 a.

⁷⁷ See Chap. 30, Rule 176, *post*.

(3) Any goods of the deceased, *e.g.*, furniture or a watch, which are brought into England after his death, before any person has, under the law of a foreign country where they are situate, obtained a good title to them, pass to the English administrator; and goods which belong to the deceased, but which after his death have in a foreign country, in accordance with the laws thereof, passed to and come into the possession of another person, *e.g.*, a purchaser, certainly do not on coming to England become the property of the English administrator. The only question requiring consideration is whether goods of the deceased to which another person has in a foreign country obtained a title, *e.g.*, as foreign personal representative, without having taken them into possession, pass, on arriving in England, to the English administrator.⁷⁸

(4) In cases in which a foreign personal representative or his agent can be made accountable in England for property of the deceased in his hands in England,⁷⁹ such property is recoverable in England by, and constitutes assets in the hands of, the English administrator.⁸⁰

Illustrations

In the following Illustrations N is the deceased, A is the English administrator:—

1. N leaves freehold and leasehold property, and goods and bills payable to bearer, in England. They pass to A.

2. N leaves debts due to him from debtors resident in England. They pass to A.

3. N dies in a lodging at New York and leaves goods there. At A's request the landlord of the house where N dies hands over the goods to A as N's English administrator, and also pays A as such administrator £100 due from the landlord to N. No representative of N has been constituted under the law of New York. A comes to England with the goods and money. The goods and the money pass to A.

4. A recovers by action in England £100 due to N from X, a debtor living in New York. The £100 passes to A.

5. N dies leaving goods in New York. B takes out administration to N in New York, and, as New York administrator, takes possession of the goods. B at New York sells them to a purchaser who brings them to England. They do not pass to A.

6. N dies in New York leaving there a watch and jewels. B takes out letters of administration in New York to N. After B has taken out letters of administration to N, but before B has taken possession of the watch and jewels, X, the son of N, takes possession of them, and brings them to England. *Semble*, they pass to A.⁸¹

⁷⁸ See further on this point, Chap. 17, comment on Rule 106, *post*.

⁷⁹ See Chap. 17, Rule 107, *post*.

⁸⁰ See *Lowe v. Fairlie* (1817) 2 Madd. 101; *Logan v. Fairlie* (1825) 2 S. & St. 284; *Sandilands v. Innes* (1829) 3 Sim. 263; *Tyler v. Bell* (1837) 2 My. & Cr. 89; *Bond v. Graham* (1842) 1 Hare 482; *Eames v. Hacon* (1880) 16 Ch.D. 407; (1881) 18 Ch.D. (C.A.) 347; *Re Welsh* [1931] Ir.R. 161.

⁸¹ 'If property came to England after the death, would the foreign administration give a right to it?' *Whyte v. Rose* (1842) 3 Q.B. 493, 506, *per Rolfe, B.* 'Suppose, after a man's death, his watch be brought to England by a third party, could such party, in answer to an action of trover by an English

7 N, domiciled in England, dies intestate in New York, where he leaves goods. B obtains letters of administration to N from a court of competent jurisdiction in New York. B, acting under the direction of such court, hands over the goods of N at New York to C, as the person entitled to them in the judgment of such court as N's next of kin. C brings the goods to England. Whether the goods pass to A?

Extension of English Grant to Northern Ireland, Scotland and other British Territories.

RULE 61.⁸²—An English grant⁸³ made to the administrator of any person duly stated to have died domiciled in England will, on production of the said grant to, and deposit of a copy thereof with, the proper officer of the High Court of Justice in Northern Ireland, be sealed with the seal of the said court, and be of the like force and effect, and have the same operation in Northern Ireland as a grant of probate or letters of administration made by the said court.⁸⁴

The latter grant is hereinafter referred to as a Northern Irish grant.

RULE 62.⁸⁵—An English grant made to the administrator of any person duly stated to have died domiciled in England will, on production of the said grant to, and deposit of a copy thereof with, the clerk of the Sheriff Court of the County of Edinburgh, be duly indorsed with

administrator, plead that the watch was in Ireland at the time of the death?' *Ibid.*, per Parke, B.

It may, however, be doubtful whether the goods have not become the goods of B before their arrival in England, and therefore whether they ought to pass to A. But what authority there is is against this theory.

⁸² Probates and Letters of Administration Act (Ireland), 1857, s. 94, as amended by the Northern Ireland (Miscellaneous Provisions) Act, 1932, s. 2.

See, further, the Judicature Act (Ireland), 1877, and the Government of Ireland Act, 1920, s. 41. Compare the Finance Act, 1894, ss. 1, 6, 22. By s. 2 of the Irish Free State (Consequential Adaptation of Enactments) Order, 1923, this Act must be read as restricted to Northern Ireland. Since April 1, 1923, no English grant has been issued to be resealed in Eire; see Probate, Non-Contentious Rules, ss. 73 and 107 with notes. This is doubtless due to the same reasoning which holds that the Judgments Extension Act, 1868, no longer applies to Eire; see Rule 88, *post*, and note that the Irish courts do not accept that view.

⁸³ For meaning of 'English grant' see Rule 48, p. 297, *ante*.

⁸⁴ But note that the Administration of Estates Act, 1925, Part I, does not extend to any country except England.

⁸⁵ Confirmation of Executors (Scotland) Act, 1858, s. 14. See, further, the Judicature Act, 1873, and the Sheriff Court (Scotland) Act, 1876, ss. 35, 41, and compare the Finance Act, 1894, ss. 1, 6, 22. See also Probate, Non-Contentious Rules, s. 74.

the proper certificate by the said clerk, and thereupon have the same operation in Scotland as if a confirmation had been granted by the said court.

Comment

In accordance with this Rule, an English grant may, when the deceased dies domiciled in England, by formal proceedings, be extended to Scotland, so as to have there the operation of a 'confirmation', which is the equivalent, under Scottish law, to a grant of probate or letters of administration. Consistently with the general rule that a grant of probate is not conclusive as to the domicile of the deceased, the statement of domicile required of the statute on which the above Rule is based is decisive only in order to determine which is to be deemed the principal grant, on which duty on all personal assets within the United Kingdom is to be paid.⁸⁶

RULE 63.⁸⁷—Whenever the Colonial Probates Act, 1892, is by Order in Council applied to any British possession, *i.e.*, to any part of British territory not forming part of the United Kingdom, or to any dependent territory, adequate provision is made for the recognition in that possession or territory of an English grant.

Comment

'Her Majesty the Queen may, on being satisfied that the legislature of any British possession [*i.e.*, any part of British territory exclusive of the United Kingdom⁸⁸] has made adequate provision for the recognition in that possession of probates and letters of administration [which terms include confirmation in Scotland] granted by the courts of the United Kingdom, direct by Order in Council that this Act [*i.e.*, the Colonial Probates Act, 1892] shall, subject to any exceptions and modifications specified in the Order, apply to that possession, and thereupon, while the Order is in force, this Act shall apply accordingly'.⁸⁹

⁸⁶ *Ewing v. Orr-Ewing* (1885) 10 App.Cas. 453, 512.

⁸⁷ See Probate, Non-Contentious Rules, Nos. 92-102.

⁸⁸ See Interpretation Act, 1889, s. 18 (2). Eire is not of course part of the United Kingdom, while on the other hand Northern Ireland is; see *Re Robert Gault* [1922] P. 195.

The Canadian Provinces and the Australian States are British possessions for the purpose of the Colonial Probates Act, 1892 (see s. 4). Indian probates are included, and probates granted by British courts in foreign countries (*e.g.* in protectorates) by virtue of s. 3 of the Act. It is also provided by the Colonial Probates (Protected States and Mandated Territories) Act, 1927, that probates in such territories can be treated on the usual basis of reciprocity.

⁸⁹ Colonial Probates Act, 1892, s. 1, with which read s. 6.

The effect of this enactment is that, whenever the Colonial Probates Act, 1892, which provides means for the recognition in the United Kingdom of probates and letters of administration granted in British possessions,⁹⁰ has been applied to a British possession, steps must also have been taken by the legislature of such British possession for the recognition there of probates and letters of administration granted by the courts of the United Kingdom.⁹¹

⁹⁰ See as to extension of a colonial or Indian grant to England, Chap. 17, Rule 110, *post*.

⁹¹ For a full list of the territories for which Orders have been made (which does not include Eire) see Halsbury's *Laws of England*, 2nd ed., Vol. 11, para. 407, note (d), and annual supplements.

JURISDICTION OF FOREIGN COURTS

CHAPTER 11

GENERAL RULES AS TO JURISDICTION

Interpretation of Terms.

RULE 64.—In this Digest

- (1) 'Proper Court' means a court which is authorised by the law of the country to which it belongs, or under whose authority it acts, to adjudicate upon a given matter.
- (2) 'Court of competent jurisdiction' means a court which has, according to the principles maintained by English courts, the right to adjudicate upon a given matter.

When in this Digest

- (i) it is stated that the courts of a foreign country 'have jurisdiction', it is meant that they are courts of competent jurisdiction;
- (ii) it is stated that the courts of a foreign country 'have no jurisdiction', it is meant that they are not courts of competent jurisdiction.
- (3) 'Foreign² judgment' means a judgment, decree, or order of the nature of a judgment (by whatever name it be called), which is pronounced or given by a foreign court.³

¹ See as to the aim of the Rules in § 2, pp. 22–35, *ante*.

² For the meaning of the word 'foreign', see pp. 39, 42, *ante*.

³ This definition or description is suggested by Piggott (3rd ed.), pp. 5, 6; but it is not meant to include, as does his definition, an adjudication of bankruptcy or a grant of administration. He, moreover, confines his definition to a judgment pronounced by a court of competent jurisdiction, which we have purposely not done. At common law proof of a foreign judgment is afforded by exemplification under the seal of the foreign court, or if it has none by the judge's signature: *Appleton v. Braybrooke* (1817) 6 M. & S. 34; *Alves v. Bunbury* (1814) 4 Camp. 28; and see now Evidence Act, 1861, s. 7, as to certificates of judgments under the Foreign Judgments (Reciprocal Enforcement) Act, 1933, see s. 10.

Comment

(1) '*Proper court*' and (2) '*Court of competent jurisdiction*'.

(1) The term '*proper court*' has reference to the intra-territorial competence of a court, and means a court authorised by the law of the country to which the court belongs, to adjudicate about a given matter. Thus, the Pennsylvanian Court of Common Pleas⁵ was held to be a '*proper court*' for the purpose of divorcing persons resident, though not domiciled, in Pennsylvania, since the court had under the law of Pennsylvania jurisdiction to divorce such persons. But the District Court of Nicosia in Cyprus was held not to be a '*proper court*' to divorce persons there domiciled, as it was not authorised by the law of Cyprus to dissolve marriages.⁶ A proper court is often designated, by English writers, a '*court of competent jurisdiction*', but this is not the sense in which the expression '*court of competent jurisdiction*' is used in this Digest.

(2) The term '*court of competent jurisdiction*' refers, not to the intra-territorial, but to the extra-territorial competence of a court, or rather to the extent to which the competence of a court is admitted in any country other than the country to which the court belongs. When thus used, as it constantly is by English writers, the term '*court of competent jurisdiction*' means a court which may rightly, according to the principles maintained by English courts, determine or adjudicate upon a given matter. Thus, the courts of a country where married persons, whether British subjects or not, are domiciled are courts of competent jurisdiction to divorce such persons, since, according to the principles maintained by English tribunals, the courts of the country where persons are domiciled may rightly divorce such persons.⁸ This is the sense in which the term '*court of competent jurisdiction*' is used in this Digest.

(3) *Foreign judgment* implies the exercise by a court of the power of investigation and decision in a manner akin to English judicial proceedings. A mere executive order will presumably be denied rank as a judgment,¹⁰ and such value has been denied in the United States to a step in a judicial process which excludes judicial intervention though given by statute the character of a judgment.¹¹

⁵ See *Green v. Green* [1893] P. 89; foreign law is, of course, a question of fact, hence the use of the past tense in these examples.

⁶ See *Papadopoulos v. Papadopoulos* [1930] P. 55.

⁸ *Harvey v. Farnie* (1882) 8 App.Cas. 43. Compare Chap. 6, Rule 81, p. 216, ante, and Chap. 14, Rule 71, p. 368, post, and Intro., pp. 25, 29, ante.

¹⁰ *Fracis, Times & Co. v. Carr* (1900) 82 L.T. 698, per Vaughan Williams, L.J. On appeal it was admitted that the decision was not a judgment: [1902] A.C. 176. See also Beale, s. 429 (2) and post, p. 398, Illustration 4.

¹¹ *Foot v. Newell* (1860) 29 Mo. 400.

1. WHERE JURISDICTION DOES NOT EXIST

(1) *In respect of Persons.*

RULE 65.—The courts of a foreign country have no jurisdiction over, i.e., are not courts of competent jurisdiction as against—

- (1) any sovereign;—
- (2) any ambassador, or other diplomatic agent, accredited to the sovereign of such foreign country.—

An action or proceeding against the property of any of the persons¹² enumerated is, for the purpose of this Rule, an action or proceeding against such person.

Comment

(1) As to a sovereign.¹³—Subject to the provisions of the Crown Proceedings Act, 1947, to the terms of any Conventions in force and to the observations in the case of *The Cristina*¹⁴ previously referred to,¹⁵ English courts will presume that a court of a foreign country will recognise the jurisdictional immunity of sovereigns under international law, at any rate so far as the sovereigns do not claim rights in violation of international law. In many foreign countries jurisdiction over other foreign States is exercised in certain classes of cases, e.g., a judgment of a French court in favour of a plaintiff against the U.S.S.R., who claimed ownership of valuable property which had been confiscated under the law of that State.

(2) As to diplomatic agents.—The question how far an English court would admit the competence of a foreign court to entertain an action for breach of contract or for tort against a diplomatic agent accredited to the sovereign of the foreign country has never, it is believed, been raised before any English tribunal, but should the question come before our courts they would (it is submitted) hold that, except through the consent of the sovereign of such agent, the foreign court could have no jurisdiction. But this has never formed the subject of any decision, though foreign law frequently affords less complete exemption from jurisdiction to diplomatic agents than is accorded by English law.

In proper cases the English court will no doubt recognise the

¹² As to the conclusiveness of the Foreign Office certificate in relation to sovereigns and diplomatic persons, see A. B. Lyons, 23 B.Y.B.I.L. 240 (1946).

¹³ See Rule 19, p. 131, *ante*, and Oppenheim, *op. cit.*, Vol. 1, pp. 242-244, and see also S. H. Brookfield, 'Immunities of Foreign States engaged in Private Transactions', 20 Jo.Comp.Leg. 1 (1938).

¹⁴ [1938] A.C. 435.

¹⁵ *Ante*, p. 134, comment on Rule 19.

right of a foreign court to accord to United Nations officials and organs, similar jurisdictional immunities to those which they themselves accord under the Diplomatic Privileges (Extension) Acts, 1944 and 1946. It would similarly be difficult to resist the claim of any foreign allied government to accord immunities similar to those granted to other persons and bodies under the Diplomatic Privileges (Extension) Acts, 1941, 1944 and 1946.¹⁶

The Foreign Judgments (Reciprocal Enforcement) Act, 1933,¹⁷ provides that for the purposes of that Act a foreign court shall not be deemed to have had jurisdiction if the judgment debtor, being a defendant in the foreign proceedings, was a person who, under the rules of public international law, was entitled to immunity from the jurisdiction of the court and did not submit to the jurisdiction.

(2) *In respect of Subject-Matter.*

RULE 66.¹⁸—The courts of a foreign country have no jurisdiction—

- (1) to adjudicate upon the title, or the right to the possession, of any immovable not situate in such country; or
- (2) (*semble*) to give redress for any injury in respect of any immovable not situate in such country.

Comment

Clause 1.—If a court pronounces a judgment affecting land out of its jurisdiction, the courts of the country where it is situated—and, it is presumed, also the courts of any other country—are justified in refusing to be bound by it, or to recognise it; and this even if the judgment proceed on the *lex loci rei sitæ*.¹⁹

This rule is merely an application of the more general principle that no court ought to give a judgment the enforcement whereof lies beyond the court's power, and especially if it would bring the court into conflict with the admitted authority of a foreign sovereign, or, what is the same thing, the jurisdiction of a foreign court.²⁰ English courts, therefore, do not admit the jurisdiction of any foreign court, *e.g.*, an Irish or a French court, to determine a person's title, under a will or otherwise, to English immovables,

¹⁶ *V. ante*, p. 136.

¹⁷ Section 4 (3) (c); see *post*, p. 420.

¹⁸ See Piggott (3rd ed.), p. 264; Story, s. 591.

¹⁹ Piggott (3rd ed.), p. 264. *Duke v. Andler* [1932] 4 D.L.R. 529, followed in *Haspel v. Haspel* [1934] 2 W.W.R. 412; see D. M. Gordon, 49 L.Q.R. 547, J. A. Corry, 11 Can.Bar Rev. 211 (1933); Falconbridge, 538.

²⁰ See Intro., pp. 17, 18, 22, *ante*.

in which term must be included leasehold²¹ no less than freehold property.

The Supreme Court of Canada has held that a foreign equitable decree in personam relating to land in British Columbia, though based on the fraud of a defendant personally subject to the foreign court's jurisdiction, and therefore within the rule in *Penn v. Lord Baltimore*,²² will not be enforced in Canada.²³ It is possible that the short reason why foreign equitable decrees *in personam* affecting land in England would not be enforced by English courts is simply that foreign judgments *in personam* are not usually enforceable in England unless they are for a debt or definite sum of money.²⁴

Clause 2.—As our courts do not entertain actions for trespass to foreign land,²⁵ it is probable that they would deny the competence of a foreign court to give damages for trespass to land in England, or for trespass to land in any foreign country to which the court did not belong. A possible exception might be made where the foreign court assumes jurisdiction in an Admiralty action by virtue of a universally recognised Admiralty jurisdiction.²⁶

Illustrations

1. T, by his will duly executed in 1842, devised all his real and personal estate to A. He had real estate in Ireland and also in England. The Irish courts, it was held, had no jurisdiction to adjudicate upon the validity of the will in respect of the real estate in England; and a decree of the Irish Court of Chancery in 1852, after verdict upon an issue *devisavit vel non*, did not determine the validity or invalidity of the will so far as it related to lands in England, and could not be pleaded in bar to a suit in the English Court of Chancery.²⁷

2. T, domiciled in Ireland, left a will devising the whole of his real and personal estate to A. T died possessed of lands both in Ireland and in England. The Probate Division of the Irish High Court had no jurisdiction to grant probate or make a decree under the Probate and Letters of Administration (Ireland) Act, 1857, ss. 65-67, so as *directly*²⁸ to affect the rights of persons interested in the land in England.

²¹ Compare *De Fogassieras v. Duport* (1881) 11 L.R.Ir. 123.

²² (1750) 1 Ves Sen. 444, Rule 20, see Exception 1, *ante*, p. 145

²³ *Duke v. Andler* [1932] 4 D.L.R. 529; cf. *Haspel v. Haspel* [1934] 2 W.W.R. 412.

²⁴ Rule 86, *post*, p. 403; cf. Corry, 11 Can.Bar Rev. 211 (1933).

²⁵ *British South Africa Co. v. Companhia de Moçambique* [1893] A.C. 602. See Rule 20, p. 141, *ante*.

²⁶ Cf. Rule 20, Exception 3, and *The Tolten* [1946] P. 153 (C.A.); and see Chap. 13, Rule 70, *post*.

²⁷ *Boyse v. Colclough* (1854) 1 K. & J. 124.

²⁸ But, owing to the effect of the Supreme Court of Judicature (Consolidation) Act, 1925, s. 169, as amended by the Administration of Justice Act, 1928, s. 10 (Rule 108, *post*), taken together with the Administration of Estates Act, 1925, s. 1, which vests English land in the personal representative of the deceased, a Northern Irish grant, sealed and extended to England, may affect indirectly the title to English land, whether personal or real estate. A similar principle applies to a Scottish confirmation extended to England under the Confirmation of Executors Act, 1858, s. 12 (Rule 109, *post*), and to a colonial or Indian grant, sealed and extended to England under the Colonial Probates

3. A agrees with X in California to sell to X land situated in England. A and X are residents of California. The land is conveyed to X in accordance with English law. A sues X in California to set aside the conveyance because of X's fraud. The Californian court orders X to reconvey the land to A and on X's refusal to do so the clerk of the court purports to reconvey in X's name. A sues X in England for a declaration that he is the owner of the land. The Californian decree will not be recognised in England.²⁹

2. WHERE JURISDICTION DOES EXIST

RULE 67.—Subject to Rules 65 and 66, the courts of a foreign country have jurisdiction (i.e., are courts of competent jurisdiction)—

- (1) in an action or proceeding³⁰ in personam³¹;
- (2) in an action or proceeding in rem³²;
- (3) in matters of divorce, or nullity of marriage³³;
- (4) in matters of administration and succession,³⁴

to the extent, and subject to the limitations, hereinafter stated in the Rules having reference to each kind of jurisdiction.³⁵

Act, 1892, extended by the Colonial Probates Act, 1927, s. 1 (Rule 110, *post*). Thus in *Hood v. Lord Barrington* (1868) L.R. 6 Eq. 218, it was ruled that a holder of a confirmation duly sealed could sell and dispose of English leaseholds, and *Re Howden and Hyslop's Contract* [1928] Ch. 479, rules that Scottish executors can thus make a good title to English land without the necessity of a separate grant of probate in respect thereof.

²⁹ Cf. *Duke v. Andler* [1932] 4 D.L.R. 529, followed in *Haspel v. Haspel* [1934] 2 W.W.R. 412.

³⁰ 'Or proceeding' is added to cover any proceeding of the nature of an action.

³¹ See Chap. 12, Rules 68, 69, *post*.

³² See Chap. 13, Rule 70, *post*.

³³ See Chap. 14, Rules 71–73, *post*. The jurisdiction in respect of judicial separation, and restitution of conjugal rights of foreign courts would fall here to be considered, but it is not supported by authority sufficient to render detailed discussion valuable. For what can be said, see Rule 71, *post*, pp. 368, 372.

³⁴ See Chap. 15, Rules 74, 75, *post*.

³⁵ The jurisdiction of foreign courts as to bankruptcy and winding-up of companies is not made the subject of Rules, because of the lack of authority in regard to the subject-matter. See Rule 99, *post*. As regards winding-up of companies, authority belongs under the Companies Act, 1948, to the Scottish and Northern Ireland courts similar to that of the English court; see Rules 46 and 47, *ante*. For the enforcement of orders of these courts, see Rule 53, Exception 3. The English courts are prepared in a proper case to recognise the claim of the foreign country of incorporation to be the principal place of winding up and to allow the English winding up to be ancillary thereto, *Re Vocalion (Foreign), Ltd.* [1932] 2 Ch. 196 at p. 207.

JURISDICTION IN ACTIONS IN PERSONAM¹

RULE 68.—In an action in personam in respect of any cause of action, the courts of a foreign country have jurisdiction in the following cases :—

First Case.—Where at the time of the commencement of the action the defendant was resident or present² in such country, so as to have the benefit, and be under the protection, of the laws thereof.³

Second Case.—(*Semble*) where the defendant is, at the time of the judgment in the action, a subject or citizen of such country.⁴

Third Case.—Where the party objecting to the jurisdiction of the courts of such country has, by his own conduct, submitted to such jurisdiction, i.e., has precluded himself from objecting thereto⁵—

(a) by appearing as plaintiff⁶ in the action or counterclaiming⁷; or

¹ Cheshire, pp. 778-798; Beale, Vol. 1, Chap. 4; Lorenzen, pp. 534-542; Wolff, pp. 262-263; Story, ss. 538-543, 546-549; Westlake, Chap. 17; Foote, pp. 598-603; Goodrich, ss. 69-76. See Intro, General Principle No. 3, p. 22; and pp. 26-28, ante. Compare Rule 69, p. 362, post. Read, *Recognition and Enforcement of Foreign Judgments in the Common Law Units of the British Commonwealth* (1936) 145-186.

² *Carrick v. Hancock* (1895) 12 T.L.R. 59. For the case of a corporation, see *Littauer Glove Corporation v. F. W. Millington, Ltd.* (1928) 44 T.L.R. 746.

³ *Schibbsby v. Westenholz* (1870) L.R. 6 Q.B. 155, 161; *Rousillon v. Rousillon* (1880) 14 Ch.D. 351, 371. Compare *Godard v. Gray* (1870) L.R. 6 Q.B. 139; *Sirdar Gurdial Singh v. Rajah of Faridkote* [1894] A.C. 670; *Jaffer v. Williams* (1908) 25 T.L.R. 12; *Emanuel v. Symon* [1908] 1 K.B. (C.A.) 302; *Permanent Building and Investment Association v. Hudson* (1896) 7 Q.L.J. 23.

⁴ *Schibbsby v. Westenholz* (1870) L.R. 6 Q.B. 155; *Rousillon v. Rousillon* (1880) 14 Ch.D. 351; *Douglas v. Forrest* (1828) 4 Bing. 686; *Dakota Lumber Co. v. Rinderknecht* (1905) 6 Terr.L.R. 210; *Emanuel v. Symon* [1908] 1 K.B. (C.A.) 302; *Phillips v. Batho* [1913] 3 K.B. 25, 29; *Forsyth v. Forsyth* [1948] P. 125, 132.

⁵ See Westlake, ss. 325-327; Foote, pp. 601-603; *Guiard v. De Clermont* [1914] 3 K.B. 145; *Jeannot v. Faerst* (1909) 25 T.L.R. 424; *Harris v. Taylor* [1915] 2 K.B. (C.A.) 580; *Richardson v. Allen* (1916) 28 D.L.R. 134 (Alberta).

⁶, ⁷ For notes see p. 352.

- (b) by voluntarily appearing as defendant⁶ in such action; or
- (c) by having expressly or impliedly contracted⁹ to submit to the jurisdiction of such courts.

Comment and Illustrations

(1) General Principles.

(1) The authority of the English courts to entertain proceedings in personam against a defendant has, until quite modern times, been based in substance solely on the presence in England of the defendant at the commencement of the proceedings. No question, therefore, has until recently arisen as to how far the jurisdiction in personam of our tribunals might or might not be affected by circumstances other than the defendant's presence in England, as, for example, by his place of residence or domicile, by his nationality or allegiance, by the place where a cause of action arose, or by the defendant's possession of property in England. These matters being irrelevant as regarded the jurisdiction exercisable by English judges, our courts have never till recently been called upon to form for their own use a general theory as to jurisdiction. Hence, when they have been compelled to consider the effect which ought to be given to foreign judgments, they have shown an inclination to evade the necessity for formulating any general doctrine as to the principles which ought to regulate the exercise of jurisdiction by foreign courts,¹¹ and have, where it was possible, tried to determine each case more or less in reference to its special circumstances.

An indication of the trend of opinion on the subject is afforded by the enumeration in the Foreign Judgments (Reciprocal Enforcement) Act, 1933¹² of the cases in which foreign courts are deemed

⁶ *Schibsbay v. Westenholz* (1870) L.R. 6 Q.B. 155, 161; *Burpee v. Burpee* (1929) 41 B.C.R. 201.

⁷ Suggested by the Foreign Judgments (Reciprocal Enforcement) Act, 1933, s. 4 (2) (a) (ii).

⁸ *Voinet v. Barrett* (1885) 55 L.J.Q.B. 39, 42; *Molony v. Gibbons* (1810) 2 Camp. 502; *Richardson v. Army, Navy and General Assurance Association, Ltd.* (1925) 21 Ll.L.Rep. 345, *Swiss Bank Corporation v. Boehmische Industrial Bank* [1923] 1 K.B. (C.A.) 673, 681, 682, *Poissart v. Poissart* [1941] 3 W.W.R. 646. Cf. Foreign Judgments (Reciprocal Enforcement) Act, 1933, s. 4 (2) (a) (i).

⁹ *Copin v. Adamson* (1875) 1 Ex.D. (C.A.) 17; *Vallée v. Dumergue* (1849) 4 Ex. 290; *Bank of Australasia v. Harding* (1850) 9 C.B. 661; *Bank of Australasia v. Nias* (1851) 16 Q.B. 717; *Meeus v. Thellusson* (1853) 8 Ex. 638; *Kelsall v. Marshall* (1856) 1 C.B.(n.s.) 241. Conf. *Emanuel v. Symon* [1908] 1 K.B. (C.A.) 302; *Jeannot v. Fuerst* (1909) 25 T.L.R. 424. English courts would doubtless have to recognise any system under which English companies had in foreign countries to register a name of a person to accept process analogous to the provision in the Companies Act, 1948, s. 407; *Employers' Liability Assurance Corporation v. Sedgwick Collins & Co.* [1927] A.C. 95. Cf. Foreign Judgments (Reciprocal Enforcement) Act, 1933, s. 4 (2) (a) (iii); *Graupner*, 59 L.Q.R. 227 (1943).

¹¹ See Westlake, p. 399; Story, ss. 610, 581, 537-540, 546-549.

¹² Section 4. See Rule 90, p. 420, *post*.

to have jurisdiction for the purposes of that Act, although those purposes are confined to the registration in England, with a view to execution, of judgments given in countries in which the Act has been extended by Order in Council.

(2) In most of the reported cases the matter calling for determination has been how far a judgment given against a defendant in proceedings abroad should be allowed to be enforced against him in England by means of an action. The question, therefore, raised as to the competence of the foreign tribunal has been whether it was or was not the 'duty'¹³ of the defendant to obey the judgment of the foreign court; and the answer to this inquiry has been judicially given in the form of a more or less complete enumeration of the cases in which a party to an action abroad is bound to obey the judgment of the foreign court. It will be observed that the judgments or judicial dicta on this subject which are cited below mainly refer to the case of a defendant; but in principle they are clearly applicable to any person against whom a court pronounces judgment in an action *in personam*. There is, however, little need to particularise the various circumstances, such, for example, as residence or allegiance, which might conceivably make it the duty of a plaintiff to obey the judgment of the foreign court; for by the mere bringing of the action he has submitted himself to the jurisdiction of the court, and in fairness to the defendant, if for no other reason, is bound to submit to the judgment of the tribunal to which he has himself appealed.

In *Emanuel v. Symon*,¹⁴ Buckley, L.J., gave the following catalogue of the circumstances in which English courts will hold that a foreign court was a court of competent jurisdiction in actions *in personam*: 'In actions in personam there are five cases in which the courts of this country will enforce a foreign judgment: (1) Where the defendant is a subject of the foreign country in which the judgment has been obtained; (2) Where he was resident in the foreign country when the action began; (3) Where the defendant in the character of plaintiff has selected the forum in which he is afterwards sued¹⁵; (4) Where he has voluntarily appeared; and (5) Where he has contracted to submit himself to the forum in which the judgment was obtained'. The first two cases mentioned by Buckley, L.J., correspond with the first two cases mentioned in our Rule; the last three cases correspond with the third case mentioned in the Rule.

(2) The Three Special Cases.

The circumstances under which, according to this judgment, a person is bound to obey the judgment of a foreign court, are

¹³ See Intro., p 28, ante.

¹⁴ [1908] 1 K.B. 302, 309; cp. *Schibsby v. Westenholz* (1870) L.R. 6 Q.B. 155, 159; *Rousillon v. Rousillon* (1880) 14 Ch.D. 351, 370-371; *Sirdar Gurdial Singh v. Rajah of Faridkote* [1894] A.C. 670, 683-684.

¹⁵ Query 'selected the forum as the one in which he would sue'.

restated in the three Cases of Rule 68. These three Cases are applications of two principles explained in the Introduction.¹⁶ The first and second Cases are clearly covered by the 'principle of effectiveness', the third Case by the 'principle of submission'.

The list given in this Rule is not necessarily exhaustive. The law on the authority to be ascribed to the decisions of foreign tribunals is still uncertain, and still liable to undergo further development by means of judicial legislation.

*First Case. Residence.*¹⁷—The *residence* of a defendant in a country at the time when an action is commenced against him is an admitted ground of jurisdiction. 'If the defendants had been', it is said by the court in *Schibsby v. Westenholz*,^{17a} 'at the time when the suit was commenced resident in the country, so as to have the benefit of its laws protecting them, or, as it is sometimes expressed, owing temporary allegiance to that country, we think that its laws would have bound them'.

As the *presence* of a defendant in England at the time of the service of the writ was the sole foundation of the jurisdiction of the English courts, they could hardly decline to hold that the *residence* of a defendant in a foreign country gave jurisdiction to the courts thereof as to the cause of action stated in the writ.

Three questions may, however, be raised on this point.

First Question.—Is *residence*, in the strict sense of the term, necessary, or will the mere presence of the defendant in the foreign country, e.g., France, be enough to give the French courts jurisdiction? The answer is that his *presence* is enough, or in other words, that *residence* means for the present purpose nothing more than such presence of the defendant as makes it possible to serve him with a writ, or other process by which the action is commenced.¹⁸ In the case of a corporation *residence*, of course, involves 'some carrying on of business at a definite, and, to some reasonable extent, permanent place',¹⁹ and not the mere presence within the jurisdiction of the foreign court of a representative of the corporation.

It may be doubted, however, whether casual presence, as distinct from residence, is a desirable basis for conceding jurisdiction to a foreign court, if the parties are strangers and the cause of action arose outside the foreign country. 'The court is not a convenient one for either of the parties, nor is it in a favourable

¹⁶ *Viz.*: General Principle No. 3, Intro., p. 22, *ante*, and General Principle No. 4, Intro., p. 24, *ante*.

¹⁷ See Rule 68, *First Case*.

^{17a} (1870) L.R. 6 Q.B. 155, 161.

¹⁸ *Carrick v. Hancock* (1895) 12 T.L.R. 59; *Forbes v. Simmons* (1914) 7 W.W.R. 97. See Rule 27, p. 171, *ante*.

¹⁹ *Littauer Glove Corporation v. F. W. Millington* (1920), *Ltd.* (1928) 44 T.L.R. 746. See A. Farnsworth, 'What amounts to "carrying on business" by a Foreign Corporation', 20 Jo Comp. Legislation, p. 188.

position to deal intelligently either with the facts or with the law'.²⁰ It is, perhaps, significant that the Foreign Judgments (Reciprocal Enforcement) Act, 1933,²¹ says that for the purposes of that Act a foreign court shall be deemed to have had jurisdiction if the defendant was *resident* in the country of that court at the time when the action began.

Second Question.—Is the *domicile* of the defendant, as contrasted with and in the absence of residence, sufficient to give a foreign court jurisdiction? English courts now assert jurisdiction *in personam* over defendants domiciled or ordinarily resident in England,²² hence it has been suggested that they ought to concede jurisdiction on the ground of domicile to foreign courts. Dicey's view was that domicile was not a sufficient ground for the jurisdiction of foreign courts.²³ There are dicta in English cases²⁴ which suggest the recognition of domicile, but no English decision supports it, though one Canadian decision does.²⁵ It is not mentioned as a basis of jurisdiction in the Foreign Judgments (Reciprocal Enforcement) Act, 1933. It is not claimed as a ground for jurisdiction by the Scottish courts.²⁶

Third Question.—Is it necessary that the defendant should have been *personally* present in the foreign country or is it sufficient that he was carrying on business there through a manager or agent? Dicey expressed no opinion on this question. In the last edition it was suggested²⁷ that since the presence of the defendant at the time when the obligation was incurred is not sufficient, still less have English courts any ground for allowing the exercise of jurisdiction merely because business is done through a manager or agent. On the other hand, the Foreign Judgments (Reciprocal Enforcement) Act, 1933,²⁸ provides that for the purposes of the Act the foreign court shall be deemed to have jurisdiction if the defendant had an office or place of business in the foreign country and the proceedings were in respect of a transaction effected through or at that office or place. This would appear to be the commercially more convenient rule, though English authority is lacking.

²⁰ Dodd, 'Jurisdiction in Personal Actions' (1929) 23 Ill.L.Rev. 427, 437-438, cited Read, p. 150, and Cheshire, p. 781.

²¹ Section 4 (2) (a) (iv); see *post*, p. 425.

²² Order XI, r. 1 (c); Exception 3 to Rule 28, *ante*, p. 186.

²³ 3rd ed., p. 401; cf. *ante*, p. 31.

²⁴ *Jaffer v. Williams* (1908) 25 T.L.R. 12; *Gibson & Co. v. Gibson* [1913] 3 K.B. 379; *Emanuel v. Symon* [1908] 1 K.B. (C.A.) 302; *Turnbull v. Walker* (1892) 67 L.T. 767, 769. Cf. Cheshire, p. 789.

²⁵ *Marshall v. Houghton* (1923) 33 Man.R. 166; cf. *Haspel v. Haspel* [1934] 2 W.W.R. 412, 414-415.

²⁶ *Glasgow Corporation v. Johnston* [1915] S.C. 555; *Kerr v. Ferguson* [1931] S.C. 736; Maclaren, *Court of Session Practice*, p. 35.

²⁷ 5th ed. pp. 414, 417.

²⁸ Section 4 (2) (a) (v).

1. X is an Englishman living in France at the time when an action is commenced there against him. The French courts have jurisdiction over X.²⁹

2. X is an English traveller, staying for a few days at an hotel in Massachusetts. Whilst he is there a writ is issued and served upon him requiring him to appear as defendant in an action brought against him in a Massachusetts court. The Massachusetts court has jurisdiction.

3. The circumstances are the same as in Illustration 2, except that the writ is issued a day or two before X arrives in Massachusetts. The Massachusetts court has (*semble*) jurisdiction.³⁰

4. X is the director of an English company. He visits New York, and while he is there, A, a New York firm, takes out a summons against the English company, and serves process on X. X ignores the proceedings and returns to England. The company has no branch in New York. The New York court has no jurisdiction.³¹

5. X is a British subject residing in England, but domiciled in France. An action is brought against him in Paris. He is served with process or notice of process in England. The French court has (*semble*) no jurisdiction.

*Second Case. Allegiance.*³²—‘The courts of this country consider the defendant bound where he is a *subject* of the foreign country in which the judgment [against him] has been obtained’.³³

The doctrine, however, that allegiance is sufficient to give jurisdiction, though supported by judicial dicta, cannot be established by any reported decision. In *Douglas v. Forrest*,³⁴ which goes near to a decision on this point, the court dwell on the fact of the defendant having at the time of the judgment possessed property in Scotland; but this cannot now be regarded as a sufficient basis for jurisdiction.³⁵ Moreover, the doctrine of allegiance as the foundation for jurisdiction is inapplicable to British territory, for allegiance is owed by every British subject to the British Crown; and accordingly it has been held that the fact that the defendant was born in an Australian State is insufficient to give the courts of

²⁹ *Schibsby v. Westenholz* (1870) L.R. 6 Q.B. 155. As to how far want of notice may be an answer to an action on a judgment, see Rule 79, p. 396, *post*.

³⁰ See, in favour of jurisdiction, *i.e.*, in favour of the Massachusetts court being held in England a court of competent jurisdiction, *Carrick v. Hancock* (1895) 12 T.L.R. 59; *Schibsby v. Westenholz* (1870) L.R. 6 Q.B. 155, 161; *Rousillon v. Rousillon* (1880) 14 Ch.D. 351; *Sirdar Gurdayal Singh v. Rajah of Faridkot* [1894] A.C. 670; *Emanuel v. Symon* [1908] 1 K.B. (C.A.) 302. But on the other hand, note that if the issue of the writ is to be taken to be the commencement of the action, X is not in Massachusetts at the time when the action commences, and therefore does not come precisely within any of the cases cited. In *Carrick v. Hancock* it does not appear at what point the action commenced.

³¹ *Littauer Glove Corporation v. F. W. Millington* (1920), *Ltd.* (1928) 44 T.L.R. 746.

³² See Rule 68, *Second Case*, p. 351, *ante*; Cheshire, p. 788.

³³ *Rousillon v. Rousillon* (1880) 14 Ch.D. 351, 371, judgment of Fry, J. Cf. *Douglas v. Forrest* (1828) 4 Bing. 686, *Schibsby v. Westenholz* (1870) L.R. 6 Q.B. 155, 161; *Emanuel v. Symon* [1908] 1 K.B. 302, 309; *Harris v. Taylor* [1915] 2 K.B. 580, 591; *Gavin Gibson & Co. v. Gibson* [1913] 3 K.B. 379, 388; *Forsyth v. Forsyth* [1948] P. 125, 132.

³⁴ (1828) 4 Bing. 686, criticised in *Gavin Gibson & Co. v. Gibson* [1913] 3 K.B. 379, 390–392, *per* Atkin, J.; cf. *Dakota Lumber Co. v. Runderknecht* (1905) 6 Terr.L.R. 210.

³⁵ See Rule 69 (1), *post*, p. 362.

that State jurisdiction over him.³⁶ This position is not likely to be affected by the recognition of Dominion citizenship, for the effect is merely to make the defendant a citizen of the Dominion and not of any of its component parts or law districts.

Dicey's view was that nationality as a ground of jurisdiction could be justified on the ground that 'a subject is bound to obey the commands of his sovereign, and therefore the judgments of his sovereign's courts'³⁷; but this has been criticised as smacking of unreality in modern times.³⁸ The Foreign Judgments (Reciprocal Enforcement) Act, 1933, does not mention nationality as a ground for holding that a foreign court had jurisdiction for the purposes of that Act.

1. X is a French citizen residing and domiciled in England. An action is brought against X in France. X, whilst residing in England, has actual notice of the action. Judgment is, in his absence, pronounced against X in France. The French court (*semble*) has jurisdiction.³⁹

2. X is a British subject residing and domiciled in England. He was born in Victoria. The Victoria court has no jurisdiction over X.⁴⁰

*Third Case. Submission.*⁴¹—This case rests on the simple and universally admitted principle that a litigant who has voluntarily submitted himself to the jurisdiction of a court cannot afterwards dispute its jurisdiction.⁴² The submission may take place in different ways, and may be made either by the party who is plaintiff or by the party who is defendant before the foreign court.⁴³

(1) *Plaintiff*. 'We think it clear, upon principle, that if a person selected, as plaintiff, the tribunal of a foreign country as the one in which he would sue he could not afterwards say that the judgment of that tribunal was not binding upon him'.⁴⁴

Clearly the plaintiff exposes himself to acceptance of the jurisdiction of the court as regards any set-off, counterclaim, or cross-action which may be brought against him by the defendant.

A, an Englishman residing in England, brings an action against X in France for the breach of a contract made and broken in England. X counterclaims. The French court gives judgment in X's favour. The French court has jurisdiction over A.

This is so clear that no further illustration is needed.

(2) *Defendant*. A person who voluntarily appears as defendant in an action submits himself to the judgment of the court so that he

³⁶ *Gavin Gibson & Co. v. Gibson*, *supra*; cf. *Emanuel v. Symon* [1908] 1 K.B. 302.

³⁷ 5th ed. pp. 405-406.

³⁸ Read, p. 155; Cheshire, p. 789.

³⁹ Compare *Schibbsby v. Westenholz* (1870) L.R. 6 Q.B. 155, 161.

⁴⁰ *Gavin Gibson & Co. v. Gibson* [1913] 3 K.B. 379.

⁴¹ See Rule 68, *Third Case*, p. 351, *ante*.

⁴² See Intro., p. 24, *ante*.

⁴³ See Rule 68, *Third Case*, (a), (b) and (c).

⁴⁴ *Schibbsby v. Westenholz* (1870) L.R. 6 Q.B. 155, 161; *Burpee v. Burpee* (1929) 41 B.C.R. 201. See Westlake, ss. 324, 325; cf. Foreign Judgments (Reciprocal Enforcement) Act, 1933, s. 4 (2) (a) (ii).

cannot afterwards dispute its jurisdiction. A submission is, however, held to be voluntary, not only when the defendant appears and pleads to the merits of the case without protesting the jurisdiction, but also when, although protesting, he also pleads to the merits.⁴⁵ According to the much criticised decision of the Court of Appeal in *Harris v. Taylor*,⁴⁶ it is sufficient to give a court jurisdiction that a defendant merely appears in order to protest the jurisdiction. If he chooses to appear and to object to the jurisdiction of the court, it would seem that he involves himself in the necessity of submitting to that jurisdiction, if the plea to the jurisdiction should be disallowed by the court. This is so at any rate if the foreign procedure affords no means of contesting the jurisdiction of the court except by making a general appearance. But it is 'a possible inference from *Harris v. Taylor* that protest to the jurisdiction of a foreign court will not amount to consent to its jurisdiction if there is a mode of procedure provided by its law whereby protest may be made without appearing generally, and that mode is used'.⁴⁸ And it has been held in Canada that if the defendant takes no part in the foreign proceedings and allows judgment to go against him in default of appearance, and later moves to set the default judgment aside, his appearance is not voluntary.⁴⁹

The Foreign Judgments (Reciprocal Enforcement) Act, 1933,⁵⁰ provides that a foreign court is deemed to have jurisdiction for the purposes of the Act if the defendant submitted to the jurisdiction by voluntarily appearing in the proceedings *otherwise than for the purpose of contesting the jurisdiction of the court*. It may be that the Act has in effect adopted the limited interpretation of *Harris v. Taylor* which is suggested above.

An appearance is equally voluntary at common law whether it be motivated by the fact that the defendant has property within the jurisdiction of the court on which execution may be—or has actually been—levied in the event of judgment going against him by default,⁵¹ or even by the fact that, though he has no property within the jurisdiction, his business often takes him within the jurisdiction so that the judgment of the court might be made effective against him.⁵²

⁴⁵ Compare *Bossière v. Brockner* (1889) 6 T.L.R. 85; *Guard v. De Clermont* [1914] 3 K.B. 145; *Richardson v. Allen* (1915) 34 W.L.R. 606 (Alberta); *Luke v. Mayoh* [1922] S.A.S.R. 385; cf. *Richardson v. Army, Navy and General Assurance Association, Ltd.* (1925) 21 Ll.L.Rep. 345.

⁴⁶ [1915] 2 K.B. 580, fully discussed by Cheshire, pp. 785–787; Read, pp. 165–171.

⁴⁸ Read, p. 167; cf. *Luke v. Mayoh* [1922] S.A.S.R. 385, where, however, the defendant chose to appear generally.

⁴⁹ *McLean v. Shields* (1885) 9 O.R. 699; *Esdale v. Bank of Ottawa* (1920) 51 D.L.R. 485.

⁵⁰ Section 4 (2) (a) (i).

⁵¹ *De Cosse Brissac v. Rathbone* (1861) 6 H. & N. 801; *Poissart v. Poissart* [1941] 3 W.W.R. 646.

⁵² *Voinet v. Barrett* (1885) 55 L.J.Q.B. (C.A.) 39.

In one case only is it possible that appearance and pleading to the jurisdiction or the merits or both may not be held to involve a voluntary submission to the jurisdiction. There is authority⁵³ for the view that if a defendant appears to defend an action solely in order to save property of his within the jurisdiction of the court, which has been arrested or attached as a basis for jurisdiction, such an appearance will not be held to be voluntary. But the doctrine does not seem to have been the *ratio decidendi* of any reported case.⁵⁴

Neither an appearance to save property threatened with seizure nor an appearance to save property already seized is accepted as voluntary by the Foreign Judgments (Reciprocal Enforcement) Act, 1933, which provides⁵⁵ that the foreign court has no jurisdiction for the purposes of the Act if the defendant appears for the purpose of protecting or obtaining the release of, property seized or threatened with seizure.

The defendant by appearance clearly renders himself subject to the jurisdiction of the court in respect not merely of the original claim but also of such further claims as the court allows to be added by the plaintiff. But this does not mean that he subjects himself also to similar claims by new plaintiffs.⁵⁶

1. A brings an action in a French court against X, an Englishman domiciled in England. X appears in France and defends the action, because his business transactions involve frequently his presence in France, so that judgment might be executed against him there. His appearance is voluntary, and the French court has jurisdiction over him.⁵⁷

2. The circumstances are the same as in Illustration 1, but X has valuable property in France which might be seized in execution if the action were decided against him. The court has jurisdiction.⁵⁸

3. The circumstances are the same as in Illustration 1, but, after judgment has been given by the French court in default, X appears to have the case reopened, his motive being the arrest in execution of the judgment in default

⁵³ *Voinet v. Barrett* (1885) 55 L.J.Q.B. 39, 41, judgment of Esher, M.R.; *Schubbsby v. Westenholtz* (1870) L.R. 6 Q.B. 155, 162, per Lord Blackburn; *Guard v. De Clermont* [1914] 3 K.B. 145, 155.

⁵⁴ The fact that property has been seized in execution will not make an appearance to defend involuntary. *Guind v. De Clermont* [1914] 3 K.B. 145. Moreover, in *The Duplex* [1912] P. 8, 11-15, following *The Dictator* [1892] P. 304; *The Gemma* [1899] P. (C.A.) 285; cf. *The Joannus Vatis* [1922] P. 213, an appearance in an action *in rem* was held to subject the defendants, who contested liability for a collision, and counterclaimed for damage to their vessel, to liability *in personam* for the full amount of the damage and not merely for the value of the ship. Note that this case does not assert that appearance merely to secure by bail the release of a ship would subject the party appearing to the jurisdiction *in personam* of the court. The arrest of property unconnected with the cause of action will not be a ground for jurisdiction: *The Belds* [1936] P. (C.A.) 51.

A defendant who pleads on an arrestment to found jurisdiction in Scotland is liable to have the judgment of the court enforced against him under the Judgments Extension Act, 1868. See Rule 88, p. 413, *post*.

⁵⁵ Section 4 (2) (a) (i).

⁵⁶ See *Re Indiana Transportation Co.* (1917) 244 U.S. 456; submission to jurisdiction in respect of death of one passenger does not involve submission to other claims.

⁵⁷ *Voinet v. Barrett* (1885) 55 L.J.Q.B. (C.A.) 39.

⁵⁸ *De Cosse Brissac v. Rathbone* (1861) 6 H. & N. 301.

of a small balance lying to his credit in a French bank. The court has jurisdiction.⁵⁹

4. X is an Englishman domiciled and resident in England. A brings an action against him in a foreign country for breach of contract, jurisdiction being founded on the arrest of property of X within that country. X appears in order to save his property. Whether the court has jurisdiction?⁶⁰

5. A brings an action for criminal conversation against X in a Manx court. X appears generally and disputes the jurisdiction. By reason of his appearance the court has jurisdiction.⁶¹

Contract to Submit.—The parties to a contract may make it one of the express⁶² or implied⁶³ terms of the contract that they will submit in respect of any alleged breach thereof or any matter having relation thereto, to the jurisdiction of a foreign court, and a person who has thus contracted is clearly bound by his own submission.⁶⁴ All that need be further noted is, that under this head may be brought cases in which, from the nature of the contract, *e.g.*, possibly under peculiar circumstances an agreement with regard to foreign land,⁶⁵ it may be presumed that the parties intended to submit to the jurisdiction of particular courts, *viz.*, the courts of the country where the land is situate.

1. A is a Belgian firm carrying on business in Belgium. X is a British subject domiciled in England and resident in London; he enters into a contract to assign certain patent rights to A in Belgium. The contract provides (*inter alia*) that 'all disputes as to the present agreement and its fulfilment shall be submitted to the Belgian jurisdiction.' In an action by A against X brought in the proper Belgian court for alleged breach of the contract, and in which, in accordance with the provisions of Belgian law, citation is duly served upon X in London, judgment is obtained for £1,000. The Belgian court has jurisdiction.⁶⁶

2. X, an Englishman, enters into a contract with A to trade in co-partnership in Russia. X resides in England. It is a term of the contract that all disputes, no matter how or where they arise, shall be referred to a Russian

⁵⁹ *Guiaud v. De Clermont* [1914] 3 K.B. 145.

⁶⁰ *Ibid.*, p. 155. In *The Challenge and the Duc d'Aumale* [1904] P. 41, it was held that the parties, whose ship had been arrested in Belgium as a step ancillary to proceedings in a French court, and who had entered an appearance in the Belgian proceedings, had not thereby bound themselves to submit to the jurisdiction of the French court. The decision would, it is clear, have been otherwise had the arrest taken place in France and the parties had appeared in the French proceedings. Compare Rule 70, p. 365, *post*.

⁶¹ *Harris v. Taylor* [1915] 2 K.B. (C.A.) 580.

⁶² *Copin v. Adamson* (1875) 1 Ex.D. (C.A.) 17; *Law v. Garrett* (1878) 8 Ch.D. (C.A.) 26; *Hart & Son, Ltd. v. Furness Withy & Co., Ltd.* (1904) 37 N.S.R. 74; Foreign Judgments (Reciprocal Enforcement) Act, 1933, s. 4 (2) (a) (iii).

⁶³ *Bank of Australasia v. Harding* (1850) 9 C.B. 661; *Bank of Australasia v. Nias* (1851) 16 Q.B. 717; *Vallée v. Dumergue* (1849) 4 Ex. 290; *Rusdon Iron & Locomotive Works v. Furness* [1906] 1 K.B. (C.A.) 49; *Allen v. Standard Trusts Co.* [1920] 3 W.W.R. 990; *Meeus v. Thellusson* (1853) 8 Ex. 638.

⁶⁴ *Nelson*, p. 363. See *Law v. Garrett* (1878) 8 Ch.D. (C.A.) 26.

⁶⁵ But see Rule 69, p. 362, *post*; and compare *British Wagon Co. v. Gray* [1896] 1 Q.B. (C.A.) 35, decided with reference to Order XI, r. 1 (e); and *Emanuel v. Symon* [1908] 1 K.B. (C.A.) 302, reversing judgment of court below [1907] 1 K.B. 236.

⁶⁶ *Feyerick v. Hubbard* (1902) 71 L.J.K.B. 509; this case follows, and, perhaps slightly extends, *Rousillon v. Rousillon* (1880) 14 Ch.D. 351. Cf. *Jeannot v. Fuerst* (1909) 25 T.L.B. 424.

court. Disputes arise concerning the terms of the partnership. A brings an action against X, in a Russian court, for alleged breach of the contract. The Russian court has jurisdiction.⁶⁷

3. X is an Englishman, resident and domiciled in England, and not a native or citizen of France. He holds shares in a French company. X thereby becomes, under the law of France, subject to all the conditions contained in the statutes of the company. Under these statutes every shareholder is compelled to elect a 'domicile' in France, and, as to all disputes which may arise during the liquidation of the company, is subject to a French tribunal. The company goes into liquidation, and A brings an action in France against X for the amount not paid up on X's shares. Notice is duly served on X, at his elected 'domicile', though X has no knowledge of the statutes of the company or their provisions. A recovers judgment against X. The French court has jurisdiction.⁶⁸

4. X, an Englishman residing in England, is a member of an Australian company. An Australian Act enables the chairman of the company to sue and be sued for the company, and provides that he is to be taken as agent for the members of the company. An action is brought, and judgment recovered, in Australia, against the chairman by A, *i.e.*, in effect, an action is brought, and judgment recovered, against X; he has no notice of the proceedings against the chairman. The Australian court has jurisdiction.⁶⁹

5. X, a British subject, when residing and carrying on business in Western Australia, enters into partnership there with A for the working of a gold mine situate in Western Australia. The venture is not successful. There is a dissolution of partnership and under a decree of an Australian court accounts are taken showing a deficiency, in respect of which a suit is brought in the Australian court against X, and judgment given for £1,000. X is not in Western Australia at the commencement of the suit nor at any time during its continuance; nor is he at any time resident or domiciled there. He does not appear to the writ issued in the Australian suit, nor does he agree to submit to the jurisdiction of the court of Western Australia. The writ is served upon him in England, and he is kept informed of the proceedings in Western Australia. The Western Australian court has no jurisdiction.⁷⁰

6. X, an Englishman resident and domiciled in England, is the tenant of land in France. X is sued in a French court by his landlord, A, for rent due. Constructive notice is given to X in accordance with the provisions of French law, but he has no other notice of the proceedings and does not appear to defend the action. The French court (*semble*) has no jurisdiction.⁷¹

Character of the Rule.

It appears from these cases that the main principle recognised by English courts with regard to the jurisdiction of the High Court, or of foreign courts, in actions *in personam*, is that the courts of a country where a defendant is present, *i.e.*, where he can be served

⁶⁷ See *Law v. Garrett* (1878) 8 Ch.D. (C.A.) 26. This case does not directly raise the question of jurisdiction, but implies that the agreement gave jurisdiction to the Russian court. Compare *Kirchner & Co. v. Gruban* [1909] 1 Ch. 413; *Re Schintz* [1926] Ch. (C.A.) 710.

⁶⁸ *Copin v. Adamson* (1875) 1 Ex.D. (C.A.) 17. Compare the fuller report of the proceedings in the court below (1874) L.R. 9 Ex. 345. See also *Vallée v. Dumergue* (1849) 4 Ex. 290; *Jamieson v. Robb* (1881) 7 V.L.R. 170.

⁶⁹ *Bank of Australasia v. Harding* (1850) 9 C.B. 661. See also *Bank of Australasia v. Nias* (1851) 16 Q.B. 717. The result is that an action can be maintained in England against X, on the Australian judgment, given nominally against the chairman. See Chap. 16, and Rule 115, *post*.

⁷⁰ *Emanuel v. Symon* [1908] 1 K.B. (C.A.) 302.

⁷¹ See p. 362, *post*.

with a writ, have in general jurisdiction over him,⁷² and that it is doubtful whether in practice and in such an action English courts recognise, even in the case of foreign courts, allegiance as a basis of jurisdiction. Further, English courts are ready to recognise submission by a plaintiff or a defendant to the High Court or to a foreign court, as a valid ground of jurisdiction. It is also obvious that the High Court must in the long run concede to the courts of foreign countries pretty much the same rights of jurisdiction which it claims for itself. Hence the suggestion that domicile⁷³ should in actions *in personam* be admitted in the case of foreign countries to give jurisdiction to the courts thereof.

RULE 69.⁷⁴—In an action *in personam* the courts of a foreign country do not acquire jurisdiction either—

- (1) from the mere possession by the defendant at the commencement of the action of property locally situate in that country ; or
- (2) from the presence of the defendant in such country at the time when the obligation in respect of which the action is brought was incurred in that country.

Comment and Illustrations

Clause 1. ‘Whilst we think’, it is laid down by the Court of Queen’s Bench, ‘that there may be other grounds for holding a person bound by the judgment of the tribunal of a foreign country than those enumerated in *Douglas v. Forrest*,⁷⁵ we doubt very much whether the possession of property, locally situated in that country and protected by its laws, does afford such a ground. It should rather seem that, whilst every tribunal may very properly execute process against the property within its jurisdiction, the existence of such property, which may be very small, affords no sufficient ground for imposing on the foreign owner of that property a duty or obligation to fulfil the judgment. But it is unnecessary to decide this, as the defendants had in this case no property in France’.⁷⁶

⁷² See Rule 68, *First Case*, p. 351, *ante*.

⁷³ See *ante*, p. 355.

⁷⁴ As to clause 1, see *Schibsby v. Westenholz* (1870) L.R. 6 Q.B. 155; as to clause 2, *Sirdar Gurdial Singh v. Rajah of Faridkote* [1894] A.C. 670, 686, 686, with which contrast *Bequet v. MacCarthy* (1831) 2 B. & Ad. 951, and *Schibsby v. Westenholz* (1870) L.R. 6 Q.B. 155, 161; *Gibson & Co. v. Gibson* [1918] 3 K.B. 379.

⁷⁵ (1828) 4 Bing. 708; and Rule 68, p. 351, *ante*.

⁷⁶ *Schibsby v. Westenholz* (1870) L.R. 6 Q.B. 155, 168, *per curiam*. See also *Votnet v. Barrett* (1885) 55 L.J.Q.B. 39; *Emanuel v. Symon* [1908] 1 K.B. (C.A.) 802. Contrast *Cowan v. Braidwood* (1840) 1 M. & Gr. 882, where possession of property seems to have been regarded as a good ground of jurisdiction.

This statement, though not quite decisive, appears to negative the claim made by the courts of some foreign countries, and especially of Scotland,⁷⁷ to ground jurisdiction in an action *in personam* on the mere fact of the possession by the defendant of property lying within the limits of the country to which the courts belong.⁷⁸ The foreign court has, of course, in the view of English law authority to deal *in rem* with such property and any person's rights in respect of it.

1. X is domiciled and resident in England. He possesses goods in a house in Edinburgh. A brings an action against X in the Court of Session for breach of contract in England. X's goods in Edinburgh are arrested to found jurisdiction (*ad fundandam jurisdictionem*). The court has no jurisdiction.⁷⁹

2. A is a fruit merchant in Edinburgh. He brings an action in the Court of Session against the L. & N. W. Ry. for damage to fruit of A's, arising from the negligence of the defendants in the carriage thereof. The act of negligence takes place in England; A arrests movable property of the defendant's in Scotland. The court has no jurisdiction.⁸⁰

3. A, an Englishman resident in London, has a claim against X & Co., an English company resident in London, in respect of a life policy granted to N. X and Co. have money in a bank in Scotland. A arrests the money due by the bank to X & Co., and brings an action in the Court of Session against X & Co. on the policy. The court has no jurisdiction.⁸¹

Clause 2. A dictum of Blackburn, J.,⁸² suggested that under the circumstances stated in clause 2, the judgment of a foreign court would bind the defendant, *i.e.*, the court would be a court of competent jurisdiction, but the Privy Council has dissented from this doctrine.⁸³ It may, therefore, be concluded, with great probability, that, as stated in clause 2, the mere presence of a defendant in a country at a time when an obligation is incurred does not of itself give the courts jurisdiction over him in respect of such obligation.

⁷⁷ See *L. & N. W. Ry. v. Lindsay* (1858) 3 Macq. 99; *Douglas v. Jones* (1831) 9 S. 856; *Weinschel, Petr.* [1916] 2 Sc.L.T. 91; *Maclaren, Court of Session Practice*, pp. 41, 42; Rule 88, p. 413, *post*

⁷⁸ See, however, p. 369, *ante*, as to the possibility of a contract with reference to land in a foreign country implying submission to the jurisdiction of the courts of such country.

⁷⁹ *I.e.*, the Scottish court is not a 'court of competent jurisdiction' in the opinion of English judges. See, as to the ambiguity of the expression 'court of competent jurisdiction', pp. 345-6, *ante*, and compare Rule 88, p. 413, *post*, and the Judgments Extension Act, 1868, s. 8. The fact that this ground of exercise of jurisdiction is not recognised generally is admitted in Scotland. See *Pick v. Stewart, Galbraith & Co., Ltd.* (1907) 15 Sc.L.T. 447.

⁸⁰ See *L. & N. W. Ry. v. Lindsay* (1858) 3 Macq. 99. The court has jurisdiction according to Scottish law.

⁸¹ See, for the facts, *Parke v. Royal Exchange Co.* (8 D. 365), cited 3 Macq. 109. In this case it was held that the Court of Session had jurisdiction according to Scottish law. But the case does not decide that it was a 'court of competent jurisdiction' in the sense in which the words are here used, *i.e.*, according to English law.

⁸² *Schibsby v. Westernholz* (1870) L.R. 6 Q.B. 161.

⁸³ *Sirdar Gurdial Singh v. Rajah of Faridkote* [1894] A.C. 670. Cf. Foreign Judgments (Reciprocal Enforcement) Act, 1933, s. 4 (2) (a) (iv) which requires the defendant to be resident in the foreign country at the time when the proceedings were instituted.

1. X, a British subject domiciled in England, has held an official position and resided in Italy. X, whilst residing there, is guilty of a fraud, but, before proceedings are commenced against him in respect thereof, he has returned to and taken up his permanent residence in England. An action, of which he has notice in England, is brought against him in respect of the fraud in an Italian court, and judgment for £1,000 is recovered. The Italian court has no jurisdiction.⁸⁴

2. X, a Swiss subject, when in Paris, enters into a contract with A that he will not carry on a certain trade in England or elsewhere. When X is residing in England he carries on the trade there in breach of his contract. A brings an action against X in a French court. The French court has no jurisdiction.⁸⁵

⁸⁴ Suggested by *Sirdar Gurdyal Singh v. Rajah of Faridkote* [1894] A.C. 670.

⁸⁵ *Rousillon v. Rousillon* (1880) 14 Ch.D. 351, 371.

JURISDICTION IN ACTIONS IN REM¹

RULE 70.²—In an action or proceeding *in rem* the courts of a foreign country have jurisdiction to determine the title to any immovable or movable within such country.³

Comment

‘If the matter in controversy is land’, writes Story, ‘or other immovable property, the judgment pronounced in the *forum rei sitæ* is held to be of universal obligation, as to all the matters of right and title which it professes to decide in relation thereto. This results from the very nature of the case; for no other court can have a competent jurisdiction to inquire into or settle such right or title. By the general consent of nations, therefore, in cases of immovables, the judgment of the *forum rei sitæ* is held absolutely conclusive’.⁴

‘The same principle’, writes Story, ‘is applied to all . . . cases of proceedings *in rem*, against movable property, within the jurisdiction of the court pronouncing the judgment. Whatever the court settles as to the right or title, or whatever disposition it makes of the property by sale, revendication, transfer, or other act, will be held valid in every other country, where the same question comes directly or indirectly in judgment before any other foreign tribunal. This is very familiarly known in the cases of proceedings *in rem* in foreign Courts of Admiralty, whether they are causes of prize, or of bottomry or of salvage, or of forfeiture [or of damage by collision], or of any of the like nature, over which such courts have a rightful jurisdiction, founded on the actual or constructive possession of the subject-matter (*res*)’.⁵ This passage refers especially to the cases where ‘rightful jurisdiction’ is exercised, *e.g.*, in Admiralty or prize

¹ As to the distinction between an action *in personam* and an action *in rem*, see *Castrique v. Imrie* (1870) L.R. 4 H.L. 414, 429, opinion of Blackburn, J.; *Meyer v. Ralli* (1876) 1 C.P.D. 358; *The City of Mecca* (1879) 5 P.D. 28; (1881) 6 P.D. (C.A.) 106; *Re Trufort* (1887) 36 Ch.D. 600; *Minna Craig Steamship Co. v. Chartered, etc. Bank* [1897] 1 Q.B. (C.A.) 460; *Carr v. Francis, Times & Co.* [1902] A.C. 176; *Evans v. Evans* (1911) 19 W.L.R. 287; *Burchell v. Burchell* (1926) 56 O.L.R. 515; *Jones v. Smith* (1925) 56 O.L.R. 550; *Davidson v. Sharpe* (1920) 60 Can.S.C.R. 75; Read, 133–134; Cheshire, 791–798. For the United States doctrine see Goodrich, s. 65.

² See Story, s. 592; *Sirdar Gurdial Singh v. Rajah of Faridkote* [1894] A.C. 670, 685. Oppenheim, Vol. 1, pp. 615–656.

³ See Intro., General Principle No. 3, p. 22, *ante*; Wolff, p. 363.

⁴ Story, s. 591.

⁵ Story, s. 592, cited with approval in *Castrique v. Imrie* (1870) L.R. 4 H.L. 414, 428, 429, opinion of Blackburn, J. Compare *Minna Craig Steamship Co. v. Chartered, etc. Bank* [1897] 1 Q.B. (C.A.) 460; *McKie v. McKie* [1933] Ir.R. 464.

matters. The basis of this 'rightful jurisdiction' was the compliance with the universal law maritime which could give a universal title; non-compliance with such law would not be presumed, but, if proved, non-compliance might give no more than a locally valid title depending on the sovereign's power in his own territory. In the same way, a title to a movable obtained by or through a foreign sovereign in violation of international law, may be held to be inoperative by the courts of a State to which the movable is subsequently taken.⁶ A sovereign cannot claim the protection of international law for a title obtained in violation of that law. In *Cam-mell v. Sewell*,⁷ Cockburn, C.J., spoke of 'a good contract of sale to transfer the property in Norway, without anything to show that by the general law of nations, or by the law of any nation which can possibly apply to the present case, the sale valid in Norway can be invalidated elsewhere'. Subject to this the courts of a country are courts of competent jurisdiction⁸ with regard to the title to, or possession of, movable not less than immovable property which is situate in that country.

It follows, therefore, that proceedings to determine ownership of property in any country must be deemed *prima facie* valid though notification of the proceedings was made only by publication and not by any form of personal service.⁹

Our Rule, it should be noted, is of wide application. It applies not only to proceedings which are in strictness in the eyes of English law actions *in rem*, but also to proceedings of any and every kind, such as the administration of a deceased person's property¹⁰ which, though not strictly in the technical language of English law and in the view of English courts actions *in rem*, determine the title to property.

The Foreign Judgments (Reciprocal Enforcement) Act, 1933, provides¹¹ that a foreign court shall be deemed to have jurisdiction for the purposes of the Act, in the case of an action of which the subject-matter was immovable property or in an action *in rem* of which the subject-matter was movable property, if the property in question was at the time of the proceedings in the foreign court situate in the foreign country. The Act, therefore, lays down a Rule which is in substantial harmony with Rule 70. It has been held in New Zealand that an action *in personam* to recover instalments of purchase-money due under a sale of land is not an action of

⁶ See *ante*, pp. 156, 157, 347.

⁷ (1860) 5 H. & N. 728.

⁸ But as to movable property not of exclusively competent jurisdiction. Compare, as to the principle of effectiveness, Intro., p. 22, *ante*; and as to the law governing the assignment of a movable, Rules 129-131, *post*, pp. 558-570.

⁹ See *Pennoyer v. Neff* (1878) 95 U.S. 714, 727, 734; *Huling v. Kaw Valley Ry.*, 130 U.S. 559, 563; *Arndt v. Griggs* (1890) 134 U.S. 316.

¹⁰ See Chap. 15, Rule 74, p. 386, *post*.

¹¹ Section 4 (2) (b); see *post*, p. 420.

which the subject-matter is immovable property within the meaning of the Act.¹²

Illustrations

1 Goods belonging to A, an Englishman, are on board a Prussian ship which is wrecked in Norway. The goods are sold in Norway, as A alleges, wrongfully. A takes proceedings in a Norwegian court to set aside the sale. The Norwegian court has jurisdiction to determine the title to the goods.¹³

2 The right to the possession of English bills, drawn and accepted in England by English firms, is raised before a Norwegian court whilst the bills are in Norway, in the hands of N, the agent of X, to whom the bills have been indorsed in England. The Norwegian court has jurisdiction to determine the right to the possession of the bills.¹⁴

3 N dies domiciled in England leaving land and money in New York. The courts of New York have jurisdiction to administer and to determine the right to succeed to N's land and money in New York.¹⁵

4 X, of North Carolina, is indebted to A, of North Carolina. While X is visiting Maryland, proceedings are there taken to garnish X's debt by B, who has a claim against A. A in England sues X to recover the amount due. The garnishment proceedings are a valid extinction of the debt.¹⁶

5 Cargo is consigned to A in Malta on a Greek ship. It is damaged en route and a Greek consular court at Constantinople authorises the hypothecation of the cargo and the execution thereon of a bottomry bond to cover cost of transshipping and freight to Malta. A claims to set aside the bond on the ground of irregularity of procedure. The decision is binding *in rem*, and A's claim is dismissed.¹⁷

6 A owns a ship which is condemned as prize by a Prize Court of a belligerent power sitting in a neutral State, and purchased by X. A can successfully assert his ownership in an English court, for the foreign court was not a competent court, as it sat in a neutral country, contrary to international law.¹⁸

7 A's goods are seized by pirates. The pirates' ship is captured by naval forces. A's goods are in the captured ship. A may enforce his right to restitution in the Court of Admiralty of the capturing forces in accordance with the maxim *pirata non mutat dominium*.¹⁹

¹² *Re a Judgment, McCormac v. Gardner* [1937] N.Z.L.R. 517.

¹³ See *Cammell v. Sewell* (1860) 5 H. & N. 728. The Exchequer Chamber agreed that the decision in Norway was not technically a judgment *in rem*, but we are concerned with substance, not form, and their judgment entirely supports the rule.

¹⁴ *Aloock v. Smith* [1892] 1 Ch. (C.A.) 238.

¹⁵ Compare *Enohin v. Wylie* (1862) 10 H.L.C. 1, 19, language of Lord Cranworth, and p. 23, language of Lord Chelmsford. See Chap. 15, Rule 74, p. 386, *post*.

¹⁶ Suggested by *Harris v. Balk* (1905) 198 U.S. 218. See *post*, p. 577.

¹⁷ *Messina v. Petrocchino* (1879) L.R. 4 P.C. 144, approving *Dent v. Smith* (1869) L.R. 4 Q.B. 414; salvage adjustment by Russian Consul at Constantinople.

¹⁸ *The Flad Oyen* (1799) 1 C.Rob. 336. *I.e.*, the Prize Court cannot legally be a court of the country which controls the *res*, and our Rule thus is excluded. See also *The Appam* (1917) 248 U.S. 124; *Oppenheim*, Vol. 2, p. 659; Higgins and Colombos, *International Law of the Sea*, 1945, Chap. 21; Pitt-Cobbett, *Cases on International Law*, Vol. 2 (1937) pp. 274-276.

¹⁹ *Oppenheim*, Vol. 1, p. 566; Higgins and Colombos, p. 286; piracy *jure gentium* is an offence by the universal maritime law, see *Re Piracy Jure Gentium* [1934] A.C. 586, and the maxim quoted is generally accepted in international law: see Wortley, 24 B.Y.B.I.L. 258 (1947).

JURISDICTION IN MATTERS OF DIVORCE AND NULLITY OF MARRIAGE¹

1. DIVORCE

(1) WHERE COURTS HAVE JURISDICTION

RULE 71.—The courts of a foreign country have jurisdiction to dissolve the marriage of any parties domiciled in such foreign country at the commencement of the proceedings for divorce.²

This Rule applies to—

- (1) an English marriage ;
- (2) a foreign marriage.

Comment

According to the rules of the conflict of laws maintained by English courts this divorce jurisdiction of the courts of a foreign country where the parties to a marriage are domiciled is not affected either by the country where the marriage is celebrated, or by the domicile or the nationality of the parties at the time of the marriage. Rule 71 is confined to monogamous marriages³; but applies as well to an 'English marriage', i.e., a marriage which, whether celebrated in England or elsewhere, is entered into by parties of whom the husband is at the time thereof domiciled in England, as to a 'foreign marriage', by which term is meant any marriage which does not fall within the description or definition just given of an English marriage. A doubt, indeed, was at one time entertained whether the court of any foreign country could, in the eyes of English tribunals, dissolve an English marriage. But this doubt has now been entirely removed, and the law on this point has been authoritatively laid down as follows :—

'The law now unquestionably stands in this position: That the court of the existing bona fide domicile for the time being of the

¹ See references, p. 216, note 1. See also pp 430–432, *post*.

² *Bater v. Bater* [1906] P. (C.A.) 209; *Harvey v. Farnie* (1882) 8 App.Cas. 43; *Cremor v. Cremor* [1905] V.L.R. 532; *Gardner v. Gardner* (1897) 15 N.Z.L.R. 739; *Guest v. Guest* (1883) 3 O.R. 344; *Henderson v. Muncey* [1943] 4 D.L.R. 758. For the principle of respect for a foreign divorce see *Collington's Case* (1678) 2 Swans. 326.

³ *R. v. Superintendent Registrar of Marriages for Hammersmith, ex p. Mir-Anwaruddin* [1917] 1 K.B. 634 (C.A.), which appears to be the only authority on this point in English law; cf. discussion, *post*, p. 372.

married pair has jurisdiction over persons originally domiciled in another country to undo a marriage solemnised in that other country. It seems to me that that is the law now applicable to this case' [viz., the case of British subjects originally domiciled in England who inter-married in England, and had been divorced in New York], 'because we have it as a fact that the domicile of the parties, through the husband, was an American domicile—a domicile in the State of New York'.⁴

'When the jurisdiction of the court is exercised according to the rules of international law, as in the case where the parties have their domicile within its forum, its decree dissolving their marriage ought to be respected by the tribunals of every civilised country. The opinions expressed by the English common law judges in *Lolley's Case*⁵ gave rise to a doubt whether that principle was in consistency with the law of England, which at that time did not allow a marriage to be judicially dissolved. That doubt has since been dispelled; and the law of England was, in their Lordships' opinion, correctly stated by Lord Westbury in *Shaw v. Gould*,⁶ in these terms: "The position that the tribunal of a foreign country, having jurisdiction to dissolve the marriages of its own subjects, is competent to pronounce a similar decree between English subjects who were married in England, but who before, and at the time of, the suit are permanently domiciled within the jurisdiction of such foreign tribunal, such decree being made in a bona fide suit without collusion or concert, is a position consistent with all the English decisions, although it may not be consistent with the resolution commonly cited as the resolution of the judges in *Lolley's Case*"'.⁷

The court, moreover, of the country where the parties are domiciled at the time of the proceedings for divorce has jurisdiction to grant a divorce on any ground for which a divorce may be granted under the law of such country, even though such ground, e.g., incompatibility of temper, is not a cause for which divorce could be obtained in the country, e.g., England, where the parties were domiciled at the time of the marriage.⁸ It may now, in short, be taken to be the established rule of English law, that domicile is the true test of divorce jurisdiction.

The parties at the time of the divorce under the law of the foreign country where they are then domiciled, e.g., Sweden, may be still citizens or subjects of another country, and of a country, e.g., Chile, under the law of which divorce does not exist. But even in this case

⁴ *Bater v. Bater* [1906] P. (C.A.) 209, 232.

⁵ (1812) Russ. & Ry. 237; 2 Cl. & F. 567.

⁶ (1868) L.R. 3 H.L. 55.

⁷ *Le Mesurier v. Le Mesurier* [1895] A.C. 517, 527, 528, judgment of Privy Council, cited with approval in *Bater v. Bater* [1906] P. (C.A.) 209, 235.

⁸ *Bater v. Bater* [1906] P. (C.A.) 209; *Mezger v. Mezger* [1937] P. 19; so in Canada: *R. v. Hamilton* (1910) 22 O.L.R. 484; in New Zealand, *Gardner v. Gardner* (1897) 15 N.Z.L.R. 739. For Scotland see *Humphrey v. Humphrey's Tr.* (1895) 33 Sc.L.R. 99; and *C. D. v. A. B.* [1908] S.C. 737, 739 n., and Fraser, *Husband and Wife* (2nd ed.), p. 1331.

the English courts would adhere, it is submitted, to the principle that domicile is the test of divorce jurisdiction, and hold that a Swedish divorce court has jurisdiction to dissolve the marriage of Chilean citizens domiciled in Sweden. It must, however, be admitted that, where citizenship and domicile differ, cases of considerable nicety may arise, especially in dealing with the position of citizens of countries such as Chile, which make personal capacity depend, not upon domicile, but upon allegiance or nationality, and further do not recognise divorce as regards their own citizens. But any difficulty will, by English courts, now be almost certainly solved by treating any divorce as valid which is granted by the divorce court of the country where the parties are domiciled, on the English theory of domicile.

A fraudulent pretence that the parties to divorce proceedings are domiciled in the foreign country, *e.g.*, Scotland or New York, where the divorce is obtained, will in England invalidate the divorce,⁹ and acquiescence in the obtaining of such a divorce will amount to connivance,¹⁰ or conduct conducing,¹¹ in subsequent divorce proceedings brought in this country upon the ground of the respondent's adultery with the person he or she had married after the conclusion of the foreign proceedings.

A divorce in the country of the domicile may be treated as invalid if the decree is pronounced without notice of the proceedings to the respondent,¹² or after the petitioner's authority to those acting upon his behalf has been revoked.¹³ It seems, however, that collusion or non-disclosure of material facts which does not affect the jurisdiction of the foreign court, or service of notice of the proceedings on the respondent will not be held to invalidate the divorce in England,¹⁴ and the mere fact that the desire to obtain a divorce accounted in part for the acquisition of a foreign domicile has never been held sufficient to have this effect.¹⁵

Non-judicial divorces. The Rule under discussion would appear to apply to cases where there is no court to exercise jurisdiction, and the legislature grants divorce, as in Quebec. It may be taken as probable that a recital as to the parties' domicile in an Act of the appropriate legislature would be sufficient grounds for the English courts to hold that domicile really existed, but no doubt the domicile

⁹ See Rule 78, *post*; *Bonaparte v. Bonaparte* [1892] P. 402; *Maday v. Maday* (1911) 4 Sask.L.R. 18; *cf. C. v. C.* (1917) 39 O.L.R. 571.

¹⁰ *Lankester v. Lankester* [1925] P. 114.

¹¹ *Clayton v. Clayton* [1932] P. 45 (acquiescence in foreign nullity decree assumed to be invalid in England).

¹² *Shaw v. Att.-Gen.* (1870) L.R. 2 P. & D. 156 at p. 162; *Collis v. Hector* (1875) L.R. 19 Eq. 384, at pp. 340-42; *Rudd v. Rudd* [1924] P. 72; *Scott v. Scott* [1937] Sc.L.T. 632; *Bavin v. Bavin* [1939] 3 D.L.R. 328.

¹³ *Hughes v. Hughes* (1932) 147 L.T. 20.

¹⁴ *Bater v. Bater* [1906] P. 209 at p. 217; *Vardy v. Smith* (1931) 48 T.L.R. 661, affirmed 49 T.L.R. 36, 14 B.Y.B.I.L. 199; *Crowe v. Crowe* (1937) 157 L.T. 557.

¹⁵ *Vardopulo v. Vardopulo* (1909) 25 T.L.R. 518; *Carswell v. Carswell* (1881) 8 R. 901; *Stavert v. Stavert* (1882) 9 R. 519.

would be open to dispute to the same extent as if the divorce had been pronounced by a court. There is, however, no authority on this point, and there is also no authority which has any direct bearing on the question whether English courts will recognise as valid divorces which are effective under the law of the domicile of the parties although they are not the outcome of judicial proceedings, or of legislation preceded by a judicial inquiry.¹⁶

In *Preger v. Preger*¹⁷ and *Spivack v. Spivack*¹⁸ the invalidity of Jewish religious divorces was taken for granted, but in each case the domicile appears to have been English. In *Sasson v. Sasson*¹⁹ the Privy Council held that the divorce of Jewish British subjects domiciled in Egypt effected through the Grand Rabbinate at Alexandria was valid under the relevant ordinances, while the *Hammersmith Marriage Case*²⁰ contains dicta which suggest that a monogamous marriage must be dissolved by the decree of a court in order that the divorce should be recognised in England.

In these circumstances, the question whether the English courts would recognise divorce by consent or unilateral declaration of a type which was at one time possible under the law of the Soviet Union, even if it is effective under the law of the domicile, is a matter of pure conjecture. In view of the paramount importance of the law of the domicile in questions of status,²¹ it is submitted that if such divorces are recognised as valid in the country of the domicile, they should be recognised as valid in England. If the cause for divorce is immaterial,²² so ought the method to be. It has been suggested that such divorces should be recognised where the divorce is by consent but not where it is the result of a unilateral declaration, and the principle that the respondent must have notice of the proceedings in order that the foreign decree may be recognised in England is invoked for the exclusion from recognition of divorce of the latter type.²³ It is, however, difficult to see the relevance of a principle which is based on the necessity of the fair conduct of judicial proceedings to a procedure which is not judicial by nature. English courts require that the respondent must have notice of the proceedings so that he or she may have an opportunity of contesting them; but no amount of notice would enable a party to contest a unilateral declaration of divorce. It is therefore submitted that, provided the divorce is of a type appropriate to a monogamous union,²⁴ it ought, on principle, to be

¹⁶ *Bell Yard* Nov. 1935, p. 10 *et seq.*; *Falconbridge*, p. 622 *et seq.*

¹⁷ (1926) 42 T.L.R. 281.

¹⁸ (1930) 46 T.L.R. 243.

¹⁹ [1924] A.C. 1007.

²⁰ [1917] 1 K.B. 684, at pp. 642-3 and p. 659.

²¹ *Baindail v. Baindail* [1946] P. 122; *Armitage v. Att.-Gen.* [1906] P. 135.

²² *Bater v. Bater* [1906] P. 209.

²³ *Falconbridge* 623-4.

²⁴ See proviso to Rule 81, *ante*, p. 216.

recognised in England if it is valid under the law of the domicile, whatever be the method by which it was obtained.

*R. v. Superintendent Registrar of Marriages for Hammersmith, ex p. Mir-Amearuddin*²⁵ decides that, if the divorce is not of a type appropriate to dissolve a monogamous union, it will not be recognised as effective for this purpose in England, even if it may be effective under the personal law of the husband which admits of polygamy. The case concerned divorce by *talak*, and the question naturally arises as to the degree of recognition which will be accorded to such a divorce in relation to a polygamous marriage. It is submitted that, now that it has been clearly recognised that these marriages confer upon the parties the status of married persons while they are in England,²⁶ divorces which are appropriate to such unions should be recognised as dissolving them if this is the effect which they have in the country of the domicile.

Judicial separation, restitution of conjugal rights and ancillary relief. There is a lack of English authority on the question of the jurisdiction of foreign courts in matters of judicial separation and restitution of conjugal rights, but English courts could not logically refuse to recognise the authority of the courts of the domicile or matrimonial residence in these matters.²⁷ There is also a lack of *ad hoc* authority as to the extent to which English courts will recognise the power of foreign courts to exercise control in matters of the property and parental rights of the persons whose marriage is affected by their decrees similar to that exercised by English courts when granting ancillary relief in matrimonial causes.²⁸ But the principle that similar authority should be conceded to foreign courts is implicit in the cases which decide that the ancillary decrees of foreign courts will not be recognised if the principal decree cannot be recognised in England.²⁹

Illustrations

1. H and W are British subjects domiciled in England. They there intermarry. H afterwards becomes domiciled in New York. W takes proceedings to obtain divorce in a New York court. The court has jurisdiction and, if it pronounces a decree, the decree will be recognised in England.³⁰

2. The circumstances are the same as in Illustration 1, except that W takes proceedings for divorce on a ground which is a cause for divorce under the law of New York, but is not a ground on which divorce could be obtained in England. The court has jurisdiction and, if it pronounces a divorce, the decree will be recognised in England.³¹

²⁵ [1917] 1 K.B. 634.

²⁶ *Ante*, p. 225.

²⁷ *Ainslie v. Ainslie* (1927) 39 C.L.R. 381; decree of separation in Western Australia bars claim for restitution in N.S.W. See also *Lord v. Lord* (1902) 28 V.L.R. 566.

²⁸ See pp. 221-2 *ante*, and *Re McKee* [1948] 4 D.L.R. 339.

²⁹ *Papadopoulos v. Papadopoulos* [1930] P. 55; *Simons v. Simons* [1939] 1 K.B. 490.

³⁰ *Bater v. Bater* [1906] P. (C.A.) 209.

³¹ *Bater v. Bater* [1906] P. (C.A.) 209; and *Humphrey v. Humphrey's Tr.* (1895) 38 Sc.L.R. 99; *Scott v. Att.-Gen.* (1886) 11 P.D. 128.

3. H and W are Chilean subjects domiciled in Sweden. Under Chilean law they could, under no circumstances, obtain a divorce in Chile. H takes proceedings to obtain divorce in a Swedish court, and divorce is granted on a ground, *e.g.*, incompatibility of temper, for which a divorce could not be granted in England. (*Semble*) the court has jurisdiction and its decree will be recognised as effective in England although it might not be recognised in Chile.

4. H and W are divorced by a court in Kenya, which varies a settlement of the husband's property in favour of W. The court has (*semble*) jurisdiction and its decree will be recognised in England.³²

5. H and W are divorced by a court in France, where they are domiciled, and the custody of the child is given to the father. W takes the child to England. H claims the custody of the child, and is entitled to the aid of the English courts, which will, however, have regard to the welfare of the child.³³

6. H and W1, who are Mohammedans domiciled in Pakistan, go through a ceremony of marriage according to Mohammedan rites in Karachi. H divorces W1 by talak and comes to England. He then marries W2 at a registry office in London. (*Semble*) the marriage is valid because H did not have the status of a married man when he married W2.³⁴

SUB-RULE.—Where the courts of a foreign country have jurisdiction to dissolve a marriage, such courts also have jurisdiction to entertain an action against a co-respondent in a divorce suit for damages due from such co-respondent to the husband in favour of whom such divorce is granted, and this without reference to the residence or the domicile of such co-respondent at the commencement of the suit.³⁵

Comment and Illustration

H, resident and domiciled in British India, petitions for divorce from his wife, W. The Indian court has jurisdiction to grant a divorce under the Indian Divorce Act, No. 4 of 1869, s. 2.

X is a co-respondent. At the time when the petition is presented X is neither domiciled nor resident in India. H recovers judgment against X for £7,000. The Indian court has jurisdiction to entertain an action against X, and H may recover the £7,000 in an action against X in the English High Court.³⁶

This is the effect of the decision in *Phillips v. Batho*³⁷ which is, in terms, confined to a 'foreign country' which is part of British territory; but the underlying principle is that a decree of divorce is a judgment *in rem*, appropriately pronounced by the court of the domicile, and that judgments which are ancillary thereto should be treated as valid everywhere. It is, however, open

³² *Re Gooch* [1929] 1 Ch. 740 in which the decree of the Kenya Court was assumed to be effective, but only for the purposes of the argument.

³³ *Radoyevitch v. Radoyevitch* [1930] S.C. 619. See Rule 117, *post*.

³⁴ Cf. *Baindail v. Baindail* [1946] P. 122, *ante*, p. 225.

³⁵ Cf. Sub-Rule to Rule 31, *ante*.

³⁶ *Phillips v. Batho* [1913] 3 K.B. 25.

³⁷ [1913] 3 K.B. 25.

to question whether a judgment for damages against a co-respondent is ancillary to a decree of divorce, and it certainly is not under the domestic law of England. It is therefore arguable that the principles governing jurisdiction *in personam* should apply to such a case. *Phillips v. Batho* has been severely criticised extra-judicially, and it has not been followed in Canada and New Zealand.³⁸

(2) WHERE COURTS HAVE NO JURISDICTION

RULE 72.—Subject to the Exceptions hereinafter mentioned, the courts of a foreign country have no jurisdiction to dissolve the marriage of parties not domiciled in such foreign country at the commencement of the proceedings for divorce.³⁹

Comment

This Rule certainly holds good as to English marriages.⁴⁰

'In no case has a foreign divorce been held to invalidate an English marriage between English subjects, where the parties were not domiciled in the country by whose tribunals the divorce was granted'.⁴¹ The Scottish courts at one time claimed the right to dissolve English marriages where the parties had acquired no real domicile in Scotland, but had merely resided there a sufficient time to give the Scottish courts jurisdiction, according to one view of Scottish law,⁴² and this claim was consistently repudiated by English tribunals. In spite, therefore, of doubts formerly expressed on the subject,⁴³ it must be taken now as clearly established that the Scottish courts have no power to dissolve an English marriage where the parties are not really domiciled in Scotland⁴⁴; and, further, that the same doctrine applies to all foreign courts.⁴⁵

Nor is there any reason to doubt that English tribunals apply

³⁸ Read pp. 262-7 and cases there cited.

³⁹ *Pitt v. Pitt* (1864) 4 Macq. 627; *Dolphin v. Robins* (1859) 7 H.L.C. 390; *Shaw v. Gould* (1868) L.R. 3 H.L. 55. See also *Sinclair v. Sinclair* (1798) 1 Hagg.Cons. 294; *R. v. Woods* (1908) 6 O.L.R. 41; *Cox v. Cox* [1918] 2 W.W.R. 422; *Lord v. Lord* (1902) 28 V.L.R. 566; *Harris v. Harris* [1980] 4 D.L.R. 195; *R. v. Brinkley* (1907) 14 O.L.R. 234; *Chatenay v. Chatenay* [1938] 3 D.L.R. 379.

⁴⁰ *Green v. Green* [1893] P. 89.

⁴¹ *Shaw v. Att.-Gen.* (1870) L.R. 2 P. & D. 156, 161, 162, *per* Lord Penzance.

⁴² See, however, *Pitt v. Pitt* (1864) 4 Macq. 627, which made it doubtful whether, even according to the law of Scotland, the Scottish courts had, under such circumstances, the right to pronounce a divorce; *Barkworth v. Barkworth* [1913] S.C. 759, which shows that the old claim is not now adhered to; *Stavert v. Stavert* (1882) 9 R. 519; *Low v. Low* (1891) 19 R. 115; Fraser, *Husband and Wife* (2nd ed.), pp. 1278-1288.

⁴³ See *per* Lord Chelmsford in *Shaw v. Gould* (1868) L.R. 3 H.L. 55, 57.

⁴⁴ *Dolphin v. Robins* (1859) 7 H.L.C. 390, 414.

⁴⁵ In *R. v. Russell* [1901] A.C. 446, no serious effort was made to argue that the divorce in the United States was sufficient to evade the charge of bigamy.

the same rule to a foreign divorce purporting to dissolve a foreign marriage as to a foreign divorce purporting to dissolve an English marriage, and that, therefore, a foreign divorce is invalid in England, in the case of a foreign marriage, if the parties to the marriage are, at the time of the divorce, not domiciled in the country where the court granting the divorce exercises jurisdiction.

Nice questions may be raised as to the effect in England of a foreign divorce granted in a country where the parties are not domiciled. Where divorce jurisdiction is exercised by foreign courts on the ground of nationality in respect of foreigners domiciled in England, the divorce would clearly be held invalid in England. Furthermore, it is unlikely that the English courts would recognise a divorce granted by a foreign court which had assumed jurisdiction in the case of a deserted wife who was not domiciled in the forum,⁴⁶ and, where the parties are domiciled in England, it is doubtful whether the English courts could, consistently with the principles which they have adopted in these matters, recognise divorces granted under foreign legislation similar to s. 13 of the Matrimonial Causes Act, 1937,⁴⁷ such as the Canadian Divorce Jurisdiction Act, 1930.⁴⁸

Where the parties are not domiciled in England, the first exception to this rule may apply, but it is evident that cases of great hardship may arise.

Where the foreign court is held not to have had jurisdiction in the main suit, ancillary decrees such as those for maintenance of the wife,⁴⁹ and custody of children,⁵⁰ will not be enforced in England.

Estoppel. In order to give some colour of validity to invalid divorces granted outside the domicile of the parties, American courts have developed a doctrine of estoppel, whereby a party will be estopped from denying the validity of the divorce if he or she took advantage of the decree by remarrying or accepting a property settlement from the other party, or if he or she set the proceedings in motion by petitioning for divorce.⁵¹ Such estoppel does not apparently extend to third parties, for example the children of the

⁴⁶ Cf. doubtful exceptions to Rule 31 discussed pp. 232-3, *ante*, and see *Lack v. Lack* [1926] 50 C.L.T. 656; *Hannah v. Hannah*, *ibid.*, 370; *Hastings v. Hastings* [1922] N.Z.L.R. 273. In appropriate circumstances the case might come within the first Exception to this Rule, *post*. For suggestions for reform see Final Report of the Committee on Procedure in Matrimonial Causes, s. 83 (ii).

⁴⁷ *Ante*, p. 234.

⁴⁸ Similar legislation exists in New Zealand, *Poingdestre v. Poingdestre* (1909) 28 N.Z.L.R. 604; *Cables v. Cables* (1912) 32 N.Z.L.R. 178; and in the Australian States.

⁴⁹ *Papadopoulos v. Papadopoulos* [1930] P. 55; *Simons v. Simons* [1939] 1 K.B. 490.

⁵⁰ *Re E.E.L.* [1938] N.Ir. 56.

⁵¹ Restatement, s. 112; Goodrich, p. 350; Harper, *The Validity of Void Divorces*, 79 U. of Penn.L.R. 158 (1930); 61 H.L.R. 326 (1948).

marriage.⁵² In Canada it has been held that if a party to an invalid divorce remarries, she is estopped from denying its validity so as to claim her share as widow in her first husband's intestacy.⁵³ There does not appear to be any English authority on the point.

Illustrations

1. H and W, a man and woman domiciled in England, are married at Greenwich. H, the husband, afterwards resides, but does not obtain a domicile, in Scotland. He then applies for and obtains a divorce from the Court of Session. The Court of Session has no jurisdiction to dissolve the marriage,⁵⁴ and, if it does so, the divorce will not be recognised in England.

2. H and W, domiciled French subjects, are married in France. While still retaining their French domicile they are divorced in Belgium, where they are residing. The Belgian courts have no jurisdiction.⁵⁵

3. H and W are domiciled in British Columbia. H deserts W and becomes domiciled in England. W, after two years desertion, applies for, and is granted, a divorce under the Canadian Divorce Jurisdiction Act, 1930, in a British Columbian court. Although the court has jurisdiction under the Canadian Act, and although the divorce would be recognised throughout Canada, it would not (*semble*) be recognised in England.⁵⁶

4. H and W are domiciled in England. W obtains a divorce from a court in Massachusetts which orders H to pay her maintenance at a specified rate. H gets into arrears with his payments under the order, and W brings an action to recover the arrears in England. The action will be dismissed, because the divorce was not granted by a court of competent jurisdiction and the order for maintenance was ancillary to the decree of divorce.⁵⁷

5. H and W are married and domiciled in England. W goes to Nevada, resides there for six weeks and obtains a divorce from H on a ground which would be insufficient by English law. W marries an American citizen and lives with him in the U.S.A. H dies intestate without having lost his English domicile. (*Semble*) W cannot claim to share in his estate as his widow, though the Nevada divorce is not recognised as valid in England.⁵⁸

Exception 1.—If the courts of a foreign country where the parties are not domiciled dissolve their marriage, and if the divorce would be recognised by the courts of the country where, at the date of the decree, the parties are domiciled, it will be recognised in England.⁵⁹

⁵² *Matter of Lindgren* (1944) 293 N.Y. 18, 55 N.E. (2d) 849.

⁵³ *Re Graham Estate* [1937] 3 W.W.R. 413.

⁵⁴ *Shaw v. Gould* (1868) L.R. 3 H.L. 55; *Dolphin v. Robins* (1859) 7 H.L.C. 390; *Tollemache v. Tollemache* (1859) 1 Sw. & Tr. 557.

⁵⁵ See *Le Mesurier v. Le Mesurier* [1895] A.C. 517, 540, cited, pp. 230-1, *ante*; and *Wilson v. Wilson* (1872) L.R. 2 P. & D. 435, 442, cited p. 218, *ante*. The statements of law in these cases are so wide that they clearly apply not only to English but also to foreign marriages.

⁵⁶ Falconbridge (p. 621) suggests that the English court might recognise the divorce on the analogy of s. 13 of the Matrimonial Causes Act, 1937. Under the Matrimonial Causes (War Marriages) Act, 1944, *ante*, p. 235, and *post*, Exception 3, there is express provision for the recognition of divorce or nullity decrees pronounced in the Dominions under reciprocal legislation, see s. 4.

⁵⁷ *Simons v. Simons* [1939] 1 K.B. 490.

⁵⁸ Cf. *Re Graham Estate* [1937] 3 W.W.R. 413.

⁵⁹ Dicey's formulation of the exception has been slightly amended; see Morris, 24 Can.Bar Rev. 73 (1946) and Tuck, 25 *ibid.* 226 (1947). Cf. Final Report of

Comment

In a case, the circumstances of which brought it within this Exception, the existence of the Exception, and the principle on which it rests, were thus judicially laid down :—

‘Are we to recognise in this country the binding effect of a decree obtained in a State in which the husband is not domiciled if the courts of the State in which he is domiciled recognise the validity of that decree? . . .

‘The evidence, in the present case, shows that in the State of New York [where the parties were domiciled according to English law] the decision of [*i.e.*, the divorce granted by] the Court of South Dakota [where the parties were not domiciled according to English law at the time of the divorce] would be recognised as valid. The point then is : Are we in this country to recognise the validity of a divorce which is recognised as valid by the law of the domicile? In my view, this question must be answered in the affirmative. It seems to me impossible to come to any other conclusion, because the status is affected and determined by the decree that is recognised in the State of New York—the State of the domicile as having affected and determined it. That being so [H] and [W] his former wife, the present petitioner, have ceased to be husband and wife in the place where they were domiciled at the date of the decree. It seems to me logically to follow that this court must recognise that state of dissolved union—dissolved, that is, in one State and recognised as dissolved in the other State—and that it must be recognised as dissolved all over the world’.⁶⁰

It will be observed that, in order that a case may come within this Exception, the parties must be domiciled in a country whose courts recognise the foreign divorce at the date when the decree was pronounced. If, for instance, at the commencement of the proceedings they were domiciled in a country whose courts would recognise the validity of the divorce, but they changed their domicile, prior to the decree, to a country whose courts do not recognise the divorce, it seems that the divorce would be held to be invalid in England. The parties would still be husband and wife in the place where they were domiciled at the date of the decree. It is for this reason that the English courts could hardly exercise jurisdiction by way of Exception to Rule 31 (*ante*) in a case in which the parties, though not domiciled in England, were domiciled in a country whose courts would recognise the English decree, *e.g.*, on the grounds of nationality or residence. The crucial date for determining jurisdiction is probably that of the commencement

the Committee on Procedure in Matrimonial Causes s. 83 (iv). There is no authority as to the effect of a divorce which is not the result of a judicial decree but would, nevertheless, be recognised by the courts of the domicile; see pp. 370-372, *ante*.

⁶⁰ *Armitage v. Att.-Gen.* [1906] P. 135, 141, 142, judgment of Sir J. Gorell Barnes, P.; *Clark v. Clark* (1921) 37 T.L.R. 815.

of the proceedings,⁶¹ but, for the purpose of the Exception under discussion, it is essential that the status of the parties should have been changed according to the law of their domicile.⁶²

The Exception is of considerable importance so far as divorces pronounced by Dominion courts are concerned. Thus, the Canadian Divorce Jurisdiction Act, 1930, allows a wife deserted for two years or more by her husband, to obtain a divorce from the court of the province in which her husband was domiciled immediately prior to the desertion. Such a divorce would necessarily be held valid in any province of Canada, and by operation of this Exception, if the husband is domiciled in any Canadian province, the divorce will be held valid in England.

Again, it has recently been held in Victoria⁶³ that, by virtue of Commonwealth legislation, a Victorian court must recognise a decree of divorce pronounced by any Australian court although of opinion that the parties were not domiciled within the jurisdiction of such court. If this decision is accepted in all the Australian States, it means that the English courts will have to recognise all Australian divorces, as long as the husband was domiciled in one of the Australian States when the decree in question was pronounced.

Illustrations

1. H, a domiciled citizen of the State of New York, marries in England W, a domiciled Englishwoman. W, when living apart from H, though not domiciled in the State of South Dakota, obtains from the courts of that State a divorce from H, who is then domiciled in New York. The law of New York would admit the jurisdiction of the court of South Dakota and would treat the divorce as valid. The divorce is valid in England.⁶⁴

2. H and W, French or American citizens, domiciled in New York, obtain a divorce in France. If the divorce is in these circumstances valid in New York, it is (*semble*) valid in England; if, on the other hand, it is invalid in New York, it is also (*semble*) invalid in England.⁶⁵

3. H and W are domiciled in British Columbia. H deserts W and obtains a domicile in Nova Scotia. W after two years' desertion applies for and is

⁶¹ *Ante*, p. 219.

⁶² The actual decision in *Armitage v. Att.-Gen.* [1906] P. 135 is criticised by Morris, 24 Can.Bar Rev. 73 (1946), principally on the ground that New York law only recognised the South Dakota decree because W was domiciled in South Dakota in the New York sense, and the English court could not so regard her without abandoning the rules (a) that the only domicile which is relevant in an English court is a domicile in the English sense (*ante*, p. 96), and (b) that the domicile of a married woman is the same as that of her husband (*ante*, p. 107). See also Truck in 25 Can.Bar Rev. 226 (1947), who ignores the fact that in 1906 rule (b) was still open to doubt.

⁶³ *Harris v. Harris* [1947] V.L.R. 44; cf. *Williams v. State of North Carolina* (1942) 317 U.S. 287; (1945) 325 U.S. 226; discussed Falconbridge, Ch. 41.

⁶⁴ *Armitage v. Att.-Gen.* [1906] P. 135.

⁶⁵ The difference is that, if the divorce is valid in New York, where the parties are domiciled, the case falls within the Exception to Rule 72; if it is invalid in New York the case falls within Rule 72; *Cass v. Cass* (1910) 26 T.L.R. 305; *Owen v. Robinson* [1925] N.Z.L.R. 591; *Paul v. Paul* (1936) 80 S.J. 555; *Wylie v. Martin* [1931] 3 W.W.R. 465. The fact that the doctrine of *Armitage v. Att.-Gen.* has only been considered in such a small number of cases is surprising in view of the varying divorce laws of the world.

granted under the Canadian Divorce Jurisdiction Act, 1930, a divorce in British Columbia. The divorce under the Act is valid in Nova Scotia, and therefore is also valid in England.

Exception 2.—The court of any British possession to which the Indian and Colonial Divorce Jurisdiction Acts, 1926–40, apply may, subject to the provisions of these Acts, dissolve the marriages of British subjects domiciled in England or in Scotland, and such divorces shall, when registered in England or Scotland, have effect as if they had been duly pronounced by the English or Scottish courts.

Comment

The Indian Divorce Act, No. IV, 1869, authorised Indian courts to dissolve marriages solemnised in India in cases where the petitioner professed the Christian religion and resided in India. It provided that the courts should act upon principles and rules as nearly as might be conformable to those upon which English courts acted from time to time. Nevertheless, the Indian courts continued to exercise jurisdiction in cases in which the parties were not domiciled in India long after domicile had become the recognised basis of divorce jurisdiction in the English conflict of laws.

In *Keyes v. Keyes*⁶⁶ it was held that a divorce pronounced by an Indian court under the Act of 1869 on the basis of residence was invalid in England, and legislation validating such divorces retrospectively was at once enacted.⁶⁷ As some of the Indian courts continued to exercise jurisdiction in divorce on the basis of residence,⁶⁸ and in order to remove hardships to British subjects who were resident but not domiciled in India, the Indian and Colonial Divorce Jurisdiction Act, 1926, was passed. It was amended in 1940 in consequence of the Matrimonial Causes Act, 1937, and there was a further amending Act of minor importance in 1945.

The High Court in India, or the courts of any British possession to which the Acts might be extended by Order in Council, was empowered to dissolve the marriages of British subjects resident within its jurisdiction although they were domiciled in England or Scotland.⁶⁹ The grounds for divorce must be those provided for by English law, and the marriage must have been celebrated, or the matrimonial offence committed within the jurisdiction of the

⁶⁶ [1921] P. 204.

⁶⁷ Indian Divorces (Validity) Act, 1921.

⁶⁸ Such divorces are validated by the Indian and Colonial Divorce Jurisdiction Act, 1926, s. 3.

⁶⁹ The Act of 1940 contains a provision analogous to s. 13 of the Matrimonial Causes Act, 1937; see first statutory Exception to Rule 31, *ante*.

court pronouncing the decree. A decree pronounced under these Acts is not effective in England or Scotland until registered in whichever of the two is the country of the domicile, but it may be registered by the person against whom it was pronounced or by anyone having an interest in the proceedings.⁷⁰

The Acts have been extended to Kenya,⁷¹ the Straits Settlements⁷² (now the colony of Singapore and the Malayan Union^{72a}), Jamaica,⁷³ Hong Kong,⁷⁴ Ceylon,⁷⁵ and Burma.^{75a} So far as India and Pakistan are concerned, any court in these Dominions had jurisdiction under the Acts if proceedings were begun before August 15, 1947, but not otherwise,⁷⁶ and so far as Ceylon is concerned, any court in the Dominion had jurisdiction under the Acts if proceedings were begun before February 4, 1948, but not otherwise.⁷⁷ Accordingly the divorce jurisdiction of the courts of each of these three Dominions is now regulated by Rule 72.

The operation of the Acts has been repealed altogether so far as Burma is concerned by the Burma Independence Act, 1947,⁷⁸ although it is provided by section 4 (8) of that Act that the English courts shall have jurisdiction to entertain applications for modification of orders made by the Burmese courts under the Indian and Colonial Divorce Jurisdiction Acts, 1926 and 1940, provided such orders were registered in England before the coming into force of the Act of 1947.

Exception 3.—Any divorce granted under the provisions of the Matrimonial Causes (War Marriages) Act, 1944, or under legislation of any part of British territory outside the United Kingdom or of any protected State, which is declared by Order in Council to correspond substantially with the provisions of the above Act, will be recognised as valid in England.⁷⁹

Comment

The Matrimonial Causes (War Marriages) Act, 1944, confers powers on the Court of Session in Scotland analogous to those

⁷⁰ *Wilkins v. Wilkins* (1932) 101 L.J.P. 35.

⁷¹ S.R. & O. 1928, 635.

⁷² S.R. & O. 1931, 851 and 1103.

^{72a} S.R. & O. 1947, 2783.

⁷³ S.R. & O. 1932, 475, 646.

⁷⁴ S.R. & O. 1935, 836.

⁷⁵ S.R. & O. 1936, 562 and 742.

^{75a} S.R. & O. 1937, 230.

⁷⁶ Indian Independence Act, 1947, s. 17.

⁷⁷ Ceylon Independence Act, 1947, s. 3 (1); S.R. & O. 1947, 2782.

⁷⁸ 2nd Schedule, Part I.

⁷⁹ Matrimonial Causes (War Marriages) Act, 1944, s. 4.

conferred on the High Court which have been discussed under the second statutory Exception to Rule 31. Provision for the reciprocal recognition of similar legislation in Australia, South Africa and New Zealand has been made by Order in Council.⁸⁰

2. DECLARATION OF NULLITY OF MARRIAGE

RULE 73.—The courts of a foreign country have jurisdiction to pronounce a decree of nullity of marriage if—

- (1) the parties were domiciled in such foreign country at the commencement of the proceedings for nullity⁸¹; or
- (2) *semble*, if the marriage was celebrated in such foreign country⁸²; or
- (3) *semble*, if the decree would be recognised as annulling the marriage in the country where the parties were domiciled at the date of the decree⁸³; or
- (4) if the decree was pronounced under legislation to which recognition in England is accorded by Order in Council made under section 4 of the Matrimonial Causes (War Marriages) Act, 1944.⁸⁴

Comment

(1) *Domicile*. The first part of this Rule was established by the House of Lords in *Salvesen v. Administrator of Austrian Property*.⁸⁵ In that case the House recognised as a judgment *in rem* affecting status a foreign nullity decree granted by the court of the domicile of both parties, annulling a marriage celebrated abroad on the ground of want of compliance with the formalities prescribed by the *lex loci celebrationis*. This decision involves the reconsideration of a number of earlier cases⁸⁶ in which foreign nullity decrees were not recognised in England, many of which must now be regarded as overruled on this point. In some respects the decision

⁸⁰ S.R. & O. 1946, 2019; 1948, 111.

⁸¹ *Salvesen v. Administrator of Austrian Property* [1927] A.C. 641; *Moore v. Bull*, [1891] P. 279; *Wilcox v. Wilcox* (1914) 27 W.L.R. 359.

⁸² *Roach v. Garvan* (1748) 1 Ves.Sen. 157; *Scrimshire v. Scrimshire* (1752) 2 Hagg.Cons. 408; *Sinclair v. Sinclair* (1798) 1 Hagg.Cons. 294; *Ogden v. Ogden* [1908] P. 46; and more decisively *Mitford v. Mitford* [1923] P. 130.

⁸³ See Rule 72, Exception 1, *ante*, p. 376.

⁸⁴ See Rule 72, Exception 3, *ante*, p. 380.

⁸⁵ [1927] A. C. 641.

⁸⁶ *Simonin v. Mallac* (1860) 2 Sw. & Tr. 67; *Hay v. Northcote* [1900] 2 Ch. 262; *Ogden v. Ogden* [1908] P. 46; *Stathatos v. Stathatos* [1913] P. 46; *De Montaigne v. De Montaigne* [1913] P. 154.

is open both to a wide and to a narrow interpretation, but the tendency of later decisions seems to be to interpret it widely.

(a) *Marriages celebrated in England*. It is clear that the decision in *Salvesen's Case* is wide enough to cover marriages celebrated in England as well as marriages celebrated abroad⁸⁷; and accordingly the decrees which were not recognised in *Simonin v. Mallac*⁸⁸ and *Ogden v. Ogden*⁸⁹ would now be treated as valid. It is true that in the latter case the woman never lived with the man in the country of his domicile; but the marriage appears to have been voidable, not void, and therefore she acquired his domicile by operation of law.⁹⁰

(b) *Marriages celebrated in England annulled for lack of form*. In *Salvesen's Case*⁹¹ the foreign court applied the same law as an English court would have applied to determine whether the marriage was formally valid, namely the *lex loci celebrationis*. It appears that the decision would be the same even if the marriage was celebrated in England with all the formalities required by English law, and was annulled abroad for lack of form.⁹² In such a case the foreign court could only annul the marriage on this ground if it misapplied English domestic law or if it applied some law other than the *lex loci celebrationis* to determine formal validity; but neither circumstance appears to be a ground for refusing recognition to the foreign decree. Nor is this inconsistent with the principles on which foreign judgments are recognised in England.⁹³

(c) *Marriages celebrated abroad under the Foreign Marriage Act, 1892*. It seems to follow that the decision in *Salvesen's Case*⁹⁴ is wide enough to cover foreign decrees annulling marriages celebrated abroad under the Foreign Marriage Act, 1892, but lacking formal validity by the *lex loci celebrationis*. Hence the decree which was not recognised in *Hay v. Northcote*⁹⁵ would, it is submitted, be recognised today. The learned judge who decided that case followed *Simonin v. Mallac*⁹⁶ and seems to have thought that the Consular Marriage Act, 1849 (now repealed and re-enacted by the Foreign Marriage Act, 1892) provided that the marriage should be valid according to English law for all purposes. But all that s. 1 of the latter statute says is that the marriage 'shall be as valid in law as if the same had been solemnised in the United

⁸⁷ *De Massa v. De Massa* [1939] 2 All E.R. 150 n.; *Galene v. Galene* [1939] P. 237; *De Bono v. De Bono* [1948] 2 S.A.L.R. 802.

⁸⁸ (1860) 2 Sw. & Tr. 67.

⁸⁹ [1908] P. 46; see *Hughes* in 44 L.Q.R. 418 (1928).

⁹⁰ *De Reneville v. De Reneville* [1948] P. 100; see *post*, p. 383.

⁹¹ [1927] A.C. 641.

⁹² *De Massa v. De Massa* [1939] 2 All E.R. 150 n.; *Galene v. Galene* [1939] P. 237; *De Bono v. De Bono* [1948] 2 S.A.L.R. 802.

⁹³ See *post*, p. 401, and cf. *Godard v. Gray* (1870) L.R. 6 Q.B. 189.

⁹⁴ [1927] A.C. 641.

⁹⁵ [1900] 2 Ch. 262.

⁹⁶ (1860) 2 Sw. & Tr. 67.

Kingdom with a due observance of all forms required by law'.⁹⁷ If English courts recognise foreign decrees annulling marriages celebrated in England on the ground of lack of form, even though the marriage is formally valid by English law, they should, it is submitted, also recognise foreign decrees annulling marriages celebrated abroad under the Foreign Marriage Act, 1892, even though the marriage is formally valid under that statute.

(d) *Where only one party is domiciled in the foreign country.* If the marriage is voidable the woman acquires the domicile of the man by operation of law⁹⁸ and a decree granted by a court of his domicile would no doubt be given full recognition in England, even though the woman never lived with him in the country of his domicile. If the marriage is void, the woman may acquire a domicile of choice in the country in which the man is domiciled, in which case the decree of its courts will be recognised in England on similar principles. There is, however, no authority covering the case where the parties have no common domicile; but it is submitted that a decree pronounced by the court of the country in which one party is domiciled should be recognised in England if the English court is satisfied that the marriage is void in the sense that no decree of nullity would have been required, if the allegations upon which the decree was founded were proved.

(2) *Forum celebrationis.* The second part of this Rule means that the courts of a foreign country where the marriage was celebrated have, according to English law, a right to determine whether the ceremony constituted a valid marriage according to the laws of that country. This jurisdiction is independent of the domicile of the parties. Our Rule cannot, however, be laid down as absolutely certain. English courts have assumed jurisdiction for themselves to determine the validity of a marriage celebrated in England, even in the case of parties not domiciled in England,⁹⁹ and as long as they continue to do so, there is no apparent reason why they should not concede an analogous jurisdiction to the courts of a foreign country.

The distinction between void and voidable marriages has not been discussed in relation to the jurisdiction of foreign courts, and, in *Mitford v. Mitford*,¹ the only modern case in which a decree of the *forum celebrationis* was recognised, a voidable marriage appears to have been treated as though it was void. It may be observed, however, that the principle of *Inverclyde v. Inverclyde*² has been applied in a Canadian case, where a foreign decree annulling a

⁹⁷ Section 1 of the Act of 1849 is the same except that the section says 'within Her Majesty's dominions' instead of 'in the United Kingdom'.

⁹⁸ *De Reneville v. De Reneville* [1948] P. 100.

⁹⁹ See Rule 35, sub-clause (3), *ante*, p. 244.

¹ [1923] P. 130.

² [1931] P. 29; see *ante*, pp. 246-7.

voidable marriage, pronounced in the country where the marriage was celebrated, but where the parties were not domiciled, was refused recognition.³

(3) *Decree recognised in the country of the domicile.* On the analogy of the rule in divorce (Rule 72, Exception 1) we may assume that English courts will recognise a decree of nullity made by the courts of the country where the parties are not domiciled if that decree would be held valid by the court of their domicile. If the marriage is void, and the parties had different domiciles, it is submitted that it would be sufficient if the decree was recognised by the courts of the domicile of the party whose status was in question before the English courts. The exception to the general rule with regard to the validity of foreign divorce decrees has already been discussed⁴ and does not call for further comment here.

(4) *Matrimonial Causes (War Marriages) Act, 1944.* This has already been discussed.⁵

Other cases. It is impossible to say if these cases are exhaustive of the jurisdiction of foreign courts in view of the lack of conclusive authority. With the possible exception of *Mitford v. Mitford*⁶ there is no case in which a decree pronounced in a foreign country where the parties were resident, but not domiciled, has been recognised as valid in England on the ground of residence. Accordingly this possibility has been ignored in the formulation of the Rule. A decree pronounced by the court of the husband's residence was ignored without discussion in *Clayton v. Clayton*.⁷ On the other hand, English courts could hardly take exception to foreign decrees annulling a marriage celebrated in England which they themselves would hold invalid; and it is therefore possible that a decree on the ground of bigamy pronounced by a court of the residence of the parties might be recognised in England.

Illustrations

1. H, domiciled in Austria, marries in France W, domiciled in Scotland. H and W acquire a domicile of choice in Germany, where they live together. W obtains a decree of nullity from a German court on the ground that the marriage ceremony was formally invalid by French law. The German decree will be recognised in England.⁸

2. H and W, domiciled in France, marry in England. The marriage is valid by English law, but is annulled by a decree of a French court on the ground of non-compliance with the requirements of French law as to publication of banns and parental consents. The French decree will be recognised in England.⁹

3. H, a Frenchman domiciled in France, marries in France W, a British subject domiciled in England. The marriage is celebrated by an English

³ *Fleming v. Fleming* [1934] 4 D.L.R. 90.

⁴ *Ante*, p. 376.

⁵ *Ante*, p. 380.

⁶ [1923] P. 130.

⁷ [1932] P. 45.

⁸ *Salvesen v. Administrator of Austrian Property* [1927] A.C. 641.

⁹ *De Massa v. De Massa* [1939] 2 All E.R. 150 n.; *Galene v. Galene* [1939] P. 237.

marriage officer under the Foreign Marriage Act, 1892, but is annulled by a decree of a French court on the ground that the marriage officer is not authorised by French law to celebrate marriages. (*Semble*), the French decree will be recognised in England.¹⁰

4. H, domiciled in England, marries W, domiciled in Germany, in Germany under a ceremony in German form. H and W reside in Germany. The marriage is annulled by a decree of a German court. The German decree will be recognised in England.¹¹

5. H and W, both domiciled in England, go through what purports to be a marriage ceremony in France. Afterwards, when H and W are resident in Belgium, the marriage is annulled by a Belgian court. *Quære* whether the Belgian decree will be recognised in England?

¹⁰ These are the facts in *Hay v. Northcote* [1900] 2 Ch. 262, where the French decree was not recognised, but see *ante*, pp. 382-3. The case is unlikely to arise again because marriage officers are forbidden to perform a marriage that will be invalid under the local law unless they are satisfied that both parties are British subjects or, if only one is a British subject, that the other is not a citizen of the country: S.R. & O. 1913, No. 1270, Arts 1 and 2.

¹¹ *Mitford v. Mitford* [1923] P. 130.

JURISDICTION IN MATTERS OF ADMINISTRATION AND SUCCESSION

RULE 74.¹—The courts of a foreign country have jurisdiction to administer, and to determine the succession to, all immovables and movables of a deceased person locally situate in such country.

This jurisdiction is unaffected by the domicile of the deceased.

Comment

This Rule is merely an application or result of Rule 70 relating to jurisdiction *in rem*. A decision in a matter of administration or succession is clearly a judgment *in rem* in the sense of that term in international law and cannot be questioned in an English court, even if in regard to succession an error should in the view of an English court be made. Provided, therefore, that the decision is limited to property locally situate in the foreign country concerned, even if it be obtained by fraud, or under an erroneous belief that the putative deceased is dead, it may operate as a valid assignment.²

Illustration

N, an Englishman domiciled in England, dies in England intestate, leaving £10,000 in New York. Administration is taken out in New York. The New York courts have jurisdiction to administer the £10,000 to decide what debts are chargeable against it, and their priorities, and if they see fit, to determine who are the persons entitled to succeed beneficially to the distributable residue of the £10,000.³

RULE 75.⁴—The courts of a foreign country have jurisdiction to determine the succession to all movables wherever locally situate of a testator or intestate dying domiciled in such country.

¹ Compare Rule 70, p. 365, *ante*, and Rules 129–131, pp. 558–570, *post*.

² See Rule 81, Exception, *post*.

³ Compare *Enohin v. Wylie* (1862) 10 H.L.C. 1.

⁴ Compare *Re Trufort* (1887) 36 Ch.D. 600; *Enohin v. Wylie* (1862) 10 H.L.C. 1; 31 L.J.Ch. 402; *Dogliani v. Crispin* (1866) L.R. 1 H.L. 901. Compare *Ewing v. Orr-Ewing* (1883) 9 App.Cas. 24; and *Ewing v. Orr-Ewing* (1885) 10 App.Cas. 453. See also Rule 94, *post*.

Comment

If a deceased person is at the moment of his death domiciled abroad, the courts of his domicile have jurisdiction, though not necessarily exclusive jurisdiction, to decide upon the right to the succession to his property.

It must be noted that this Rule applies only to succession. The English court will, if it thinks fit, administer the assets and distribute the balance to those entitled under the law of the domicile. The result may be that the sum available to the successors is greater or less than would be the case in the country of domicile, because English law may exclude debts not excluded by the foreign law or vice versa.⁵

Further difficulties are inevitable where there is divergence of view as to where the domicile of the testator or intestate is. English courts will always decide this point for themselves,⁶ but if they decide that it was in a foreign country, it is their duty to accept the decrees of the courts⁷ and the law of that country as conclusive in matters of succession.

Illustration

1. T dies domiciled in France; he leaves money, goods, etc., both in France and in England. The French courts have jurisdiction to determine whether A is or is not entitled to succeed to T's money, etc., in France and in England.⁸

2. T, an Englishman and a British subject, dies domiciled in Portugal. He leaves at his death goods in England. A claims to be, under Portuguese law, entitled to succeed to T's movable property, and inter alia to the English goods. A would not be, according to English law, a legitimate son of T. The Portuguese courts have jurisdiction to determine whether A is entitled to succeed to T's movables.⁹

3. A domiciled Czech is last heard of in a German concentration camp. He leaves assets in Czecho-Slovakia. The Czech courts have jurisdiction to presume his death and to make an order vesting his assets in the persons entitled under Czech law to succeed thereto.¹⁰

⁵ See *Re Lorillard* [1922] 2 Ch. (C.A.) 688.

⁶ See p. 96, *ante*.

⁷ *Dogliani v. Crispin* (1866) L.R. 1 H.L. 301; *Re Trufort* (1887) 36 Ch.D. 600; *Re Martin* [1900] P. (C.A.) 211.

⁸ *Re Trufort* (1887) 36 Ch.D. 600, 611, *per* Stirling, J.

⁹ *Dogliani v. Crispin* (1866) L.R. 1 H.L. 301.

¹⁰ *In Goods of Schulhof* [1948] P. 66; see also *In Goods of Spenceley* [1892] P. 255; *In Estate of Dowds* [1948] P. 256; Cohn in 64 L.Q.R. 188-190 (1948); Breslauer in 10 Mod.L.R. 122 (1947). The case would be otherwise if the foreign court purporting to make a grant were not that of the domicile, or if there were no assets within the jurisdiction thereof, as then the death of the deceased would be a mere matter of evidence and so a question for the *lex fori*. *See quare* whether the decision of the court of the domicile, in order to be followed, need include an order vesting the assets of the deceased: compare *Ex parte Welsh* [1943] W.L.D. 147, and see Cohn, *loc. cit.*

EFFECT OF FOREIGN JUDGMENTS IN ENGLAND ¹

1. GENERAL

(1) *No Direct Operation.*

RULE 76.—A foreign judgment has no direct operation in England.

This Rule must be read subject to the effect of Rules 88 to 90.²

Comment

A foreign judgment³ does not at common law operate directly in England. The judgment of, *e.g.*, a French court, cannot be enforced here by execution, though by statute some degree of enforcement may be possible.

(2) *Invalid Foreign Judgments.*

RULE 77.—Any foreign judgment which is not pronounced by a court of competent jurisdiction⁴ is invalid in England.

Whether a court which has pronounced a foreign judgment is, or is not, a court of competent jurisdiction in respect of the matter adjudicated upon by the court is to be determined in accordance with Rules 64 to 75.

Comment

A judgment pronounced by a court which is not a 'court of competent jurisdiction' in the sense in which the term is used in this Digest is a decision given by a court with reference to a matter which, according to the principles maintained by our judges, the

¹ See Cheshire, Ch. 18; Wolff, ss. 231-53; Halsbury's *Laws of England*, Hailsham ed., vol. 6, pp. 191-365; Goodrich, Ch. 15; Restatement, ss. 429-50 and, generally, Read, *Recognition and Enforcement of Foreign Judgments* (1938); Piggott, *Foreign Judgments*, Pts. 1-3; Gutteridge in 18 B.Y.B.I.L. (1932) 49; Nussbaum in 41 Columbia L.R. (1941), p. 221; Renton in 50 S.Afr.L.J. (1933) 157; Willis in 14 Can.Bar.Rev. (1936) 1.

² *Post*, pp. 413-427.

³ For definition of 'foreign judgment' see p. 345, *ante*.

⁴ For meaning of 'court of competent jurisdiction', see Rule 64, p. 345, *ante*.

foreign court had no right to determine. Hence the judgment is necessarily invalid in England.

Question.—Is a judgment pronounced by a foreign tribunal which is a court of competent jurisdiction, but is not a 'proper court',⁵ valid?

In previous editions of this work the above Rule concluded with the words: 'The validity of a foreign judgment is not necessarily affected by the fact that the court which pronounces the judgment is not a proper court'. The authority upon which this qualification was expressed to rest was *Vanquelin v. Bouard*⁶ (the facts of which case are given in Illustration 5 below). Dicey was supported in the interpretation he put on the judgment in that case by the opinion of Westlake,⁷ and perhaps also by some ambiguous words of Lindley, L.J., in *Pemberton v. Hughes*.⁸ If, indeed, in *Vanquelin v. Bouard*, the defendant's plea amounted to the allegation that the French court was not a proper one, then, if the allegation were correct, the French judgment must have been a nullity. But the better interpretation of the case, it is submitted, is that this allegation was negatived.⁹ The decision is thus reconcilable with the somewhat stronger authority in relation to foreign judgments *in rem*,¹⁰ and to foreign divorce¹¹ and nullity¹² decrees—authority, to which Dicey did not fail to give due prominence, to the effect that the validity in England of at least these classes of foreign judgments depends upon possession by the court pronouncing them not only of international but also of local competence. The confusion of authority on the point is of less importance than would at first appear because it will normally be assumed that a court is a proper court.¹³

Illustrations

1. A obtains judgment in a French court against X, a British subject, for £100. The debt has been contracted, if at all, in England. X has never been in France, and there is no circumstance in the case giving the French court, in the opinion of English judges, a right to pronounce judgment against X (i.e., the French tribunal is not a court of competent jurisdiction). The judgment is invalid in England.¹⁴

2. X is the owner of a British ship. An action *in rem* is brought by A against the ship in a Louisiana Admiralty court. The ship is not, and never

⁵ For meaning of 'proper court', see Rule 64, p. 345, *ante*.

⁶ (1868) 15 C.B. (N.S.) 341.

⁷ Westlake, p. 398. Cf. 3rd ed., p. 439 (s. 319).

⁸ [1899] 1 Ch. 781, 790; cited with approval by Romer, L.J., in *Bater v. Bater* [1906] P. 209, 237. See also *Godard v. Gray* (1870) L.R. 6 Q.B. 139, 149.

⁹ See Cheshire (3rd ed.), pp. 806-9.

¹⁰ *Castrique v. Imrie* (1870) L.R. 4 H.L. 414, 429.

¹¹ *Pemberton v. Hughes* [1899] 1 Ch. 781.

¹² *Papadopoulos v. Papadopoulos* [1930] P. 55.

¹³ *Re Annand* (1888) 14 V.L.R. 1009. Compare *Beer v. Patrick* (1880) 1 N.S.W.L.R. 157; *Taylor v. Ford* (1873) 29 L.T. 392; *Walker v. Mahon* (1886) 2 T.L.R. (C.A.) 548. See Lush in 10 Australian Law Journal 10 (1936).

¹⁴ *Schibsby v. Westenholz* (1870) L.R. 6 Q.B. 155; *Vanquelin v. Bouard* (1868) 15 C.B. (N.S.) 341.

has been, in fact, under the control of the court, nor within the territorial limits of the State of Louisiana. The court gives judgment in favour of A. The judgment is invalid in England.¹⁵

3. X, a British subject, is the owner of a British ship. At the suit of A, the ship is arrested when just outside the territorial waters of France, and an action *in rem* is brought against the ship in a French Admiralty court. Judgment is given against the ship. The judgment is invalid in England.¹⁶

4. A New Zealand court, at a time when H is domiciled in England, grants H a divorce from his wife, W. The court not being a court of competent jurisdiction,¹⁷ the sentence of divorce is invalid in England.

5. A, a French citizen resident in France, obtains judgment against X, a French citizen resident in France, for a debt due from X to A. The French court has under French law jurisdiction only over traders. X is not a trader, but allows the case to go by default. No steps are taken by X to get the judgment of the French court set aside. The judgment is (probably) valid in England.¹⁸

6. H and W, husband and wife, are domiciled in Florida. H takes proceedings in the Florida Divorce Court to obtain a divorce from W. W does not appear. H obtains a divorce. There is an irregularity in the proceedings which might have given ground for an appeal, and which might on such appeal possibly have caused the divorce to be declared void. There is no appeal. The judgment of divorce is valid in England.¹⁹

7. In New York, where arbitral awards regularly delivered are given the status of judgments, A obtains an award, but irregularly, not having obtained the authority of the court to proceed *ex parte*. The award is a mere nullity, and no action to enforce it can lie in England.²⁰

8. A and X obtain in Cyprus from a court which is denied any jurisdiction in matters of nullity of marriage or divorce a decree of nullity of their English marriage. A takes out a summons in England for neglect to maintain her. X pleads the decree of nullity as dissolving the marriage. The court is not a proper court and the decree has no validity in England.²¹

RULE 78.²²—A foreign judgment which is obtained by fraud is invalid in England.

¹⁵ Compare *The Challenge and Duc d'Aumale* [1904] P. 41, 54

¹⁶ Compare *Borjesson v. Carlberg* (1878) 3 App.Cas. 1816; *Simpson v. Fogo* (1860) 1 J. & H. 18; (1863) 1 H. & M. 195; but see Exception to Rule 81, p. 399, *post*.

¹⁷ See as to jurisdiction of foreign courts in matters of divorce, Rules 71, 72, pp. 368, 374, *ante*

¹⁸ *Vanquelin v. Bouard* (1863) 15 C.B. (N.S.) 341.

¹⁹ *Pemberton v. Hughes* [1899] 1 Ch. (C.A.) 781, 792, judgment of Landley, M.R.; pp. 794, 795, of Rugby, L.J., and p. 796, judgment of Vaughan Williams, L.J. Compare *Mitford v. Mitford* [1923] P. 180, 141, *per* Duke, F.; *Bater v. Bater* [1906] P. (C.A.) 209.

²⁰ *Bankers' and Shippers' Insurance Co. of New York v. Liverpool Marine and General Insurance Co., Ltd.* (1942) 19 Ll.L.Rep. 335; 24 *ibid.* (H.L.) 85. Contrast *Stolp & Co. v. Browne* [1930] 4 D.L.R. 703.

²¹ *Papadopoulos v. Papadopoulos* [1930] P. 55, 64, 65, *per* Lord Merrivale, who considered *Ricardo v. Garcias* (1845) 12 Cl. & F. 365, 401.

²² As to effect of fraud on validity of judgment generally, see *Duchess of Kingston's Case* (1776) 2 Sm.L.C. (13th ed.) 644; compare *Nowion v. Freeman* (1887) 37 Ch.D. (C.A.) 244, 249, judgment of Cotton, L.J.; on judgments *in personam*, *Aboulloff v. Oppenheimer* (1882) 10 Q.B.D. (C.A.) 295; *Vadala v. Lawes* (1890) 25 Q.B.D. (C.A.) 310; *Syal v. Heyward* [1948] 2 K.B. 443; *Bowles v. Orr* (1835) 1 Y. & C. Ex. 464; *Blake v. Smith* (1810) 8 Sim. 308; *Manger v. Cash* (1889) 5 T.L.R. 271; on judgments *in rem*, *Ellerman Lines Ltd. v. Read* [1928] 2 K.B. 144, *The Alfred*

Such fraud may be either

- (1) fraud on the part of the party in whose favour the judgment is given ; or
- (2) fraud on the part of the court pronouncing the judgment.

Comment

Any judgment whatever,²³ and therefore any foreign judgment, is, if obtained by fraud, invalid. A party may, in regard to an English judgment, instead of appealing or applying for a new trial, bring an independent action for the setting aside of the judgment impugned, though this is not encouraged.²⁴ But where a foreign judgment is in question the rule is not identical with that which obtains in regard to English judgments and which demands that the objection shall be founded upon some fraudulent act not before the original court and shall not constitute a means for attaching the merits. Extrinsic fraud is certainly a ground upon which a foreign judgment may be attached. But the decisions now go farther than that.

‘There are two rules relating to these matters which have to be borne in mind, and the joint operation of which gives rise to the difficulty. First of all, there is the rule which is perfectly well established and well known, that a party to an action can impeach the judgment in it for fraud. Whether it is the judgment of an English Court or of a foreign Court does not matter; using general language, that is a general proposition unconditional and undisputed. Another general proposition which, speaking in equally general language, is perfectly well settled is, that when you bring an action on a foreign judgment, you cannot go into the merits which have been tried in the foreign Court. But you have to combine those two rules and apply them in the case where you cannot go into the alleged fraud without going into the merits.

‘Which rule is to prevail? That point appears to me to have been one of very great difficulty before the case of *Abouloff v.*

Nobel [1918] P. 298; on judgments of divorce, *Shaw v. Gould* (1866) L.R. 3 H.L. 55, 71, language of Lord Cranworth; p. 77, language of Lord Chelmsford. See also *Bater v. Bater* [1906] P. (C.A.) 209. As to nullity decrees, see *Salvesen v. Administrator of Austrian Property* [1927] A.C. 641. For the United States, see Goodrich, s. 206; Restatement, s. 440. For Ontario, see *Woodruff v. McLennan* (1887) 14 O.A.R. 242; for Nova Scotia, *Manolopoulos v. Pnaiffe* [1929] 4 D.L.R. 48; 8 Can.Bar Rev. 281. Compare *Hollender v. Ffoulkes* (1894) 26 O.R. 61; *R. v. Wright* (1877) 1 P. & B. 363; *Larnach v. Alleyne* (1862) 1 W. & W. 342; *Jacobs v. Beaver* (1908) 17 O.L.R. 496; allegation of fraud sufficient to cause dismissal of motion for judgment on Quebec judgment, as in *Codd v. Delap* (1905) 92 L.T. (H.L.) 510; *Delaporte v. Delaporte* [1927] 4 D.L.R. 983; *May v. Roberts* [1929] 3 D.L.R. 270. For Canada generally, see Read, Ch. 8 (2). And see 14 B.Y.B.I.L. (1933) 199.

²³ *Ochsenbein v. Papelier* (1878) L.R. 8 Ch. 695. Contrast *Robinson v. Fenner* [1918] 3 K.B. 835.

²⁴ *Flower v. Lloyd* (No. 1) (1877) 6 Ch.D. 297, (No. 2) 10 Ch.D. 327.

Oppenheimer.²⁵ At the time when that case was decided—namely, in 1882—there was a long line of authorities, including *Bank of Australasia v. Nias*,²⁶ *Ochsenbein v. Papelier*,²⁷ and *Cammell v. Sewell*,²⁸ all recognising and enforcing the general proposition that in an action on a foreign judgment you cannot re-try the merits. But until *Abouloff's Case* the difficulty of combining the two rules and saying what ought to be done where you could not enter into the question of fraud to prove it without re-opening the merits, had never come forward for explicit decision. That point was raised directly in the case of *Abouloff v. Oppenheimer*, and it was decided. I cannot fritter away that judgment, and I cannot read the judgments without seeing that they amount to this: that if the fraud upon the foreign Court consists in the fact that the plaintiff has induced that Court by fraud to come to a wrong conclusion, you can re-open the whole case even although you will have in this Court to go into the very facts which were investigated, and which were in issue in the foreign Court. The technical objection that the issue is the same is technically answered by the technical reply that the issue is not the same, because in this Court you have to consider whether the foreign Court has been imposed upon. That, to my mind, is only meeting technical argument by a technical answer, and I do not attach much importance to it; but in that case the Court faced the difficulty that you could not give effect to the defence without re-trying the merits. The fraud practised on the Court, or alleged to have been practised on the Court, was the misleading of the Court by evidence known by the plaintiff to be false. That was the whole fraud. The question of fact, whether what the plaintiff had said in the Court below was or was not false, was the very question of fact that had been adjudicated on in the foreign Court; and, notwithstanding that was so, when the Court came to consider how the two rules, to which I have alluded, could be worked together they said: "Well, if that foreign judgment was obtained fraudulently, and if it is necessary, in order to prove that fraud, to re-try the merits, you are entitled to do so according to the law of this country". I cannot read the case in any other way'.²⁹

It has been held to be immaterial that the facts relied on to establish a *prima facie* case of fraud were known to the party relying on them at all material times and could therefore have been raised by way of defence in the foreign proceedings.^{29a}

Objections to the doctrine set out above have been advanced

²⁵ (1882) 10 Q.B.D. 295.

²⁶ (1851) 16 Q.B. 717.

²⁷ (1873) L.R. 8 Ch. 695.

²⁸ (1860) 5 H. & N. 728.

²⁹ *Vadala v. Laves* (1890) 25 Q.B.D. (C.A.) 310, 316, 317, *per* Lindley, L.J.

^{29a} *Syal v. Heyward* [1948] 2 K.B. 448 (C.A.).

by various writers,³⁰ although it is that generally prevailing in Continental law.³¹

The fraud which vitiates a judgment must generally be fraud of the party in whose favour the judgment is obtained, but it may (conceivably, at any rate) be fraud on the part of the foreign court giving the judgment, as where a court gives judgment in favour of A, because the judges are bribed by some person, not the plaintiff, who wishes judgment to be given against X, the defendant.

The doctrine that fraud vitiates a judgment applies in principle to foreign judgments of every class, but the extent of its application differs somewhat according to the nature of the judgment.³²

It is clearly applicable to a judgment *in personam*,³³ where, be it noted, the rights in question are the rights of the litigants or of their representatives.

It applies further, at any rate between the litigants, to a judgment *in rem*.³⁴ But it is questionable whether the fraud which, as between the litigants, vitiates a judgment *in rem* affects the rights of third persons, *e.g.*, bona fide purchasers, who, in ignorance of the fraud, acquire under or in consequence of the judgment a title to the *res*, *e.g.*, a ship, affected thereby.³⁵

It applies again, though in a more limited way, to a judgment of divorce. If the fraud or collusion of the parties induces the divorce court of a foreign country to believe that it has jurisdiction where, according to the doctrine maintained by English tribunals, it has no jurisdiction, then the judgment of divorce is rendered in England invalid by such fraud or collusion.³⁶ But, if the fraud or

³⁰ Cheshire (1st ed.) 521-4; cf. 3rd ed. 816; Wolff, s. 247; Read, 278-93, and in 8 Can. Bar Rev. (1930) 231-7. The view of the Canadian courts is different and is best indicated by the words of Garrow, J., in *Jacobs v. Beaver* (1908) 17 Ont. L.R. 496, 506. 'The fraud relied on must be something collateral or extraneous, and not merely the fraud which is imputed from alleged false statements made at the trial, which were met by counter-statements by the other side, and the whole adjudicated upon by the court and so passed on into the limbo of estoppel by the judgment. This estoppel cannot be disturbed except upon the allegation and proof of new and material facts, or newly discovered material facts which were not before the former court, and from which are to be declared the new proposition that the former judgment was obtained by fraud'. See also *McDougall v. Occidental Syndicate, Ltd.* (1912) 4 D.L.R. 727; *Macdonald v. Pier* [1923] 5 C.R. 107; *Boger v. Chamberlen* 9 M.P.R. 565 (1936); *Friesen v. Braun* [1926] 2 D.L.R. 1032.

³¹ Wolff, s. 247.

³² But see *Price v. Dewhurst* (1837) 8 Sim. 279.

³³ *Vadala v. Lawes* (1890) 25 Q.B.D. (C.A.) 310.

³⁴ *Shand v. Du Buisson* (1874) L.R. 18 Eq. 283; *Messina v. Petrocchino* (1872) L.R. 4 P.C. 144, 157.

³⁵ *Castrique v. Imrie* (1870) L.R. 4 H.L. 414, 433. See Rule 81, Exception, p. 399, *post*.

³⁶ *Dolphin v. Robins* (1859) 7 H.L.C. 390; *Shaw v. Gould* (1868) L.R. 3 H.L. 55; *Bonaparte v. Bonaparte* [1892] P. 402; *Crowe v. Crowe* (1937) 157 L.T. 557. It must be remembered that an English decree absolute cannot, at any rate, on motion in the Probate, Divorce and Admiralty Division be impeached for fraud; see *Kemp-Welch v. Kemp-Welch* [1912] P. 82, though an action may be normally brought to set aside a judgment obtained by fraud, *Gordon Smith v. Pelzer* (1921) 65 S.J. 657; *Jonesco v. Beard* [1930] A.C. 298. For Canada,

collusion does not go to the root of the foreign court's jurisdiction, but merely by the pretence of facts which do not exist, or the suppression of facts which do exist, induces the foreign court to grant a divorce which it would not otherwise have granted, then (*semble*) so long as such divorce continues in force in the country where it is granted, it cannot be invalidated in England merely on account of such fraud or collusion. In many cases it has been said that the courts will not recognise the decree of divorce of a foreign tribunal where the judgment has been obtained by the collusion or fraud of the parties. 'But I think, when those cases are examined, that the collusion or fraud which was being referred to was in every case . . . collusion or fraud relating to that which went to the root of the matter, namely, the jurisdiction of the Court. In other words [they were], as an illustration, cases where the parties have gone to the foreign country and were not truly domiciled there, and represented that they were domiciled there, and so had induced the Court to grant a decree. The collusion or fraud in those cases goes to the root of the jurisdiction. There is no jurisdiction if there is no domicile, and therefore collusion and fraud entered into many of those cases in a way that went to fortify the view that where there is no domicile there is no jurisdiction. But supposing that what was kept back was something that would have made the Court come to a different conclusion than it otherwise would have done, I can see no valid reason in the judgments in cases affecting status for treating the decree as a nullity, unless it is set aside'.³⁷

If a divorce judgment 'is a judgment *in rem*, or stands on the same footing, as I think it undoubtedly does, can it be impeached in proceedings taken in this country by a person not a party to the judgment at all? Can proceedings effectually be taken in this country while that judgment stands unimpeached in the country where it was made?'³⁸

The same principle is clearly applicable to a decree of nullity of marriage, made by the court of the domicile of the parties. If the court has jurisdiction, it is irrelevant that the parties to the marriage invoked its jurisdiction in order that by the declaration of nullity the wife's property might be excluded from the operation of the confiscatory clause of the treaty of peace with Austria.³⁹

where the matter is not so limited, see *Magurn v. Magurn* (1884) 11 O.A.R. 178; *Maday v. Maday* (1911) 4 Sask.L.R. 18; *Bigger v. Bigger* [1930] 2 D.L.R. 940.

³⁷ *Bater v. Bater* [1906] P. 209, 218, judgment of Sir J. Gorell Barnes, Pres., commenting on *Harvey v. Farnie* (1880) 5 P.D. 153, (1882) 8 App.Cas. 43; applied in *Crowe v. Crowe* (1937) 157 L.T. 557.

³⁸ *Ibid.*, 209, 228, per Collins, M.R.; conf. judgment of Romer, L.J., pp. 286-87. Collins, M.R., laid stress on *Castrique v. Behrens* (1861) 30 L.J.Q.B. 168, as asserting the validity of a judgment *in rem*, though obtained by fraud, so long as it remained unversed.

³⁹ *Salvesen v. Administrator of Austrian Property* [1927] A.C. 641, 652, per Lord Haldane; 671, 672, per Lord Phillimore. Contrast *Papadopoulos v. Papadopoulos* [1930] P. 55. See p. 390, note 21, *ante*.

It is equally possible to adduce fraud in opposition to a plaintiff's claim based on a foreign judgment and to a defendant's defence based on a similar source.⁴⁰

Illustrations

1. A obtains in a Russian court judgment against X that X shall either deliver to A certain goods of A's, then, as alleged, in X's possession, or pay A a sum equivalent to £1,050. The judgment, which is affirmed on appeal to a superior Russian court, is obtained by A's fraudulently concealing from the court that at the very moment when the action is brought the goods are in the possession of A. The judgment is invalid in England.⁴¹

2. A brings an action in Sicily against X to recover money alleged to be due on certain bills of exchange. A obtains judgment against X by fraudulently representing to the Italian court that the bills of exchange were given under the authority of X and for mercantile transactions, whereas they were given without X's authority for gambling debts. The judgment is invalid in England.⁴²

3. A obtains a judgment against X in a foreign court. The judgment is given against X because X declines to bribe the foreign court. The judgment is invalid in England.⁴³

4. A commences an action against X in France. It is agreed between A and X in France that the action shall be dropped and the whole matter in dispute be referred to arbitration in London. X under this arrangement returns to England. A fraudulently, and in breach of this arrangement, continues the action in France, and recovers judgment against X in a French court for a sum equivalent to £220. The judgment is invalid in England.⁴⁴

5. X is the owner of a British ship. A, when the ship is in France, brings an action *in rem* against the ship, and by means of fraud obtains from the French court a judgment against the ship, under which it is assigned to A as owner. The judgment is invalid in England.⁴⁵

6. A seizes a British ship and by fraud obtains from a Turkish court an award in respect of his services. The judgment is invalid in England, and, as A is a British subject, an injunction can be granted against A's enforcing the judgment in any place.⁴⁶

7. H and W marry and are domiciled in England. They wish to obtain a divorce, which they cannot do in England. W takes divorce proceedings against H in Scotland. They fraudulently and collusively pretend that they are domiciled in Scotland. A divorce is granted. The divorce is invalid in England.⁴⁷

8. In 1880 W marries L, her first husband. In 1886 L petitions for divorce from W, making H, afterwards W's second husband, co-respondent. W presents cross-petition charging L with cruelty. Both petitions are dismissed. L then goes from England to New York, and obtains a New York domicile.

⁴⁰ See Westlake, s. 335, though *Henderson v. Henderson* (1843) 3 Hare 117, is not conclusive. See also Nussbaum, pp. 246-7.

⁴¹ *Aboulloff v. Oppenheimer* (1882) 10 Q.B.D. (C.A.) 295.

⁴² *Vadala v. Lawes* (1890) 25 Q.B.D. (C.A.) 810.

⁴³ It is difficult to find any reported case of fraud on the part of a tribunal, but it is admitted that such fraud would invalidate the judgment of a court; *Castrique v. Imrie* (1870) L.R. 4 H.L. 414, 433, *per* Blackburn, J.

⁴⁴ *Ochsenbein v. Papelier* (1873) L.R. 8 Ch. 695. See, especially, language of Selborne, C., p. 698.

⁴⁵ Compare *Castrique v. Imrie* (1870) L.R. 4 H.L. 414, 433, opinion of Blackburn, J.

⁴⁶ *Ellerman Lines, Ltd. v. Read* [1923] 2 K.B. (C.A.) 144.

⁴⁷ *Bonaparte v. Bonaparte* [1892] P. 402. See *Shaw v. Gould* (1868) L.R. 3 H.L. 55. Compare *Lankester v. Lankester* [1925] P. 114.

W and H also go to New York, and W there obtains a divorce from L, but the proceedings in England are not disclosed; if they had been disclosed, a divorce would not have been granted at New York. After the divorce W and H intermarry. Sixteen years afterwards H petitions in the English Divorce Court for declaration of nullity of the marriage in New York on the ground that the New York divorce was obtained by fraud. Petition dismissed, *i.e.*, the divorce held valid.⁴⁸

RULE 79.—A foreign judgment may sometimes be invalid in England on account of the proceedings in which the judgment was obtained being opposed to natural justice (e.g., owing to want of due notice to the party affected thereby or the denial of the opportunity of presenting his case to the court). But in such a case the court is generally not a court of competent jurisdiction.⁴⁹

Comment

With the justice of the decision arrived at by a foreign court of competent jurisdiction our courts have no concern. A foreign judgment may be perfectly valid, though unjust to the party against whom it is given. But the mode in which a court proceeds may, it is said, be so opposed to natural justice as to invalidate the judgment of the court.

This opposition, however, to natural justice in the procedure of a court generally consists of want of due notice of action to an absent defendant affected by the judgment. This is, in reality, a ground of objection to the jurisdiction of the foreign court, and when a foreign judgment is impeachable on the ground of opposition to natural justice, it is normally on the ground that the court is not a court of competent jurisdiction.⁵⁰ The objection,

⁴⁸ *Bater v. Bater* [1906] P. (C.A.) 209; *Crowe v. Crowe* (1937) 157 L.T. 557.

⁴⁹ *Jacobson v. Frachon* (1927) 44 T.L.R. 108, 105, *per* Atkin, L.J. See *Buchanan v. Rucker* (1808) 9 East 192; *Henderson v. Henderson* (1844) 6 Q.B. 288; *Sheehy v. Professional Life Assurance Co.* (1857) 2 C.B. (N.S.) 211; *Crawley v. Isaacs* (1867) 16 L.T. 529; *Rudd v. Rudd* [1924] P. 72; *Vardy v. Smith* (1932) 48 T.L.R. 661, 49 T.L.R. 36; *Scott v. Scott* [1937] Sc.L.T. 632; *Bavin v. Bavin* [1939] 3 D.L.R. 328; and compare *Piggott*, pp. 401-411. The judgment of a foreign court is not opposed to natural justice either because such court does not admit evidence of the parties which would now be admissible by an English court (*Scarpetta v. Lowenfeld* (1911) 27 L.T. 509), or because the notice of action given to a defendant under the law of a foreign country is not as complete as the notice of proceedings now required by the law of England (*Jeannot v. Fuerst* (1909) 25 T.L.R. 424). See also *Robinson v. Fenner* [1913] 3 K.B. 835; *Cooney v. Dunne* [1925] Sc.L.T. 22; *Richardson v. Army, Navy and General Assurance Association, Ltd.* (1925) 21 Ll.L.Rep. 345; [1924] 2 Ir.R. 96; *Bergerem v. Marsh* [1921] B. & C.R. 195; 91 L.J.K.B. 80.

It will be presumed, in the absence of evidence to the contrary, that a foreign court will treat justly any defendant, and, therefore, money paid abroad under threat of legal proceedings cannot be recovered in England. See *Clydesdale Bank, Ltd. v. Schroeder & Co.* [1913] 2 K.B. 1.

⁵⁰ Compare *Schibsby v. Westenholz* (1870) L.R. 6 Q.B. 155; *Rudd v. Rudd* [1924] P. 72.

moreover, that a defendant did not receive due notice of action can be taken (it is submitted) only where the defendant at the commencement of the action is not resident in the country where it is brought. If he is, any notice, it is conceived, is sufficient which is in accordance with the law of the foreign country.

A judgment, however, may also be invalid if, despite notice, the defendant is not given adequate opportunity to present his case to the court,⁵¹ or if, while one claim is set out on the pleadings, judgment is given in the absence of the defendant on a different cause of action.

This rule is supplemented in its effect by Exception 1 to Rule 86,⁵² which denies effect in England to foreign judgments if the cause of action is such as would not have supported an action in England. But whether it should be as widely formulated as Dicey framed it is a matter of some doubt. There would appear to be no case where the defence of denial of natural justice has been successfully raised upon the basis of anything other than absence of notice of the proceedings or inadequate opportunity to plead⁵³; and it is noteworthy that the Foreign Judgments (Reciprocal Enforcement) Committee regarded the defence as being in practice limited to cases of this sort.⁵⁴ The Foreign Judgments (Reciprocal Enforcement) Act, 1933, whilst providing that want of sufficient notice of the foreign proceedings shall be a ground for resisting the enforcement of a foreign judgment under that Act, does not anywhere employ the expression 'natural justice'.⁵⁵ Nor does the corresponding Canadian legislation.⁵⁶ It is, further, clear that an obviously wrong foreign decision is not *per se* 'contrary to natural justice'.⁵⁷

Illustrations

1. A judgment is given in a Danish court with regard to the validity of a will. The court is constituted, in accordance with Danish law, of persons some of whom are interested in the property in dispute. The judgment in favour of such persons is opposed to natural justice, and is invalid.⁵⁸

2. A obtains a judgment in France against X, who is not a French citizen, and who is not in France, and has never been resident in France; and the only notice given to X is, in accordance with French law, a service of summons on a French official. X does not appear, and judgment is obtained against him. The judgment is invalid.⁵⁹

⁵¹ *Robinson v. Fenner* [1913] 3 K.B. 835; *Jacobson v. Frachon* (1927) 44 T.L.R. (C.A.) 103.

⁵² *Post*, p. 408.

⁵³ Cf. Goodrich, s. 201; Read, 281-288; Wolff, s. 245; Cheshire, 818-821.

⁵⁴ (1932) Cmd. 4213, p. 8 (note).

⁵⁵ Section 4 (1) (a) (iii); see *post*, pp. 422, 424. Cf. Administration of Justice Act, 1920, s. 9 (2) (c); see *post*, pp. 418, 419.

⁵⁶ Uniform Foreign Judgments Act, Read, App. A.

⁵⁷ *Robinson v. Fenner* [1913] 3 K.B. 835; *Lesperana v. Leistikow* [1935] 3 W.W.R. 1; *Platt v. Siegel* (N.Z.) (1918) 20 G.L.R. 70.

⁵⁸ *Price v. Dewhurst* (1837) 8 Sim. 279.

⁵⁹ Compare *Schibsby v. Westernholz* (1870) L.R. 6 Q.B. 155, where defendant, residing in England, had notice of the action substantially equivalent to that which might have been given to absent defendants under C.L.P. Act, 1852,

3. A, a merchant of Lyons, contracts to supply silk to X in London. Disputes arise, and A obtains judgment in a Lyons court awarding damages. The court has before it a report of an expert appointed by it, who is biased and who refuses to hear certain evidence tendered by X. X objects to the report, but the court in effect accepts it. The judgment is not invalid.⁶⁰

4. Goods are seized in Muscat on the suspicion that illegal use is intended. A decree of condemnation is issued by a court of inquiry, but no public notice is given of the intention to hold the inquiry. The judgment is not valid.⁶¹

5. H and W were domiciled in England and intermarried there. H went to Canada and W heard no more of him until she received a notice of her having been divorced in the United States after the time for appealing against that decree had expired. The decree is invalid in England.⁶²

RULE 80.—A foreign judgment shown to be invalid in England under any of the foregoing Rules 77 to 79, is hereinafter termed an invalid foreign judgment.

RULE 81.—An invalid foreign judgment has (subject to the Exception hereinafter mentioned) no effect in England.

Comment

When it is established that a foreign judgment to which effect is to be given in England is invalid, the judgment has no effect in England.

A Scottish or Northern Irish judgment, however, which, in conformity with Rule 88, is extended to England by means of a certificate registered under the Judgments Extension Act, 1868, cannot be shown in England to be invalid. The judgment itself, therefore, must be treated as a valid judgment in England unless and until it is set aside by proper proceedings in Scotland or Northern Ireland.⁶³ But where such a Scottish or Northern Irish judgment is sought to be enforced in England, not by the process of extension but by action, its invalidity may be pleaded. The invalidity of a judgment sought to be enforced in accordance with the provisions of the Administration of Justice Act, 1920, or the Foreign Judgments (Reciprocal Enforcement) Act, 1933, may, moreover, always be pleaded.⁶⁴

ss. 18, 19. The French procedure could not, therefore, be condemned by an English court as contrary to natural justice. The real objection to it was that the French court was not under the circumstances a court of competent jurisdiction. See also *Copin v. Adamson* (1874) L.R. 9 Ex. 345, where notice was dispensed with by agreement.

⁶⁰ *Jacobson v. Frachon* (1927) 44 T.L.R. (C.A.) 103.

⁶¹ See *Francis, Times & Co. v. Carr* (1900) 82 L.T. 698, and p. 346, note 10, *ante*.

⁶² *Rudd v. Rudd* [1924] P. 72; *Scott v. Scott* [1937] Sc.L.T. 632; *Bavin v. Bavin* [1939] 3 D.L.R. 328.

⁶³ *Bailey v. Whelpley* (1869) Ir.R. 4 C.L. 243.

⁶⁴ See *post*, pp. 417-427.

Illustrations

1. A obtains judgment in a French court against X for a debt amounting to £100. The judgment is invalid. A cannot maintain an action against X on the judgment in England.⁶⁵

2. A court in an American State divorces H from his wife, W. The divorce is invalid. H, during the lifetime of W, marries N in England. The marriage with N is invalid, and H is liable to be convicted of bigamy.⁶⁶

3. A foreign Admiralty court gives a judgment *in rem* against an English ship. The judgment is invalid. If the ship comes to England the judgment cannot be enforced against the ship by an action *in rem*.⁶⁷

Exception.—An invalid foreign judgment *in rem* may have an effect in England as an assignment, though not as a judgment.⁶⁸

Comment

A foreign judgment given in an action *in rem*, e.g., against a ship, may, as already pointed out, though invalid as a judgment, and indeed for any purpose as between the litigant parties, have an effect in England as a valid assignment of the ship to a third party; for if the ship, whilst still in the country where the judgment was given, is assigned under or by virtue of the judgment, e.g., by the sale of the ship, under the order of the court giving the judgment, to a bona fide purchaser, the assignment is valid by the *lex situs*, and therefore prima facie valid everywhere; in other words, the judgment has an effect as an assignment.

This Exception applies not only to an action strictly *in rem*, but to any judgment which affects the title to a thing, whether movable or immovable, unless indeed the judgment, though given by a court otherwise of competent jurisdiction, is by the law of the country where the thing in question is situate rendered ab initio invalid, in which case the judgment is obviously not in the circumstances a judgment of a court of competent jurisdiction.

Illustrations

1. X purchased shares in British India sold under a grant of administration to N by the proper court. N, however, had obtained the grant of administration by means of a fraudulent misrepresentation, which deceived the court and was absolutely unknown to X, the purchaser. The fraud was discovered and the administration to N revoked and administration was thereupon granted to

⁶⁵ *Schibsby v. Westenholz* (1870) L.R. 6 Q.B. 155.

⁶⁶ *Lolley's Case* (1812) 2 Cl. & F. 567; see *Shaw v. Gould* (1868) L.R. 3 H.L. 55; *R. v. Russell* [1901] A.C. 446. But for the possible application of the doctrine of estoppel, see *ante*, pp. 375-6.

⁶⁷ See as to such an action, Rule 92, p. 430, *post*.

⁶⁸ See *Castrique v. Imrie* (1870) L.R. 4 H.L. 414, 483, opinion of Blackburn, J.; and compare Rule 91, *post*; *Simpson v. Fogo* (1863) 1 H. & M. 195, 248. See also *Phillips v. Batho* [1913] 3 K.B. 25, 30, *per* Scrutton, J.

A. A could not maintain an action against X unless the grant of administration was, under Anglo-Indian law, absolutely void ab initio, for, if so, the court was in the circumstances not a court of competent jurisdiction.⁶⁹

2. X purchases land in Ireland from N, who has obtained a grant of administration from the Irish court. N has obtained it through a natural and reasonable mistake, and therefore misrepresentation of facts, *e.g.*, through the assumption that A has died intestate. On the fact being ascertained that A is still alive, the grant of administration is revoked. A brings an action against X. The action cannot be maintained, since under the law of Ireland the grant of administration is not ab initio void. A's remedy lies, therefore, only against N.⁷⁰

3. A foreign Admiralty court gives a judgment *in rem* against a British ship owned by A, an Englishman. The judgment is obtained by the fraud of the plaintiff. The ship is under the judgment sold to X, a bona fide purchaser, who knows nothing of the fraud. When the ship comes to England, A lays claim to the ship, and shows that the foreign judgment was obtained by fraud. *Semble*, that X has a good title as against A, *i.e.*, that the judgment, though invalid, has an effect in England as an assignment.⁷¹

4. A Turkish court awards N damages in respect of salvage work on a British ship owned by A. The award is induced by fraud, but in proceedings under the judgment the ship is sold to X. The ship comes to England and A claims it. X has a good title against A.⁷²

(3) Valid Foreign Judgments.

RULE 82.—A foreign judgment, which is not an invalid foreign judgment under Rules 77 to 79, is valid in England, and is hereinafter termed a valid foreign judgment.

RULE 83.⁷³—Any foreign judgment is presumed to be a valid foreign judgment unless and until it is shown to be invalid.

⁶⁹ *Craster v. Thomas* [1909] 2 Ch. 348; *Debendra Nath Dutt v. Administrator-General of Bengal*, L.R. 35 Ind.App. 109, 117, *per* Lord Macnaghten; *Bowall v. Bowall* (1884) 27 Ch.D. 222.

⁷⁰ Compare *Hewson v. Shelley* [1914] 2 Ch. (C.A.) 13.

⁷¹ See *Castrique v. Imrie* (1870) L.R. 4 H.L. 414, 433, opinion of Blackburn, J.; and compare Rules 129–131, *post*; *Simpson v. Fogo* (1863) 1 H. & M. 195, 248. See also *Castrique v. Behrens* (1861) 30 L.J.Q.B. 163; *Phillips v. Batho* [1913] 3 K.B. 25, 30, *per* Scrutton, J.

⁷² See *Ellerman Lines, Ltd. v. Read* [1928] 2 K.B. (C.A.) 144.

⁷³ *Alvon v. Furnival* (1834) 1 C.M. & R. 277; *Bank of Australasia v. Nias* (1851) 16 Q.B. 717; *Henderson v. Henderson* (1844) 6 Q.B. 288; *Robertson v. Struth* (1844) 5 Q.B. 941.

The statement of claim, therefore, need not specifically assert, though it is usual to do so (*Ricardo v. Garcias* (1845) 12 Cl. & F. 368), that the court had jurisdiction over the parties or the cause, such jurisdiction being presumed; see *Robertson v. Struth* (1844) 5 Q.B. 941; *Barber v. Lamb* (1860) 8 C.B. (n.s.) 95. But, if the court thinks fit it will investigate the issue, as for instance in a case of status: *Papadopoulos v. Papadopoulos* [1930] P. 55. It is possible to sue on a foreign judgment by a specially endorsed writ (Ord. III, r. 6) under Ord. XIV, for the defendant's liability can be regarded as arising from an implied contract to pay the amount awarded against him: *Grant v. Easton* (1883) 13 Q.B.D. 302 (compare *Hawksford v. Giffard* (1886) 12 App.Cas. 122, 128); but an allegation on oath that the judgment was obtained by fraud is

RULE 84.⁷⁴—A valid foreign judgment is conclusive as to any matter thereby adjudicated upon, and cannot be impeached for any error either

- (1) of fact ⁷⁵; or
- (2) of law.⁷⁶

Comment

This general principle applies to every kind of judgment; it extends alike to a judgment *in personam*,⁷⁷ to a judgment *in rem*,⁷⁸ and to a judgment or sentence of divorce,⁷⁹ or any other judgment having reference to status.⁸⁰

The principle that a foreign judgment is conclusive and unimpeachable upon its merits holds good whether the judgment be relied upon by the plaintiff or by the defendant.⁸¹

Illustrations ⁸²

1. A obtains a foreign judgment against X for a debt due from X to A. The judgment is conclusive, and X cannot, in an action on the judgment in England, show that the debt was not really owing from X to A.⁸³

2. A sues X in a French court for breach of an English charterparty, in which is a clause, 'penalty for the non-performance of this agreement, estimated amount of freight'. The foreign court, under an erroneous view of the English law, treat this clause as fixing the amount of damages recoverable, and therefore gives judgment in favour of A for £700, the amount of the freight. The judgment, though given under a mistaken view of English law, is conclusive.⁸⁴

sufficient to entitle the defendant to leave to defend, see *Codd v. Delap* (1905) 92 L.T. (H.L.) 510; *Manger v. Cash* (1891) 5 T.L.R. 271.

⁷⁴ *Fuller v. Willis* (1881) 1 My. & K. 292, note; *Bank of Australasia v. Nias* (1851) 16 Q.B. 717; *Kelsall v. Marshall* (1856) 1 C.B. (n.s.) 241; 26 L.J.C.P. 19; *Ellis v. M'Henry* (1871) L.R. 6 C.P. 228, 238.

⁷⁵ *Henderson v. Henderson* (1844) 6 Q.B. 288; *De Cosse Brissac v. Rathbone* (1861) 6 H. & N. 301.

⁷⁶ *Castrique v. Imrie* (1870) L.R. 4 H.L. 414; *Godard v. Gray* (1870) L.R. 6 Q.B. 139; *Scott v. Pulkington* (1862) 2 B. & S. 11; *De Cosse Brissac v. Rathbone* (1861) 6 H. & N. 301; *Minna Craig Steamship Co. v. Chartered, etc. Bank* [1897] 1 Q.B. (C.A.) 460. For America compare *Goodrich*, ss. 202-204.

⁷⁷ *Godard v. Gray* (1870) L.R. 6 Q.B. 139; *Schibsbys v. Westenholtz* (1870) L.R. 6 Q.B. 155.

⁷⁸ *Castrique v. Imrie* (1870) L.R. 4 H.L. 414.

⁷⁹ *Harvey v. Farnie* (1882) 8 App.Cas. 43.

⁸⁰ *Doghioni v. Crispin* (1866) L.R. 1 H.L. 301; *Re Trufort* (1887) 36 Ch.D. 600, 611; *Galene v. Galene* [1939] P. 237; *De Massa v. De Massa* [1939] 2 All E.R. 150 n.; *De Bono v. De Bono* [1948] 2 S.A.L.R. 892. Compare *Schlesinger v. Administrator of Hungarian Property*, L.J.Newsp. 1923, p. 254. Contrast *Hahn v. Public Trustee* [1925] Ch. 715. See also *Reitzes de Marienwert v. Austrian Property Administrator* [1924] 2 Ch. (C.A.) 282 and *Bohemian Union Bank v. Administrator of Austrian Property* [1927] 2 Ch. 175.

⁸¹ *Burrows v. Jemuno* (1726) 2 Str. 733; *Plummer v. Woodburne* (1825), 4 B. & C. 625; *Bank of Australasia v. Harding* (1850) 9 C.B. 661; *Henderson v. Henderson* (1843) 3 Hare 100.

⁸² In these illustrations it is assumed that the court is a court of competent jurisdiction.

⁸³ *Tarleton v. Tarleton* (1815) 4 M. & S. 20. See also *Hamilton v. Dutch East India Co.* (1782) 8 Bro.P.C. 264; *Sinclair v. Fraser* (1771) 1 Dougl. 4, n.

⁸⁴ *Godard v. Gray* (1870) L.R. 6 Q.B. 139. See also *Castrique v. Imrie* (1870) L.R. 4 H.L. 414.

3. A brings an action in England for £200 due to A from X under a judgment of a New York court. The judgment is founded on a mistaken view of the law of New York. The judgment is conclusive.⁸⁵

4. A obtains a judgment for debt against X in a Canadian court. X, at the time the action is brought in Canada, has been made bankrupt in England, and might have pleaded the bankruptcy in defence to the action. The bankruptcy is not pleaded in Canada. The Canadian judgment is conclusive.⁸⁷

5. H is domiciled in Scotland; he marries W, an Englishwoman, in England. Whilst they are domiciled in Scotland, W obtains a divorce from H in a Scottish court for a cause for which divorce could not be obtained in England. The sentence of divorce is conclusive.⁸⁸

6. H and W, domiciled in Germany, obtain there a declaration of the nullity of their marriage in France, in order that W may not lose property under the confiscatory clauses of the treaty of peace. It is probable that the decree of nullity is erroneous in its interpretation of French marriage law. The decree of nullity is valid.⁸⁹

7. A Russian court awards salvage in respect of a Russian ship. The decision probably rests on a misinterpretation of maritime law. The judgment is conclusive in an English court in a claim by an owner who has paid against an insurance company.⁹⁰

8. H and W, domiciled in France, marry in England. The marriage is valid by English domestic law, but is annulled by a decree of a French court on the ground of non-compliance with the requirements of French law as to publication of banns and parental consents. The decree of nullity is valid.^{90a}

RULE 85.—A valid foreign judgment has in England the effects stated in Rules 86 to 94, and these effects depend upon the nature of the judgment.

Comment

The validity or the conclusiveness of a foreign judgment does not necessarily involve the enforceability thereof in England. The extent to which a foreign judgment, even when valid, can be enforced, or what in other words are its effects in England, is to be determined in accordance with Rules 86 to 94.⁹¹

⁸⁵ *Scott v. Pilkington* (1862) 2 B. & S. 11. Conf. *De Cosse Brissac v. Rathbone* (1861) 6 H. & N. 301; and contrast *Meyer v. Ralli* (1876) 1 C.P.D. 358, which (semble) is wrongly decided, unless it can be sustained on the score of the consent of the parties to recognise the incorrectness of the foreign court's view of the law.

⁸⁷ *Ellis v. M'Henry* (1871) L.R. 6 C.P. 228.

⁸⁸ *Harvey v. Farnie* (1882), 8 App Cas. 43. Compare *Scott v. Att.-Gen.* (1886) 11 P.D. 128.

⁸⁹ Compare *Salvesen v. Administrator of Austrian Property* [1927] A.C. 641.

⁹⁰ Compare *Dent v. Smith* (1869) L.R. 4 Q.B. 414.

^{90a} *Galene v. Galene* [1939] P. 287; *De Massa v. De Massa* [1939] 2 All E.R. 150 n.; *De Bono v. De Bono* [1948] 2 S.A.L.R. 802; contrast *Simpson v. Fogo* (1863) 1 H. & M. 195, and 3rd ed., p 439, Rule 106.

⁹¹ See pp 403-433, *post*. It need hardly be said that a criminal proceeding abroad is useless as a foundation for an action in England; see *Came v. Palace Steam Shipping Co.* [1907] 1 K.B. (C.A.) 670; compare *Gastrique v. Imrie* (1870) L.R. 4 H.L. 414, 484, and cases cited.

But contrary to the view of the Supreme Court of the United States,⁹² the question of giving effect to a foreign judgment is not at common law in any way dependent on reciprocity of treatment, which is in fact often refused as in France, Germany, etc.⁹³ Under statute, however, the existence of a substantial degree of reciprocity is an administrative pre-requisite of the direct enforcement of foreign judgments.⁹⁴

2. PARTICULAR KINDS OF JUDGMENTS ⁹⁵

(1) JUDGMENT IN PERSONAM ,

(a) As Cause of Action .

RULE 86.—Subject to the Exceptions hereinafter mentioned, a valid foreign judgment in personam may be enforced by an action for the amount due under it if the judgment is

(1) for a debt, or definite sum of money ⁹⁶; and

(2) final and conclusive,⁹⁷

but not otherwise.⁹⁸

Provided that a foreign judgment may be final and conclusive, though it is subject to an appeal, and though an appeal against it is actually pending in the foreign country where it was given.⁹⁹

⁹² *Hilton v. Guyot* (1895) 159 U.S. 113, a majority judgment, criticised in Goodrich, s. 204. English and colonial judgments are given effect, on the ground of reciprocity. *Ritchie v. McMullen*, 159 U.S. 235; *Alaska Commercial Co. v. Debney*, 144 F. 1.

⁹³ For a comprehensive account of the place of reciprocity in the recognition of foreign judgments see Nussbaum, § 23 (1); cf. Wolff, ss. 231-5.

⁹⁴ See *post*, pp. 420-427.

⁹⁵ See, for authorities as to Foreign Judgments, note 1, p. 388, *ante*.

⁹⁶ *Sadler v. Robins* (1808) 1 Camp. 253; *Henderson v. Henderson* (1844) 6 Q.B. 288; *Nouvion v. Freeman* (1889) 15 App.Cas. 1. The historical explanation of this limitation is that the form of action appropriate for the enforcement of a foreign judgment was originally debt, though some authorities allow assumpsit; Read, pp. 111-122; Goodrich, s. 211; Restatement, s. 434 (a).

⁹⁷ *Plummer v. Woodburne* (1825) 4 B. & C. 625; *Henley v. Soper* (1828) 8 B. & C. 16; *Obicini v. Bligh* (1832) 1 L.J.C.P. (N.S.) 99; *Paul v. Roy* (1852) 15 Beav. 433; *Patrick v. Shedden* (1853) 2 E. & B. 14; *Frayes v. Worms* (1861), 10 C.B. (N.S.) 149. So in Canada *Gauthier v. Routh* (1842) 6 O.S. 602; *Graham v. Harrison* (1889) 6 Man. L.R. 210.

⁹⁸ As to the position under statute, see Rules 88-90, *post*, pp. 413-427.

⁹⁹ *Nouvion v. Freeman* (1889) 15 App.Cas. 1, 13, language of Lord Watson; *Nouvion v. Freeman* (1887) 37 Ch.D. (C.A.) 244, 255, judgment of Lindley, L.J.; *Scott v. Pilkington* (1862) 2 B. & S. 11. So in Canada pendency of appeals is no defence to an action on a judgment: *Howland v. Codd* (1894) 9 Man. L.R. 435; *Wilcox v. Wilcox* (1914) 27 W.L.R. 359; *Campbell v. Morgan* (1919) 1 W.W.R. 644. As to when a judgment is final, see *Jeannot v. Fuerst* (1909) 25 T.L.R. 424; *Harrop v. Harrop* [1920] 3 K.B. 386; *Re Macartney* [1921] 1

Comment

Until after 1933 there was no mode of directly enforcing a foreign judgment in England (unless it were a Scottish or Northern Irish judgment or the judgment of a court of some British possession)¹ by execution, but a valid foreign judgment for a debt or fixed sum of money might be enforced by an action *in personam* on the part of the person in whose favour the judgment was given (generally the plaintiff in the foreign proceedings) for the sum due under the judgment. Enforcement was not dependent on the reciprocal treatment of English judgments in the foreign country, English policy being singularly generous in this regard.² Nor was it necessary that the judgment should be given as the result of investigation of the merits of the case; if the court were one of competent jurisdiction, *i.e.*, had jurisdiction over the defendant, and he failed to defend, the court's judgment might be enforced in England as fully as if he had defended the case on the merits.³

The foregoing remains the law in the sense that a valid foreign judgment is still enforceable by action, but since 1933 the direct enforcement of certain foreign (in the sense of non-British) judgments has become possible. But the existence of a substantial measure of reciprocity is necessary before such direct enforcement be undertaken and, where direct enforcement is so possible, enforcement in any other way is not permitted. That is to say, no action may be brought upon a foreign judgment capable of direct enforcement, though it may be upon the original cause of action.⁴

Conditions of enforceability.—The possibility of enforcing a foreign judgment by action, or of bringing (to use the technical term) 'an action on the judgment', is subject to two conditions, each of which is essential to the maintenance of the action.

First, the judgment must be a judgment for a *debt*.⁵ It must order X, the defendant in the English action, to pay to A, the plaintiff, a definite and actually ascertained⁶ sum of money; but if a mere arithmetical calculation is required for the ascertainment

Ch. 522, 531, 532; *McDonnell v. McDonnell* [1921] 2 Ir.R. 148; *Beatty v. Beatty* [1924] 1 K.B. (C.A.) 807; cf. *Bailey v. Bailey* (1884) 13 Q.B.D. 855; *Robins v. Robins* [1907] 2 K.B. 13. See also *Wood v. Wood* (1916) 30 D.L.R. 765; *Robertson v. Robertson* (1908) 16 O.L.R. 170; *Swaizie v. Swaizie* (1899) 31 O.R. 324; *Haddon v. Haddon* (1898) 6 B.C.R. 340; and compare *Smith v. Smith* [1926] 2 D.L.R. 896; *Bonsi v. National Trust Co.* [1930] 4 D.L.R. 826; *Maguire v. Maguire* (1921) 50 O.L.R. 100.

An action *in rem* cannot be brought to enforce a foreign judgment which is virtually *in personam*, see *The City of Mecca* (1881) 6 P.D. (C.A.) 106.

¹ See Rules 88, 89, pp. 413, 417, *post*.

² Cf. *ante*, p. 403, and *post*, p. 423.

³ *Boyle v. Victoria Yukon Trading Co.* (1902) 9 B.C.R. 213.

⁴ See *post*, Exception 2 and Rule 90, pp. 409, 420.

⁵ *Henley v. Soper* (1828) 8 B. & C. 16. Contrast *Sheehy v. Professional Life Assurance Co.* (1857) 2 C.B. (N.S.) 211; *Russell v. Smyth* (1842) 9 M. & W. 810 (collateral order to pay costs).

⁶ *Sadler v. Robins* (1808) 1 Camp. 253. Compare *Hall v. Odber* (1809) 11 East 118.

of the sum it will be treated as being ascertained'; if, however, the judgment orders him to do anything else, *e.g.*, specifically perform a contract, it will not support an action, though it may be *res judicata*.⁸

Secondly, the judgment must be '*final and conclusive*'. The expression is logomachous but, having been familiarly used in the courts, is perpetuated in the Foreign Judgments (Reciprocal Enforcement) Act, 1933.⁹

'There is [often] a little misapprehension as to what is meant by the word "final". We require a foreign judgment to be a final one, that is to say, it must not be merely what we should call here an interlocutory order, an order not purporting to decide the rights of the parties, but merely requiring something to be done pending the prosecution of the action, either for the purpose of security, or of keeping things as we say *in statu quo* until the trial of the action'.¹⁰

The reason for this is that 'to give effect . . . in this country to a . . . judgment [which is not final in the country where it is given] would enable the plaintiff to obtain in this country a greater benefit from it than he could obtain from it in [the country where it is given]. It would be entirely contrary to the principle on which English Courts proceed in enforcing a foreign judgment, if we were to adopt that course'.¹¹

The test of finality is the treatment of the judgment by the foreign tribunal as a *res judicata*. 'In order to establish that [a final and conclusive] judgment has been pronounced, it must be shown that in the Court by which it was pronounced, it conclusively, finally, and for ever established the existence of the debt of which it is sought to be made conclusive evidence in this country, so as to make it *res judicata* between the parties'.¹²

'No decision has been [or can be] cited to the effect that an English Court is bound to give effect to a foreign decree which is liable to be abrogated or varied by the same Court which issued it. All the authorities cited appear to me, when fairly read, to assume that the decree which was given effect to had been pronounced *causa cognita*, and that it was unnecessary to inquire into the merits of the controversy between the litigants, either because these had already been investigated and decided by the foreign tribunal, or because the defendant had due opportunity of

⁷ *Beatty v. Beatty* [1924] 1 K.B. 807.

⁸ Wolff, s. 243; see *Duke v. Andler* [1932] 4 D.L.R. 529; *ante*, pp. 349, 350.

⁹ Section 1 (2) (a); see *post*, pp. 420-427.

¹⁰ *Nouvion v. Freeman* (1887) 37 Ch.D. (C.A.) 244, 251, judgment of Cotton, L.J.

¹¹ *Ibid.*, 249, judgment of Cotton, L.J.

¹² *Nouvion v. Freeman* (1889) 15 App.Cas. 1, 9, judgment of Lord Herschell; *Harrop v. Harrop* [1920] 3 K.B. 386; *Re Macartney* [1921] 1 Ch. 521.

submitting for decision all the pleas which he desired to state in defence'.¹³

Moreover a judgment is manifestly not final and conclusive if an order of the court which issued it has to be obtained for its enforcement.¹⁴

Proviso.—'In order to its receiving effect here, a foreign decree need not be final in the sense that it cannot be made the subject of appeal to a higher Court; but it must be final and unalterable in the Court which pronounced it; and if appealable the English Court will only enforce it, subject to conditions which will save the interests of those who have the right of appeal'.¹⁵

'The fact that a judgment or order may be appealed from, or that it is made in a summary proceeding, does not prevent it from being *res judicata* and actionable in this country'.¹⁶

'Though the pendency of an appeal in the foreign Court might afford ground for the equitable interposition of [the English] Court to prevent the possible abuse of its process, and on proper terms to stay execution in the action, it could not be a bar to the action itself'.¹⁷

Registration of a judgment of a court of a British possession for purposes of direct enforcement in accordance with the provisions of the Administration of Justice Act, 1920, is, however, not allowed if an appeal from such judgment be pending.¹⁸ Further, the pendency of an appeal or even the existence of a mere intention to make a possible appeal may be grounds for the setting aside, conditionally or unconditionally, of the registration of a foreign judgment for purposes of direct enforcement under the Foreign Judgments (Reciprocal Enforcement) Act, 1933.¹⁹

The class of foreign judgments in relation to which it is most difficult to decide whether or not they are 'final and conclusive' are maintenance or alimony orders, providing for periodical payments. The principle applicable to such orders is, however, the same as that applying to all other foreign judgments. If they are incapable of alteration by the court making them, then they are actionable in England. But if they are, as are alimony orders of the Probate Division of the High Court, capable of variation by the court making them, no action is maintainable upon them just as no action in the King's Bench Division will lie upon an

¹³ *Nouvion v. Freeman* (1889) 15 App.Cas. 1, 13, judgment of Lord Watson; *Re Macartney* [1921] 1 Ch. 522, 531, 532; see also *McDonnell v. McDonnell* [1921] 2 Ir.R. 148.

¹⁴ *Harrop v. Harrop* [1920] 3 K.B. 386; *Beatty v. Beatty* [1924] 1 K.B. (C.A.) 807.

¹⁵ *Nouvion v. Freeman* (1889) 15 App.Cas. 1, 13.

¹⁶ *Nouvion v. Freeman*, 37 Ch.D. 244, 255, judgment of Lindley, L.J.; *Wilcox v. Wilcox* (1914) 16 D.L.R. 491; *Houland v. Codd* (1894) 9 Man.R. 435.

¹⁷ *Scott v. Pilkington* (1862) 2 B. & S. 11, 41, *per curiam*.

¹⁸ Section 9; *post*, pp. 418, 419.

¹⁹ Section 5 (1); *post*, pp. 423, 425.

order of the Probate Division.²⁰ Yet an order variable in respect of future payments may be invariable insofar as concerns arrears, in which case an action may be brought for the recovery of the latter.²¹ Statutory means for the enforcement of maintenance orders of the courts of British possessions exist.²²

Illustrations

1. A brings an action against X in a French court for breach of contract, and obtains judgment for £1,000. An action for £1,000 is maintainable in England by A against X on the judgment.²³

2. A recovers judgment against X for £1,000 in a colonial court of equity in respect of equitable claims. Action maintainable.²⁴

3. A recovers judgment in a colonial court against X for the payment of £600, the balance due on a partnership debt, and £53 costs. Action maintainable.²⁵

4. A recovers judgment against X in a Jamaican court, that X should pay A £3,000, after first deducting thereout X's costs, to be taxed by the proper officer. The costs have not been taxed. The judgment is not a judgment for a fixed sum. No action maintainable.²⁶

5. A agrees with X in California to sell to X land situate in England. The land is conveyed to X in accordance with English law. A sues X in California to set aside the conveyance because of X's fraud. The Californian court orders X to reconvey the land to A and on X's refusal to do so the clerk of the court purports to reconvey in X's name. A cannot obtain in England a declaration that he is the owner of the land on the sole ground of the Californian decision.^{26a}

6. A obtains a judgment of the Scottish Court of Session against X, ordering X to pay £500 to A on certain terms, pending an appeal by X to the House of Lords. It is in effect an interlocutory order for the payment of costs. No action maintainable.²⁷

7. A takes certain summary or 'executive' proceedings against X in a Spanish court for the recovery of a debt, and obtains a so-called *remate* judgment for £10,000. The judgment is final in these proceedings, subject, however, to reversal on appeal. In these executive proceedings X can set up certain limited defences, but cannot dispute the validity of the contract under which the debt arises. Either party, if unsuccessful in the executive proceedings, may, in the same court and in respect of the same matter take ordinary or (so-called) plenary proceedings in which all defences may be set up, and the merits of the matter may be gone into. In the plenary proceedings a *remate* judgment cannot be set up as *res judicata* or otherwise, and a plenary judgment renders the *remate* judgment inoperative. The *remate* judgment is not final and conclusive. No action maintainable on the *remate* judgment.²⁸

²⁰ *Harrop v Harrop* [1920] 3 K.B. 386; *Re Macartney* [1921] 1 Ch. 522.

²¹ *Beatty v. Beatty* [1924] 1 K.B. 807.

²² See the Maintenance Orders (Facilities for Enforcement) Act, 1920, and *post*, p. 413, note 65.

²³ See *Godard v Gray* (1870) L.R. 6 Q.B. 139; *Rousillon v. Rousillon* (1880) 14 Ch.D. 351. As to the rate of exchange for conversion of amounts awarded in foreign currency, see Rules 160, 161, 165, *post*.

²⁴ *Henderson v. Henderson* (1844) 6 Q.B. 288.

²⁵ *Henley v Soper* (1828) 8 B. & C. 16. Contrast *Smith v. Coelho* (1899) Ind.L.R. 22 Mad. 392.

²⁶ *Sadler v. Robins* (1808) 1 Camp. 253.

^{26a} Cf. *Duke v. Andler* [1932] 4 D.L.R. 529; cf. *Haspel v. Haspel* [1934] 2 W.W.R. 412.

²⁷ *Patrick v. Shedden* (1853) 2 E. & B. 14. Compare *Paul v. Roy* (1852) 15 Beav. 438; see *Plummer v. Woodburne* (1825) 4 B. & C. 625.

²⁸ *Nouvion v. Freeman* (1889) 15 App.Cas. 1.

8. A, in an action in New York, recovers judgment against X for £3,000. X appeals against the judgment of the New York Court of Appeal. An appeal under the law of New York is not a stay of execution. While the appeal is pending A brings in England an action against X on the judgment for £3,000. The action is maintainable.²⁹

9. W obtains in a British protected State a maintenance order against H. With a view of enforcing the order it is necessary for W to apply to the local court, and on such application the court may vary or rescind the order as it thinks fit. W cannot bring an action in England, founded on the judgment of the local court, as that judgment is not final and conclusive.³⁰

Exception 1.³¹—An action (*semble*) cannot be maintained on a valid foreign judgment if the cause of action in respect of which the judgment was obtained was of such a character that it would not have supported an action in England.

Comment

Transactions which give rise to a right of action in a foreign country may be such that on grounds of public policy they would not support an action in England.³² If, then, A recovers judgment in a foreign, e.g., in a Belgian, court for £100 against X in respect of some act which would not itself support an action in England, can A enforce the Belgian judgment in England by means of an action? On principle this question ought to be answered in the negative, but the question has never, it would appear, come directly before our courts, and the authorities from which a reply can be drawn are not absolutely conclusive.

It is indeed upon the great authority of Dicey that this Exception largely rests. In so far as it excludes the indirect enforcement of foreign penal and revenue laws it can be based upon a firm line of cases³³ and is generally approved by the theoretical writers.³⁴ In regard, however, to actions for the recovery of taxes it may well be anachronistic today and it would seem that

²⁹ *Scott v. Pilkington* (1862) 2 B. & S. 11; cf. especially, p. 41, judgment of Cockburn, C.J.

³⁰ *Harrop v. Harrop* [1920] 3 K.B. 386; *McDonnell v. McDonnell* [1921] 2 Ir. R. 148. Contrast *Beatty v. Beatty* [1924] 1 K.B. (C.A.) 807. Compare *Re Macartney* [1921] 1 Ch. 522.

³¹ See *Rousillon v. Rousillon* (1880) 14 Ch.D. 351. But on the facts in that case compare *Cheshire*, 186–188; *Re Macartney* [1921] 1 Ch. 522, 529, 530; *Freeman, Judgments*, s. 558; and see the very important Canadian decision in *Burchell v. Burchell* (1926) 53 O.L.R. 515, explaining *Re Macartney*, and *Read*, pp. 292–295.

³² See as to Penal, Revenue, and Political actions, Rule 22, p. 152, *ante*; *Robertson*, 185–188; *Cheshire*, 817–818, and *Re Visser* [1928] Ch. 877; *Banco de Vizcaya v. Don Alfonso de Borbon* [1935] 1 K.B. 140; cf. *A. M. Luther v. James Sagor & Co* [1921] 3 K.B. 532. As to Torts, see Rules 173, 174, *post*; *Phillips v. Eyre* (1870) L.R. 6 Q.B. 1; *The Halley* (1868) L.R. 2 P.C. 193.

³³ *Ante*, p. 152, notes 37, 38, 39.

³⁴ Cf. *Cheshire*, 817–818; *Wolff*, s. 238 (3); *Goodrich*, s. 207.

the Australian courts have dealt with the 'full faith and credit' clause of the Commonwealth constitution in the same manner as courts of the United States have interpreted the prototypical provision of the American Constitution so as to exclude the operation of the Exception in relation to judgments for State taxes.³⁵

There is less general support for the proposition which the Exception also involves, that no action may be brought in England in respect of a foreign judgment based upon a cause of action unknown to English law.³⁶

The ground of the Exception under discussion is to some extent covered by the rule contended for by other writers that no action is sustainable upon a foreign judgment contrary to the 'public policy' of English law.³⁷ The phrase, however, though it has received statutory recognition,³⁸ is an imprecise one which was not used by Dicey.

Illustrations

1. In a penal action brought in New York by A, a government official, against X, a citizen of New York, A recovers judgment for £100. X is in England. A brings an action in England against X on the judgment for £100. The action is (*semble*) not maintainable.³⁹

2. X, a Swiss, enters into a contract in France with A, a French subject, in regard to acts to be done in England. The contract, though valid by French law, is void by English law as being in restraint of trade and against public policy. A cannot maintain an action in England for any breach of the contract. X breaks the contract. A brings an action against X in France for the breach of contract and recovers £1,000. A then brings an action on the French judgment for the £1,000 against X, who is in England. *Semble*, the action is not maintainable.⁴⁰

3. X, an Englishman domiciled in England, dies leaving property there and in Malta. After his death, A, a daughter, is born to him by a Maltese lady to whom he had been engaged to be married. Affiliation proceedings on behalf of A are taken in Malta against the administrator of X's Maltese estate. The court makes an order for the annual payment of a sum of money for the benefit of A. In an administration action in England the question is raised whether the order of the Maltese court can be enforced against the assets of X in the hands of the English administrator. The action is not maintainable.⁴¹

Exception 2.—No proceedings for the recovery of a sum payable under a valid foreign judgment capable of

³⁵ *Merwin Pastoral Co. v. Moolpa Pastoral Co.* (1932) 48 O.L.R. 565; Restatement, ss. 610 and 443. See also Read, 290-292; Cook, Ch. 4; and see 1 Can. Bar. Rev. (1923) 294.

³⁶ *Burchell v. Burchell* (1926) 58 O.L.R. 515; Read, 292-295; cf. Wolff, s. 246; and see also the Canadian Uniform Foreign Judgments Act, s. 6 (f) and (h).

³⁷ Cf. Cheshire, 816; Wolff, s. 244 (8); Read, pp. 288-295.

³⁸ Administration of Justice Act, 1920, s. 9 (2); Foreign Judgments (Reciprocal Enforcement) Act, 1933, s. 4 (2) (a) (v); see *post*, pp. 418 and 422.

³⁹ See *Att.-Gen. for Canada v. Schulze* (1901) 9 Sc.L.T. 4; Compare *Municipal Council of Sydney v. Bull* [1909] 1 K.B. 7.

⁴⁰ This illustration is suggested by *Rousillon v. Rousillon* (1880) 14 Ch.D. 351.

⁴¹ *Re Macartney* [1921] 1 Ch. 522, 529, 530; and see *Harrop v. Harrop* [1920] 3 K.B. 386; see also *Burchell v. Burchell* (1926) 58 O.L.R. 515, and Read, 292-295.

registration in England in accordance with the provisions of Part I of the Foreign Judgments (Reciprocal Enforcement) Act, 1933, other than proceedings by way of registration may be taken in any court in England.⁴²

SUB-RULE.—A valid foreign judgment does not of itself extinguish the original cause of action in respect of which the judgment was given.⁴³

Comment

The judgment of an English court of record extinguishes the original cause of action.⁴⁴ If A in such a court recovers judgment for £20 against X for a breach of contract or tort, he can issue execution or bring an action against X on the judgment, but he cannot bring an action against X for the breach of contract, or the tort. A foreign judgment does not extinguish the original cause of action. So if A recovers in a French court judgment for £20 against X for a debt, he may in England bring an action on the judgment, and he may also, if he chooses, bring an action for the debt, in which case the judgment is merely available as evidence of the debt. But, though well established by the earlier cases, the rule rests upon no sound bases of principle. It is, like the now exploded doctrine that a foreign judgment was impeachable upon the merits on the ground that such a judgment was mere evidence of a debt due from the defendant, derived from the former procedural rule that a foreign court could not be treated as a court of record. Whereas one branch of that rule was exploded in the latter half of the last century, the other has remained as an illogical anomaly, in conflict with the general policy of the law *ut sit finis litium*.⁴⁵ No modern English decision can, however, be found which supports it⁴⁶ but it is significant that it has not been explicitly excluded in the statutory scheme of direct enforcement of foreign judgments.⁴⁷

⁴² Section 6 of the Act. See *ante*, p. 404 and Rule 90, *post*, pp. 420-427.

⁴³ *Maule v. Murray* (1798) 7 T.R. 470; *Smith v. Nicolls* (1839) 5 Bing.N.C. 206; *Hall v. Odber* (1809) 11 East, 118; *Bank of Australasia v. Harding* (1850) 9 C.B. 661; *Bank of Australasia v. Nias* (1851) 16 Q.B. 717; *Nouvion v. Freeman* (1887) 37 Ch.D. 244, 250, *per* Cotton, L.J.; Piggott (3rd ed.), pp. 18-20; Westlake, s. 332; Cheshire, 798-801; Wolff, ss. 234, 253; Read, 111-122; Goodrich, s. 213. It is probably otherwise in Scotland; compare Duncan and Dykes, *Principles of Civil Jurisdiction*, p. 287.

⁴⁴ *King v. Hoare* (1844) 13 M. & W. 494, 504; *Ex p. Bank of England* [1895] 1 Ch. 37.

⁴⁵ See Holdsworth, *History of English Law*, Vol. 11, p. 273; and especially Read, 111-122.

⁴⁶ Read, 252.

⁴⁷ See the Foreign Judgments (Reciprocal Enforcement) Act, 1933, *post*, pp. 420-427; Read, 120, note 259; compare Ross in 20 Minn.L.Rev. (1936) 140, 151.

Illustration

A, in an action in a French court against X for breach of contract, recovers judgment for £100. The judgment is neither wholly nor in part satisfied. A can bring an action in England against X for the breach of the contract.⁴⁸

(b) *As Defence.*

RULE 87.—A valid foreign judgment *in personam*, if it is final and conclusive⁴⁹ on the merits⁵⁰ (but not otherwise), is a good defence to an action in England for the same matter when either

- (1) the judgment was in favour of the defendant⁵¹; or,
- (2) the judgment being in favour of the plaintiff has been satisfied.⁵²

Comment

(1) *Judgment for Defendant.*—A foreign judgment in favour of the defendant in the foreign action is a complete answer to any proceedings here for the same matter by the plaintiff in such action, provided that the judgment be final and conclusive on the merits, but it is not an answer to an action in England if it be merely an interlocutory judgment, or a judgment which, though it decides the cause finally in the country where it is brought, does not purport to decide it on the merits, *e.g.*, if it is given in favour of the defendant on the ground that the action is barred by a statute of limitations.⁵³ Nor is it an answer to an action seeking a different form of relief.⁵⁴ A judgment in default or by consent may, however, be a judgment on the merits.⁵⁵ But in every case

⁴⁸ *Guard v. De Clermont* [1914] 3 K.B. 145.

⁴⁹ As to meaning of 'final and conclusive', see pp. 405-7, *ante*.

⁵⁰ *Harris v. Quine* (1869) L.R. 4 Q.B. 653; *Re Low* [1894] 1 Ch. 147, 162.

⁵¹ *Plummer v. Woodburne* (1825) 4 B. & C. 625; *General Steam Navigation Co. v. Guillou* (1843) 11 M. & W. 877; *Ricardo v. Garcias* (1845) 12 Cl. & F. 368; *Société Générale de Paris v. Dreyfus Brothers* (1887) 37 Ch.D. 215. Compare *Booth v. Leycester* (1837) 1 Keen, 579. See Read, pp. 101-106 upon the theoretical aspects of this branch of the Rule.

As to the case where a foreign judgment is rendered during litigation in England, see *The Delta* (1876) 1 P.D. 393; *Houston v. Sligo* (1885) 29 Ch.D. 448, 454; *Mutrie v. Binney* (1887) 35 Ch.D. 614. As to its effect as rendering it unjustifiable to allow service out of the jurisdiction, or otherwise, see *Société Générale de Paris v. Dreyfus* (1885) 29 Ch.D. 239; (1887) 37 Ch.D. 215; *Call v. Oppenheim* (1885) 1 T.L.R. (C.A.) 622.

⁵² *Smith v. Nicolls* (1839) 5 Bing.N.C. 208; *Barber v. Lamb* (1860) 8 C.B. (N.S.) 95; compare *Taylor v. Hollard* [1902] 1 K.B. 676.

⁵³ *Harris v. Quine* (1869) L.R. 4 Q.B. 653.

⁵⁴ *E.g.*, a suit for damages still lies even if a foreign court has refused to rescind a contract: *Callander v. Dittrich* (1842) 4 M. & Gr. 68. On the other hand, a mere change in the form of action to that of an action *in rem* is immaterial: *The Griefswald* (1859) Swabey, 430, 435. But the same relief may be asked based on a different case giving rise to a new equity: *Hunter v. Stewart* (1861) 31 L.J.Ch. 346; contrast *Henderson v. Henderson* (1843) 3 Hare 115. See *Michado v. The Hattie and Lottie* (1904) 9 Exch.C.R. 11.

⁵⁵ *Re South American & Mexican Co.* [1895] 1 Ch. 37; *Hardy Lumber Co. v. Pickerel River Improvement* (1898) 29 Can.S.C.R. 211.

the judgment relied on must have been given in the same matter and the onus will be upon the defendant to show this.⁵⁶

(2) *Judgment for Plaintiff*.—So, again, a foreign judgment in favour of the plaintiff which purports to be final and conclusive on the merits is, if followed by effective execution or satisfaction, an answer to any action brought by the plaintiff. But such a judgment, as has been seen, does not extinguish the original cause of action⁵⁷; if, therefore, it is not followed by execution or satisfaction, it can afford no defence to an action brought in England on the original claim. When satisfied, however, it acts as an estoppel against any action based on the original cause of claim. This part of the Rule has naturally been given effect to in the statutory scheme for the direct enforcement of foreign judgments.⁵⁸

Illustrations

1. A brings an action in a Victorian court against X for breach of contract. X denies the breach. A judgment which is final and conclusive in Victoria is given in favour of X. The judgment is a defence to an action in England against X by A for the same breach of contract.⁵⁹

2. A brings an action in a foreign court against X for a debt of £1,000, and recovers judgment for £45. The £45 are thereupon paid by X. A thereupon brings an action in England against X for the same debt. The judgment of the foreign court is an answer to the action.⁶⁰

3. A recovers judgment in England against X for £15,000. He afterwards brings an action on the judgment against X whose domicile is in South Africa in a South African court. This court goes into the merits of A's original claim, and gives judgment in his favour, but only for £10,000. A obtains payment of the £10,000 under the judgment of the South African court. A afterwards brings an action in England on the English judgment for the balance of £5,000. The South African judgment is (*semble*) an answer to the action.⁶¹

4. A brings an action, in a foreign court, against X for a debt of £1,000, and recovers judgment for £45 and costs. A obtains no satisfaction for the judgment. A brings an action in England against X for the £1,000. The judgment of the foreign court, not having been satisfied, is not an answer to the action.⁶²

5. X, in October, 1862, incurs a debt to A in the Isle of Man. In 1866, A brings an action against X for the debt in a Manx court. Under a Manx statute no action for the debt can be brought more than three years after the cause of action accrues, but the statute does not extinguish the debt. The Manx court gives judgment in favour of X on the ground that the action is barred by the statute. The judgment is not conclusive on the merits. A

⁵⁶ *Quickstad v. McNeill, et. al.* [1932] 4 D.L.R. 427; Figgott i, pp. 64-72.

⁵⁷ See Sub-Rule, p. 410, *ante*.

⁵⁸ Cf. The Foreign Judgments (Reciprocal Enforcement) Act, 1933, s. 2 (1); *post*, pp. 420-427.

⁵⁹ Compare *Plummer v. Woodburne* (1825) 4 B. & C. 625. See also *Ricardo v. Garcias* (1845) 12 Cl. & F. 368.

⁶⁰ *Barber v. Lamb* (1860) 8 C.B. (N.S.) 95.

⁶¹ *Taylor v. Hollard* [1902] 1 K.B. 676, 681, judgment of Jelf, J. For the South African judgment see (1886) 2 S.A.R. 78.

⁶² Compare *Barber v. Lamb* (1860) 8 C.B. (N.S.) 95

brings an action for the debt in England. The Manx judgment is not an answer to the action.⁶³

6. A, resident in London, is the creditor of X, a German bank, to the extent of £5,000. He is sued in Germany for breach of contract, submits to the jurisdiction, and is condemned to pay £6,000 damages to X. A, in default of payment by X of his debt in England, brings an action to enforce it. The judgment of the German court is not an answer to the action.⁶⁴

(c) *Extension of Certain Judgments in Personam of Superior Courts in British Territory and in Certain Foreign Countries to England.*⁶⁵

RULE 88.⁶⁶—A judgment of a Superior Court in any part of the United Kingdom for any debt, damages, or costs, has, on a certificate thereof being duly registered in a Superior Court of any other part of the United Kingdom, from the date of such registration the same force and effect as a judgment of the court in which the

⁶³ *Harris v. Qume* (1869) L.R. 4 Q.B. 653. Compare *Frayes v. Worms* (1861) 10 C.B. (n.s.) 149.

⁶⁴ It is true that X may have a valid counterclaim, but clearly he has no answer, as A was not the plaintiff in Germany.

⁶⁵ See Judgments Extension Act, 1868, the Administration of Justice Act, 1920, Part II, and the Foreign Judgments (Reciprocal Enforcement) Act, 1933.

For extension of judgments of inferior courts in the United Kingdom, see Inferior Courts Judgments Extension Act, 1882. For the enforcement of maintenance orders in different parts of British territory, see the Maintenance Orders (Facilities for Enforcement) Act, 1920; *Peagram v. Peagram* [1926] 2 K.B. 165; *Haque v. Haque* (1937) 106 L.J.P. 70; *Re Wheat* [1932] 2 K.B. 716. This Act has been very widely applied: see Annual Practice, Ord. XLII, r. 28, note. Contrast before the Act, *Harrop v. Harrop* [1920] 3 K.B. 386; see *ante*, pp. 406–7. For the reciprocal enforcement of bankruptcy and winding-up orders, see s. 121 of the Bankruptcy Act, 1914, and s. 276 of the Companies Act, 1948.

⁶⁶ See the Judgments Extension Act, 1868, ss. 1–4, 8. This Rule is intended simply to give the general result of the Act as regards the extension of judgments throughout the United Kingdom. It does not follow the precise words of the Act even in regard to the sections referred to. The Act, as it originally stood, applied in England and Ireland only to judgments of the Superior Courts of Common Law. For its extension to every Division of the High Court, see *Re Howe Machine Co.*; *Fontaine's Case* (1889) 41 Ch.D. (C.A.) 118; the Supreme Court of Judicature (Consolidation) Act, 1925, s. 324. For all details as to procedure, etc., see the Judgments Extension Act, 1868. See also *Re Watson* [1893] 1 Q.B. (C.A.) 21; *Re Low* [1894] 1 Ch. (C.A.) 147; *Re A Bankruptcy Notice* [1898] 1 Q.B. (C.A.) 383; *Thompson v. Gill* [1903] 1 K.B. (C.A.) 760; *Galbraith v. Grimshaw* [1910] 1 K.B. (C.A.) 339; A.C. 508. It may also be well to note that the provisions of that Act, in so far as they regard the extension of a Northern Irish judgment to Scotland, or of a Scottish judgment to Northern Ireland, do not in strictness belong to the subject of this treatise.

The Inferior Courts Judgments Extension Act, 1882, extends the judgments of inferior courts, e.g., county courts or civil bill courts, in one part of the United Kingdom, to other parts of the United Kingdom, by provisions analogous to those of the Judgments Extension Act, 1868. No reference to the Inferior Courts Judgments Extension Act is made in this Digest.

The Act of 1868 does not apply to the Isle of Man or the Channel Islands.

certificate is registered, and may be enforced by execution, or otherwise, in the same manner as if it had been a judgment originally obtained at the date of such registration as aforesaid in the court in which the certificate is registered.

The term 'Superior Court' means in this Rule,

- (1) as applied to England, the High Court of Justice in England;
- (2) as applied to Northern Ireland,⁶⁷ the High Court of Justice in Northern Ireland;
- (3) as applied to Scotland, the Court of Session in Scotland.

This Rule does not apply to any judgment (decret) pronounced in absence in an action proceeding on an arrestment used to found jurisdiction in Scotland.⁶⁸

Comment

(1) This Rule applies only to a judgment for 'debt, damages, or costs'. It applies, therefore, only to that kind of judgment which is enforceable by action in the courts of the different parts of the United Kingdom.⁶⁹

Hence, as has been laid down in a Scottish case, 'equity judgments are excluded, and all judgments and decrees *ad facta præstanda*, or of the nature of prohibitions or injunction'⁷⁰; and so also are judgments in actions for the recovery of land, and in probate and divorce suits,⁷¹ at any rate if the judgment in such

⁶⁷ The Act of 1868 no longer applies to Eire; *Wakely v Triumph Cycle Co.* [1924] 1 K.B. 214. This has been followed in Scotland (*Cooney v. Dunne* [1925] Sc.L.T. 22), but negatived in Ireland *Gieves v. O'Connor* [1924] 2 Ir.R. 182 (For the reasoning see *Irish Free State v. Little* [1931] Ir.R. 39.) Hence in *Banfield v. Chester* (1925) 94 L.J.K.B. 805, it was held that a certificate under Ord. LXI, r. 7 would probably be acted on in Eire, but it was ruled that it must not purport to have any operation under the Act of 1868. As a result of the English decision security for costs may be demanded from suitors in Eire, if resident in England: see *Perry v. Stratham, Ltd* [1928] Ir.R. 580; compare *Evans & Co. v. Fleming and Farrelly* [1928] Ir.R. 584; Northern Ireland, *Callan v. McKenna* [1929] N.Ir. 1; Read, 296-7.

⁶⁸ Act of 1868, s. 8. If, however, the defendant appears to defend the action, and judgment is given against him, it can be enforced under the Act; contrast the rule regarding suing on foreign judgments, pp. 358-9, *ante*. *Re Low* [1894] 1 Ch. (C.A.) 147.

⁶⁹ Compare Judgments Extension Act, 1868, ss. 1-3, 6, 8.

⁷⁰ *Wotherspoon v. Connolly* (1871) 9 Macph. 510. See *Re Howe Machine Co.* (1889) 41 Ch.D. 118; *Re Dundee Suburban Railway Co.* (1889) 58 L.J.Ch. 5; Figgott, *Foreign Judgments*, pt. in, pp. 154-156.

⁷¹ *Duncan & Dykes, Principles of Civil Jurisdiction*, pp. 308, 309. A judgment awarding damages against a co-respondent might be enforced under the Act. See *Rayment v. Rayment* [1910] P. 271, 291. As regards orders of the

an action or suit is a judgment for anything more than damages or costs; for if a party to one of these proceedings should, as might be the case, recover judgment only for damages or costs, there does not appear to be any reason why such a judgment, if recovered, *e.g.*, in Scotland, should not be capable of registration in England.

(2) Under this Rule a judgment obtained in one part of the United Kingdom, *e.g.*, in Northern Ireland, can by formal proceedings, as to the details of which the reader should consult the Judgments Extension Act, 1868, be extended to and rendered effective in any other part of the United Kingdom, *e.g.*, in England.⁷²

Though 'judgments' are in the Judgments Extension Act, 1868, itself described as 'registered'⁷³ it is in strictness the 'certificate' of a judgment which is registered, and it is also in strictness the certificate, not the judgment, which is given effect to as a judgment of the court, *e.g.*, the English High Court, in which the registration takes place. The Superior Courts of the different parts of the United Kingdom have, at any rate, as far as relates to execution,⁷⁴ full control and jurisdiction over any certificate or judgment registered in conformity with Rule 88,⁷⁵ and a certificate cannot be registered more than twelve months after the date of the original judgment without the leave of the court or a judge of the court where it is to be registered.⁷⁶ This court, *e.g.*, the English High Court, has authority to prevent execution issuing under the judgment in England, and generally to exercise full control at any rate over the certificate which is the thing actually registered. The certificate, therefore, would be set aside for an irregularity appearing on the face of it,⁷⁷ and execution would not be allowed to issue if

Chancery Divisions in England and Northern Ireland provision is made in the Crown Debts Act, 1801. See *Pennefather v. Short* [1866] W.N. 126; *Hazleton v. Wright* [1873] W.N. 3; *Newell v. Newell* [1896] W.N. 160. But see *Re Syngé* (1901) 17 T.L.R. 759; *Re Tyron* [1901] W.N. 176. See also *Kilworth v. Mountcashell* (1892) 31 L.R.Ir. 81. The English courts will, of course, lend their aid to the Scottish courts in suitable cases, *e.g.*, by restraining English persons from taking proceedings abroad: see *Re Scottish Pacific Coast Mining Co.* [1886] W.N. 63.

⁷² Section 1.

⁷³ Sections 4, 6.

⁷⁴ This is to be understood strictly; thus a judgment summons cannot be issued in England on such a judgment when registered: *Re Watson* [1893] 1 Q.B. (C.A.) 21; nor can a bankruptcy notice be founded on it: *Re A Bankruptcy Notice* [1898] 1 Q.B. 383. But a receiver by way of equitable execution can be appointed: *Thompson v. Gill* [1903] 1 K.B. (C.A.) 760; or a garnishee order made: *Johnstone v. Bucknall* [1898] 2 Ir.R. 499; *Emanuel v. Bridger* (1874) L.R. 9 Q.B. 286. A judgment extended to Northern Ireland can be registered there as a judgment mortgage: *Re Cleland* [1909] 1 Ir.R. (C.A.) 1.

⁷⁵ See section 4. The authority of the courts is limited to that which they 'now', *i.e.*, in 1868, have. Note that it is not necessary that the registering court should have jurisdiction over the defendant. *Wotherspoon v. Connolly* (1871) 9 Macph. 510; *English's Coasting and Shipping Co. v. British Finance Co.* (1886) 14 R. 220, 225, 226, *per* Inghs, L.P.

⁷⁶ *Ibid.*, s. 1.

⁷⁷ See *Part v. Scannell* (1875) Ir.R. 9 C.L. 426.

the court where the certificate is registered were properly certified that a stay of execution had been granted by the court in which the judgment had been obtained.⁷⁸

(3) The court in which a certificate is registered under Rule 88 cannot apparently inquire into the validity of the original judgment. Thus, if a judgment of the Court of Session be registered in England, the High Court in England cannot, it is submitted, set aside the certificate (as long as the judgment stands in Scotland) on the ground that the judgment was obtained by fraud. If the certificate is to be got rid of on that ground, the judgment must be impeached by proceedings in Scotland.⁷⁹

(4) Rule 88 in no way negatives the right of a plaintiff who has obtained a judgment in one part of the United Kingdom, *e.g.*, Scotland, to bring an action upon it in another part, *e.g.*, England. The plaintiff, however, who brings such an action exposes himself to one, and perhaps to two, disadvantages. He cannot in general recover any costs,⁸⁰ and, if the view here taken of the Act is correct, he gratuitously runs the risk of having the judgment impeached for fraud and for other grounds of invalidity which are not available against a registered judgment.

(5) A proceeding on arrestment in Scotland is a mode of asserting the jurisdiction of the Scottish courts over a defendant who, though not in Scotland, possesses property there.⁸¹ The reason why a judgment obtained in such an action is not allowed to be registered⁸² is that, as the English courts do not consider the possession of property to be a sufficient ground of jurisdiction in an action *in personam*, a judgment which depended upon the existence of such jurisdiction could not be enforced by action in England.⁸³ Here, as elsewhere, we see that Rule 88 and the Act on which it is grounded must be strictly confined to judgments on which an action could be brought in England.

(6) The result of the Act is to allow the enforcement in Scotland or Northern Ireland of judgments which would not

⁷⁸ This is specially provided for in the case of judgments of the Court of Session which it is proposed to register in the High Court of England or of Ireland (see s. 3), and there can be no doubt that if a stay of execution were granted by the English or Northern Irish High Court where a judgment was obtained, the Court of Session on being certified thereof would not allow execution to issue in Scotland.

⁷⁹ *Re Low* [1894] 1 Ch. (C.A.) 147, 162, 163, *per* Davey, L.J. For Scotland see *Laughland v. Wansborough Paper Co.* [1921] 1 Sc.L.T. 841; *Wansborough Paper Co. v. Laughland* [1920] W.N. (C.A.) 944, and Rule 28, Exception 5, *ante*.

⁸⁰ Section 6. See note to Ord. XLII, r. 28, in Annual Practice.

⁸¹ The validity of such jurisdiction has been repeatedly affirmed by the House of Lords in a series of cases beginning *London and North Western Railway Co. v. Lindsay* (1858) 3 Macq. 99; *North v. Stewart* (1890) 17 R. (H.L.) 60. See also *Fergusson & Co. v. Brown* [1918] S.C. (H.L.) 125; *Mitchell & Muir, Ltd. v. Fenischliffe Products Co.* [1920] 1 Sc.L.T. 199; *Moore & Weinberg v. Ernsthausen* [1917] S.C. (H.L.) 25.

⁸² Section 8.

⁸³ See Rules 69 and 77, pp. 362, 388, *ante*.

necessarily have afforded sufficient ground for an action on the score that the English court was not a court of competent jurisdiction.

RULE 89.⁸⁴—When Part II of the Administration of Justice Act, 1920, is applied by Order in Council to any part of British territory outside the United Kingdom, a judgment creditor who has obtained a judgment in a Superior Court in such part of British territory under which a sum of money is made payable, may apply to a Superior Court in the United Kingdom, at any time within twelve months (or such longer period as may be allowed by the court) after the date of the judgment, to have the judgment registered in the court, and, if they think it is just and convenient that the judgment should be enforced in the United Kingdom, the court may order the judgment to be registered accordingly, and from the date of registration the judgment shall be of the same force and effect, and proceedings may be taken upon it, as if it were a judgment of the court in which it is registered.

Provided that no judgment shall be ordered to be registered if

- (a) the original court acted without jurisdiction; or
- (b) the judgment debtor, being a person who was neither carrying on business nor ordinarily resident within the jurisdiction of the original court, did not voluntarily appear or otherwise

⁸⁴ Orders in Council were made applying the Act to Cyprus, Gibraltar, St. Vincent, Sierra Leone Colony and Protectorate, Somaliland Protectorate, Zanzibar Protectorate, S. Australia, W. Australia, Grenada, Ceylon, Trinidad and Tobago, Straits Settlements, Nigeria Colony and Protectorate, the Mandated Territory of Tanganyika, Hong Kong, Basutoland, Bechuanaland Protectorate, Swaziland, British Guiana, S. Lucia, Seychelles, Gold Coast, Leeward Is., Gilbert and Ellice Is., Solomon Is. Protectorate, Nyasaland Protectorate, Brit. Honduras, Barbados, N. Rhodesia, Uganda Protectorate, New Zealand, Newfoundland, Falkland Is., Fiji, Gambia, Kenya Colony and Protectorate, S. Rhodesia, Ashanti, Bermuda, Mauritius, Federated Malay States, Johore, Bahamas, Papua, N.S.W., Victoria, (Palestine), Saskatchewan, Kedah, Norfolk I., New Guinea, St. Helena, Queensland, Tasmania, Canberra, N. Australia, Central Australia, Jamaica and Malta. See *Annual Practice*, notes to R.S.C. Ord. XLIIA, r. 1; Read, 298. See also, *post*, p. 423, n. 4.

submit or agree to submit to the jurisdiction of that court; or

- (c) the judgment debtor, being the defendant in the proceedings, was not duly served with the process of the original court and did not appear, notwithstanding that he was ordinarily resident or was carrying on business within the jurisdiction of that court or agreed to submit to the jurisdiction of that court; or
- (d) the judgment was obtained by fraud; or
- (e) the judgment debtor satisfies the registering court either that an appeal is pending, or that he is entitled and intends to appeal against the judgment; or
- (f) the judgment was in respect of a cause of action which for reasons of public policy or for some other similar reason could not have been entertained by the registering court.

Comment

This Rule, which follows closely the terms of the Administration of Justice Act, 1920, is the outcome of proposals for arrangements for the mutual enforcement of judgments and arbitration awards throughout the Empire brought forward at the Imperial Conference of 1911. The Rule can come into operation only by the issue of an Order in Council applying it to some part of British territory outside the United Kingdom⁸⁵ in which reciprocal provision has been made for the recognition of judgments obtained in the Superior Courts of the United Kingdom, or to a territory under the protection of the Crown or in respect of which a mandate is exercised by any British Government. In the case of Canada and Australia the Act may be applied either to the Federal or Provincial or State courts, or to both sets of courts.⁸⁶

The regime created by the Act of 1920 is one which will ultimately disappear. For the Foreign Judgments (Reciprocal Enforcement) Act, 1933, empowers the Crown in Council to apply Part II of that enactment to all parts of British territory overseas. It is provided that upon the application of the later Act in this manner the Act of 1920 shall cease to have effect except in relation

⁸⁵ Including the Channel Islands and the Isle of Man. For the meaning of United Kingdom in the Act, see section 2 of the Irish Free State (Consequential Adaptation of Enactments) Order, 1923.

⁸⁶ As to Canada, Saskatchewan alone has come under the Act.

to such territories to which it extends at the date of such Order.⁸⁷ The effect of this provision, which has been acted upon in relation to British territory generally,⁸⁸ is merely to prevent the further extension of the system of enforcement envisaged by the Act of 1920. Its effect is not to apply instead the scheme of the Act of 1933. For Part I of the latter to come into operation in relation to any particular territory, a further and specific Order in Council is required. The making of such an Order, which so far has occurred only in relation to India,⁸⁹ is, however, to revoke the application of the Act of 1920, if it has any application, in relation to the territory concerned.⁹⁰ The expression 'British territory' in this connection includes protectorates and (former) mandates.⁹¹

The judgments to which the Rule applies are any judgments or orders in any civil proceedings whether before or after the passing of the Act of 1920, providing for the payment of a sum of money, and include awards in arbitration proceedings if these can, under the law in force where they are made, be enforced in the same manner as judgments. Rules of court⁹² must provide for service on the judgment debtor of notice of registration of a judgment, and fix a time during which execution of the judgment shall be suspended to enable the debtor to apply to have the registration set aside, and on application the court may set aside the registration on such terms as it thinks fit. The court, moreover, has the same control and jurisdiction over the execution of the judgment as it has over judgments given by itself.

The cases in which registration is forbidden agree in general with those in which recognition would be refused to judgments of foreign courts,⁹³ but contrary to the rule in the case of actions based on foreign judgments, it is expressly provided that the pendency of an appeal or the intention of the judgment debtor to exercise a right of appeal appertaining to him will bar registration.⁹⁴ A point of some obscurity is presented by paragraph (c) of the proviso to the Rule.⁹⁵ It appears that ordinary residence or carrying on business within the jurisdiction of the court, or agreement to submit to its jurisdiction, is a ground for the exercise of jurisdiction unless the defendant 'was not duly served with the process of the Court and did not appear'. Due service here can hardly mean service within the jurisdiction, which would often be impossible in the case of a mere agreement to accept the

⁸⁷ Section 7 (1).

⁸⁸ S.R. & O. (1933) No. 1073.

⁸⁹ S.R. & O. (1933) No. 1363. See also the Indian Independence Act, 1947, s. 18 (1). The Order referred to originally applied also to Burma, but see now the Burma Independence Act, 1947, s. 5 (4).

⁹⁰ Section 7 (2) of the Act of 1933.

⁹¹ Section 7 (3) of the Act of 1933.

⁹² See Order XLIIA, R.S.C., July 28, 1922.

⁹³ See Rules 68, 69, pp. 351, 362, *ante*.

⁹⁴ See *ante*, pp. 403, 406.

⁹⁵ Section 9 (2) (b) of the Act of 1920.

jurisdiction, and the right of an oversea court to exercise jurisdiction over an absent defendant on the ground of ordinary residence or carrying on business appears thus to be conceded.⁹⁶

It should be noted that in every case the exercise of jurisdiction by the registering court is a matter entirely of discretion, and that an application is only to be granted if the court thinks it just and convenient. The judgment creditor remains free to bring an action on the judgment of an oversea court in the ordinary way, subject to the rule that, unless the court otherwise orders, the plaintiff will not be entitled to recover any costs of the action, unless he has previously applied for registration of his judgment and has been refused, in any case in which such registration is permissible under the terms of the Act.⁹⁷

Illustrations

1. H, domiciled in a colony to which Part II of the Administration of Justice Act, 1920, applies, obtains a decree of divorce from W, and £7,000 damages against X, whom he cites as co-respondent, and who is resident in the colony at the time. X leaves the colony and proceeds to England. A can apply to the court of England for the registration of the judgment against X.

2. In the same colony A obtains against X in an action on contract judgment in the Supreme Court for £8,000. A applies in England for registration of this judgment. X shows that he has a right of appeal to the Court of Appeal and intends to exercise it. A's application must be refused.

3. A municipality in New South Wales obtains judgment in a State court in respect of rates. A cannot obtain registration of the judgment in England.⁹⁸

4. In Victoria a judgment is given against X for income tax in favour of A, a commissioner of income tax. A cannot obtain registration of the judgment.⁹⁹

RULE 90.¹—(1) When Part I of the Foreign Judgments (Reciprocal Enforcement) Act, 1933, is applied by Order in Council to any foreign^{1a} country or to any part of British territory (including protectorates and (former) mandates) outside the United Kingdom, a judgment creditor under a judgment to which Part I of the Act applies may apply to the High Court at any time within

⁹⁶ Compare R.S.C. Ord. XI, r. 1 (c); Rule 28, Exception 3, p. 186, *ante*. Compare *Ashbury v. Ellis* [1893] A.C. 339.

⁹⁷ Administration of Justice Act, 1920, s. 9 (5).

⁹⁸ Compare *Municipal Council of Sydney v. Bull* [1909] 1 K.B. 7.

⁹⁹ Compare *Re Visser* [1928] Ch. 877, and see *ante*, p. 408.

¹ See Read, 299-301; Wolff, s. 253 (3); Cheshire, 773-777; Gutteridge in 13 B.Y.B.I.L. (1932) p. 61; Yntema in 33 Mich.L.Rev. (1935) 1129; Boss in 20 Minn.L.Rev. (1936) 140; and *Report of the Foreign Judgments (Reciprocal Enforcement) Committee*, 1932, Cmd. 4213.

^{1a} The Act of 1933 nowhere defines the word 'foreign'. But it is clear from s. 7 that the word means all countries not forming part of British territory (including protectorates and (former) mandates). The term 'foreign' is thus used in this Rule in a sense different from, and less extensive than, the sense given it in other Rules of this Digest.

six years after the date of such judgment (or the date of the last judgment on appeal therefrom) to have the judgment registered in the High Court and, (subject to proof of the prescribed matters and to the other provisions of the Act) on any such application the court shall order the judgment to be registered.

Provided that no judgment shall be ordered to be registered if—

- (a) it has been wholly satisfied ; or
- (b) it could not be enforced by execution in the country or territory of the original court.

(2) Subject to the provisions of the Act with respect to the setting aside of registration—

- (a) a registered judgment shall, for the purposes of execution, be of the same force and effect ; and
- (b) proceedings may be taken on a registered judgment ; and
- (c) the sum for which a judgment is registered shall carry interest ; and
- (d) the registering court shall have the same control over the execution of a registered judgment

as if the judgment had been a judgment originally given in the registering court and entered on the date of registration.

Provided that execution shall not issue on the judgment so long as it is competent to any party to make an application to have the registration set aside (or so long as any such application is not finally determined).

(3) Any judgment of a Superior Court of a foreign country or other territory to which Part I of the Act applies given after the application of Part I of the Act to such country or territory is capable of registration in accordance with this Rule if—

- (a) it is final and conclusive as between the parties thereto ; and
- (b) there is payable thereunder a sum of money (not being a sum payable in respect of taxes or other

charges of a like nature or in respect of a fine or other penalty).

(4) On the application of any party against whom it is enforceable a judgment registered in accordance with this Rule—

(a) shall be set aside if—

- (i) it shall have been registered in contravention of the Act ; or
- (ii) it shall have been given by a court without jurisdiction ; or
- (iii) it shall have been given against a judgment debtor who, being the defendant in the original proceedings, did not receive notice of those proceedings in sufficient time to enable him to defend and did not appear ; or
- (iv) it shall have been obtained by fraud ; or
- (v) its enforcement would be contrary to public policy ; or
- (vi) the rights under the judgment are not vested in the person registering it ; and

(b) may be set aside if the registering court is satisfied that the matter in dispute in the original court had previously to the date of the judgment of that court been the subject of a final and conclusive judgment by a court having jurisdiction in the matter.

Comment

The scheme of direct enforcement of foreign judgments provided for in the Foreign Judgments (Reciprocal Enforcement) Act, 1933, upon which this Rule is based and the wording of which it follows closely, is designed to apply in relation not only to countries foreign in the political sense, but also to British territories, including protectorates and mandates, outside the United Kingdom. It would clearly be redundant as regards the latter to have two systems of enforcement of judgments and the Act therefore provides for the restriction and replacement of the system set up earlier by the Administration of Justice Act, 1920.² It is, in the first place, enacted that the Crown in Council may by Order direct the application of the later Act to British territory (including

² See Rule 89, *ante*, p. 417.

protectorates and mandates) outside the United Kingdom, whereupon the earlier Act shall cease to be capable of application to places to which it does not already apply.³ An Order in Council to this effect was made shortly after the passing of the Act of 1933.⁴ And, in the second place, it is provided that where in relation to any British territory the operative provisions of the later Act, (*i.e.*, Part I) are brought into force, those of the earlier Act shall cease to have effect in relation to that territory.⁵ Such operative provisions have so far been applied in relation to India.⁶ Of countries foreign in the political sense, only France⁷ and Belgium⁸ so far come within the Act. The basis of its application, in regard both to foreign countries and to British territories, as was that of the application of the Act of 1920 and—impliedly—of the Judgments Extension Act, 1868, is the existence of a substantial measure of reciprocity.⁹

The scope of the Act of 1933 is broadly the same as that of the earlier Acts. That is to say, it contemplates only the enforcement of final and conclusive judgments of superior courts given otherwise than upon appeal from an inferior court after the date of the Order in Council applying the Act to the country or territory concerned, and providing for the payment of sums of money, not being sums payable in respect of taxes, etc., or fines or other penalties.¹⁰ But a judgment is to be deemed final and conclusive notwithstanding that an appeal is pending or that it may still be subject to appeal,¹¹ although the pendency of an appeal or the mere intention of making one may apparently be a ground for the setting aside of an application for registration under the Act or for the adjournment of such an application.¹² And if upon an application for registration, it appears that part or parts only of the judgment are capable of registration then such part or parts may be registered alone.¹³ Registration is for the sum payable under the original judgment, expressed in sterling on the basis of the rate of exchange prevailing at the date of that judgment, plus interest due under the law of the original court up to the date of registration, plus reasonable costs incidental to registration.¹⁴ Where the judgment has been partially satisfied registration is for the unsatisfied balance.¹⁵

³ Section 7 (1).

⁴ S.R. & O. (1933) No. 1073

⁵ Section 7 (2).

⁶ S.R. & O. (1938) No. 1363. And see the Indian Independence Act, 1947, s. 18 (1). See also *ante*, p. 419, note 89.

⁷ S.R. & O. (1936) No. 609.

⁸ S.R. & O. (1936) No. 1139.

⁹ Section 9 of the Act contains provision for the modification of its application in relation to any country denying substantial reciprocity. See as to the earlier Acts, Rules 88 and 89, *ante*, pp. 413, 417.

¹⁰ Section 1 (2).

¹¹ Section 1 (3).

¹² Cf. s. 5 and *post*, p. 425.

¹³ Section 1 (5).

¹⁴ Sections 1 (6), 2 (3).

¹⁵ Section 2 (4).

The effect of registration of a foreign judgment under the Act of 1938 is to render it for purposes of execution of the same force and effect as if it were a judgment of the registering court. Execution may not, however, issue so long as it is competent to any party to make an application for the setting aside of the judgment or until the final determination of any such application. The registering court has the same control over execution as it has over the execution of its own judgments. Proceedings may be taken upon a registered judgment exactly as if it were a judgment of the registering court. Thus a bankruptcy notice may be served upon it. The sum for which a foreign judgment is registered carries interest in the same manner as an English judgment debt.¹⁶

Complete satisfaction of the foreign judgment, or the circumstance that it could not be enforced by execution in the place where it was given, are absolute bars to registration under the Act.¹⁷ Moreover, where registration has been effected, it may be set aside upon the application of any party against whom it is enforceable made within a time specified in regard to each individual judgment in the registration order.¹⁸ The setting aside of registration is automatic where such application is based upon the circumstance that the judgment is incapable of registration under the Act or has been registered in contravention of it.¹⁹ The same is the case where the ground of the application is that the judgment has been obtained by fraud^{19a}; that its enforcement would be contrary to English public policy; or that the judgment debtor, being the defendant in the original proceedings, though he may have been duly served in accordance with the appropriate foreign law, did not receive sufficient notice to enable him to defend and did not appear.²⁰ The same is also the case where the applicant for registration was not the judgment creditor, which expression for the purposes of the Act includes any person in whom the rights under the judgment have become vested by assignment, succession or otherwise.²¹ And, lastly, it is likewise the case where the ground of the application for the setting aside of registration is that the courts of the country or territory of the original court had no jurisdiction in the circumstances of the case.²² The Act defines what is to be deemed the jurisdiction of a country's courts for that purpose. As regards actions *in personam* such jurisdiction exists where the judgment debtor was plaintiff in the original

¹⁶ Section 2 (2). Cf. *Re a Judgment Debtor* (No. 2176 of 1938) [1939] Ch. 601.

¹⁷ Section 2 (1). Proviso.

¹⁸ Sections 4, 5. For the practice, see R.S.C. (No. 32) 1933, *Annual Practice*, 1945, pp. 757-764, and see *Re a Debtor* (No. 11 of 1939) [1939] 2 All E.R. 400.

¹⁹ Section 4 (1) (a) (i).

^{19a} *Syal v. Heyward* [1948] 2 K.B. 443 (C.A.).

²⁰ Section 4 (1) (a) (iv), (v) (iii).

²¹ Section 4 (1) (a) (vi) and s. 11 (1).

²² Section 4 (1) (a) (ii).

proceedings; or, in the case where he was defendant, and he counter-claimed, if he submitted to the jurisdiction by prior agreement or by voluntary appearance (otherwise than for the mere protection or securing the release of property seized or threatened with seizure), or if he was resident (or being a corporation if the judgment debtor had its principal place of business) in the country of the court, or if he had an office or place of business in that country and the proceedings were in respect of a transaction effected through or at that office or place. As regards actions *in rem* jurisdiction exists where the subject-matter is situate in the country of the court at the time of the proceedings^{22a} and, as regards actions neither *in personam* nor *in rem*, if the jurisdiction be recognised by the law of England.²³ Certain specific cases where the foreign court is not to be deemed to have jurisdiction are also enumerated in the Act.²⁴

Where upon an application for the setting aside of registration any of the circumstances already enumerated are found in fact to exist, the setting aside of registration is, as has been said, automatic. Further, the registering court may in its discretion set aside registration when it is satisfied that the matter in dispute in the original proceedings had previously to the date of judgment in those proceedings been the subject of a final and conclusive judgment by a court having jurisdiction in the matter.²⁵

The Act also provides that if, on an application to set aside registration, the applicant satisfies the court that an appeal in the original proceedings is pending or that he is entitled and intends to appeal, the court may if it think fit either set aside the registration or adjourn the application for its setting aside for a period reasonably sufficient to enable the appeal to be heard. The court may so act on such terms as it thinks just.²⁶ The effect of the interaction of this provision with those other provisions of the Act governing the setting aside of registration is not wholly clear. It would seem that the former might be taken to erect the pendency of an appeal or the existence of an intention to appeal into a distinct and separate, though of course, discretionary ground for the setting aside of registration.²⁷ It is, however, made clear that where a registration is set aside under that provision the right to apply again later for registration is not prejudiced.²⁸ The same is the case where registration is set aside on the sole ground either that the judgment was not enforceable by execution in the country of the original court

^{22a} See *McCormac v. Gardner* [1937] N.Z.L.R. 517. See also p. 366, *ante*.

²³ Section 4 (2). See also s. 11 (2). And see pp. 348, 355, 357-9, *ante*.

²⁴ Section 4 (3).

²⁵ Section 4 (1) (b).

²⁶ Section 5 (1). Cf. *Syal v. Heyward* [1948] 2 K.B. 443 (C.A.).

²⁷ It is to be noted that the pendency of an appeal or the intention to appeal are bars to registration under the Act of 1920. See *ante*, pp. 418, 419. The wording of s. 5 (2) of the Act of 1933 supports the interpretation of s. 5 (1) which would produce the like result under the latter Act.

²⁸ Section 5 (2).

or that, having been registered for the whole sum payable thereunder, it has been partially satisfied.²⁹ In all other cases the setting aside of registration would presumably be a bar to a second application for registration.

The Act of 1933 introduces a striking innovation in that it provides that no proceedings for the recovery of a sum payable under a foreign judgment capable of registration in accordance with its provisions, not being proceedings for such registration, shall be entertained by any court.³⁰ This provision does not of course limit in any way the taking of proceedings upon a registrable judgment after its registration. For it is elsewhere specifically provided that proceedings may be taken upon a registered judgment as if it had been originally given by the registering court.³¹ Nor does the provision exclude proceedings without registration not upon the unregistered judgment, but upon the original cause of action therein. That the Act did not produce that effect is perhaps to be regretted. But it is clear that all it has done is to exclude the bringing of an action at common law upon a judgment capable of registration.³²

Finally, the Act provides for a degree of recognition, as distinct from enforcement, of foreign judgments. This part of the Act extends not only to a judgment registered under its provisions, but also to any judgment, capable or incapable of registration, to which the Act applies. It does not extend, however, to a registered judgment, the registration of which has been set aside upon grounds other than that no sum of money is payable thereunder, that the judgment has been wholly or partially satisfied, or that at the date of application for registration it is unenforceable in the country or territory of the original court. Nor does it apply to an unregistered judgment the registration of which would have been set aside on grounds other than those specified had it been attempted. But, subject to these limitations, it is provided that any judgment to which the Act applies or would have applied had a sum of money been payable thereunder, registered or unregistered, capable or incapable of registration, shall be recognised in any court in the United Kingdom as conclusive between the parties thereto in all proceedings founded on the same cause of action and may be relied upon by way of defence or counterclaim in any such proceedings. This provision is expressed so as not to prevent the recognition of any foreign judgment as conclusive of any matter of law or fact it decides if, but for the Act, that judgment would be so recognised.³³ The provision does not, it is apprehended, operate to exclude the

²⁹ Section 5 (3).

³⁰ Section 6.

³¹ Section 2 (2) (a). Cf. *Re a Judgment Debtor* (No. 2176 of 1938) [1939] Ch. 601.

³² This is the view of the majority of writers, as to whom, see *ante*, p. 420, note 1. Compare Ross in 20 Minn.L.Rev. (1936) 140.

³³ Section 8.

bringing of an action in the United Kingdom upon an original cause of action in respect of which there has been a foreign judgment.³⁴

The Act of 1933 applies also to Scotland and Northern Ireland in the sense that registration of foreign judgments in accordance with its provisions may be effected in those countries.

Illustrations

1. A obtains a judgment from a Canadian court against B for £1,000. The operative provisions of the Foreign Judgments (Reciprocal Enforcement) Act, 1933, have not been brought into force in relation to Canada. The judgment cannot be registered in England under that Act.³⁵

2. A obtains a judgment for 100,000 francs against B from a French Superior Court. The judgment has not been registered. No action lies upon the judgment in England.³⁶

3. A obtains from a French Superior Court a judgment against B for 100,000 francs damages for breach of a contract made in England. The judgment has not been registered. *Semble*, an action is maintainable in England upon the contract.³⁷

4. A obtains from a Belgian Superior Court a judgment for 100,000 francs. He registers the judgment and then serves a bankruptcy notice based thereon on the debtor. His action is permissible.³⁸

5. A obtains from an Indian Superior Court by fraud a judgment for £100 against B. The judgment is registered. An application to set aside registration, made in due time, will succeed.³⁹

6. A creditor, in order to enforce his claims on his debtor's German and French property, sues him in both countries. The German court dismisses the action, while the French court gives judgment for the plaintiff. The French judgment is registered in England. *Semble*, an application to set aside the registration may be granted.⁴⁰

7. A, who is neither resident nor in possession of an office or place of business in France, buys a motor car from a firm in Paris. Before the car reaches England, an action having no connection with the purchase is begun against A by B. A enters an appearance to protect his property from seizure. B obtains judgment against A for 10,000 francs and registers the judgment in England. An application to set aside the registration, made in due time, will be granted.⁴¹

8. A obtains judgment for £100 against B in an Indian Superior Court and registers the judgment in England. B applies to have the registration set aside upon the ground that an appeal is pending in India. *Semble*, the application may be adjourned⁴² (with the result that execution will not issue in England).⁴³

³⁴ Neither s 8 nor s 6, however, is clearly worded and each is susceptible of a construction whereby the Act might be taken to exclude the rule that the original cause of action is not merged in a foreign judgment to which the Act applies. See *ante*, p. 410 and p. 426. See also Read, pp. 120 and 259.

³⁵ *Yukon Consolidated Gold Corporation v Clark* [1938] 2 K.B. 241.

³⁶ Cf. s. 6 of the Act of 1933.

³⁷ Cf. ss. 6 and 8 of the Act of 1933.

³⁸ *Re a Judgment Debtor* (No 2176 of 1938) [1939] Ch. 601.

³⁹ Cf. s. 4 (1) (iv) of the Act; *Syd v. Heyward* [1948] 2 K.B. 443 (C.A.).

⁴⁰ Cf. s. 4 (1) (b) of the Act. See also Wolff, s. 248.

⁴¹ Cf. s. 4 (1) (a) (ii) and (2) (a) (i) and (iv) of the Act. As to the position apart from the Act, see *Gusard v. De Clermont* [1914] 3 K.B. 145, and *ante*, pp. 358-360. Compare Cheshire, p. 786.

⁴² Cf. s. 5 (1) of the Act. See also *Re a Debtor* (No. 11 of 1939) [1939] 2 All E.R. 400 (argument).

⁴³ Cf. s. 2 (2) (proviso) of the Act.

(2) JUDGMENT IN REM

RULE 91.⁴⁴—A valid foreign judgment *in rem*⁴⁵ in respect of the title to a movable gives a valid title to the movable in England to the extent to which such title is given by or under the judgment in the country where the judgment is pronounced.

Comment

A valid foreign judgment or judicial proceeding *in rem* which either directly or indirectly determines the title to a movable is conclusive against all the world. This applies to all proceedings *in rem* against movable property within the jurisdiction of the Court pronouncing the judgment. 'Whatever the Court settles as to the right or title, or whatever disposition it makes of the property by sale, revendication, transfer, or other act, will be held valid in every other country, where the same question comes directly or indirectly in judgment before any other foreign tribunal. This is very familiarly known in the cases of proceedings *in rem*, in foreign Courts of Admiralty, whether they are causes of prize, or of bottomry, or of salvage, or of forfeiture, . . . over which such Courts have a rightful jurisdiction, founded on the actual or constructive possession of the subject-matter (*res*)'.⁴⁶

The real principle of a judgment *in rem* is, 'that a person who acquires a valid title by the law of any country either to a chattel or to realty shall be deemed all over the world to be owner of such chattel or realty. If, therefore, the court has absolutely the disposal of the *res*, and it is in its power, as it is in the case of a judgment *in rem* in the Admiralty Court, it does not matter who is owner; all the courts assume that the thing has been fairly litigated, that the man brought before the court is owner, and had such an interest as entitled him to raise the contest, and that the judgment *in rem* bound the whole'.⁴⁷ In other words, the rule as to the effect of a judgment *in rem* is, if Rules 129–131 can be maintained to their full extent, merely an application of those Rules.

⁴⁴ *Castrique v. Imrie* (1870) L.R. 4 H.L. 414; *Hobbs v. Henning* (1864) 17 C.B. (N.S.) 791; *Cammell v. Sewell* (1860) 5 H. & N. 728; *Cossmann v. West* (1887) 13 App.Cas. 161; *The Bold Buccleugh* (1851) 7 Moore P.C. 269; *Re Queensland, etc.* [1891] 1 Ch. 536; [1892] 1 Ch. (C.A.) 219; *Alcock v. Smith* [1892] 1 Ch. (C.A.) 238; *Minna Craig Steamship Co. v. Chartered, etc. Bank* [1897] 1 Q.B. 55; (C.A.) 460; compare Rules 129–131, *post*. For Canada see *Vanevery v. Grant* (1862) 21 U.C.R. 542.

⁴⁵ As to jurisdiction *in rem*, see Rule 70, p. 365, *ante*. A clear distinction must be drawn between a judgment *in rem* and proceedings *in rem* (against a *res*) resulting in a judgment *in personam*. See *ante*, p. 206, n. 9. To the latter Rules 89–90 apply as they do to judgments in actions *in personam*.

⁴⁶ *Castrique v. Imrie* (1870) L.R. 4 H.L. 414, 428, 429; *The Segredo* (1853) Spinks, Eccl. & Adm. 36, 57, *per* Dr. Lushington; *Minna Craig Steamship Co. v. Chartered, etc. Bank* [1897] 1 Q.B. (C.A.) 460.

⁴⁷ *Simpson v. Fogo* (1863) 32 L.J.Ch. 249, 256, judgment of Wood, V.-C.

'In the case of *Cammell v. Sewell*',⁴⁸ it has been said by a very eminent judge, 'a more general principle was laid down, *viz.*, that "if personal property is disposed of in a manner binding according to the law of the country where it is, that disposition is binding everywhere". This, we think, as a general rule, is correct, though no doubt it may be open to exceptions and qualifications; and it may very well be said that the rule commonly expressed by English lawyers, that a judgment *in rem* is binding everywhere, is in truth but a branch of that more general principle'.⁴⁹

It may be suggested, however, that although power over the thing is an essential factor for the exercise of jurisdiction *in rem* concerning it, that exercise in order to destroy ownership, which is essentially a nexus not only between a person and all the world but also between a person—the owner—and the thing owned, ought to require the consent, or at least the knowledge of the owner.

Thus a possible exception to the jurisdictional rule outlined exists where a movable is brought to a country without the consent or knowledge (or perhaps merely without the consent) of an owner who is neither a citizen of nor domiciled within the country. There is apparently no English or Dominion authority in favour of the proposition that in such a case jurisdiction does not exist, at least, until the owner has had a reasonable opportunity of removing his property or until the appropriate period of limitation has run. But again there is no authority against it.⁵⁰

Illustrations

1. A brings an action *in rem* in a French court against a British ship, the *Ann Martin*, then in the port of Havre, and claims to be the owner of the ship. A obtains a judgment in his favour, and is declared to be the owner of the ship. A has in England the rights of owner over the *Ann Martin* against all the world.⁵¹

2. A, an Englishman, is owner of a British ship. Whilst the ship is at Havre, a French court, honestly exercising its jurisdiction, pronounces in a proceeding *in rem* a judgment under which the ship is ordered to be sold for the payment of debts due from M, and is sold to X, a British subject. The court has acted under a misconception of English law, and in consequence has not recognised the rights of A as owner. The ship is brought by X to England. X has a good title to the ship in England.⁵²

3. A British ship is seized as prize by a Russian vessel, on the ground of attempted breach of blockade, and taken to a Russian port for adjudication as prize by a prize court. The goods on board the ship are sold under the order

⁴⁸ 5 H. & N. 728, 746.

⁴⁹ *Castrique v. Imrie* (1870) L.R. 4 H.L. 414, 429, *per* Blackburn, J. See also *Gould v. Webb* (1855) 4 E. & B. 933; *Swiss Bank Corporation v. Boehmische Industrial Bank* [1923] 1 K.B. (C.A.) 673; *Employers' Liability Assurance Corporation v. Sedgwick, Collins & Co.* [1927] A.C. 95.

⁵⁰ Cf. Read, 138-142; Restatement, s. 52; and see *Todd v. Armour* (1882) 19 Sco.L.R. 656, 659; *post*, p. 566.

⁵¹ Compare *Castrique v. Imrie* (1870) L.R. 4 H.L. 414; *Minna Craig Steamship Co. v. Chartered, etc. Bank* [1897] 1 Q.B. (C.A.) 460; *Vanevery v. Grant* (1862) 21 U.C.R. 542.

⁵² *Ibid.*

of the court to X. It is ultimately decided by the prize court that the ship was not lawfully captured. The title of X, the purchaser, to the goods is valid against that of A, the original owner.⁵³

4. A crate of peaches is stolen from the owner in England and taken to France. There they begin to decay and are destroyed by public authority in accordance with law as endangering the public health. The owner has no legal ground of complaint.⁵⁴

5. A, an Englishman, is owner of a yacht of British register which is stolen and abandoned in Lisbon. A Portuguese court decrees the judicial sale of the vessel for non-payment of harbour dues. B, the purchaser, brings the yacht to England again. The title of A is (*semble*) still valid.⁵⁵

RULE 92.⁵⁶—A valid foreign judgment *in rem* given by a court of Admiralty can be enforced in the High Court by proceedings against the ship or other property affected by the judgment.

Illustration

A brings an action and obtains a judgment *in rem* in a foreign country against the *City of Mecca*, a British ship, then in a port of such country. The *City of Mecca*, the judgment not having been satisfied, comes into an English port. A can enforce the foreign judgment by an action *in rem* against the ship.⁵⁷

(3) JUDGMENT, OR SENTENCE, OF DIVORCE, OR NULLITY OF MARRIAGE, OR JUDICIAL SEPARATION

RULE 93.—A valid foreign judgment, or sentence, of divorce,⁵⁸ or of nullity of marriage,⁵⁹ or of judicial separation,⁶⁰ has in England the same effect as a decree of divorce, or of nullity of marriage, or of judicial separation, granted by the court in England, as regards the status of the parties to the marriage which is dissolved or annulled, or in respect of which a decree of judicial separation is pronounced.

⁵³ See *Stringer v. English, etc Insurance Co.* (1870) L.R. 5 Q.B. 599, and especially p. 606, judgment of Martin, B.; *Hughes v. Cornelius* (1861) 2 Show. 232.

⁵⁴ Cf. Restatement, s. 52.

⁵⁵ Cf. Read, 139–140. Compare *Cammell v. Sewell* (1860) 5 H. & N. 728. See also *Burn v. Bletcher* (1863) 23 U.C.Q.B. 28, 37–38.

⁵⁶ *The City of Mecca* (1881) 6 P.D. (C.A.) 106. See Rule 29, p. 205, *ante*.

⁵⁷ See *The City of Mecca* (1881) 5 P.D. 28, 6 P.D. (C.A.) 106. The judgment, be it noted, must be a judgment *in rem*. The actionability of a foreign admiralty judgment *in personam* may be limited by Rule 90, *ante*, p. 420, which applies to money judgments given in actions *in rem* exactly as it does to money judgments in actions *in personam*.

⁵⁸ *Bater v. Bater* [1906] P. (C.A.) 209. See also pp. 368–385, *ante*.

⁵⁹ *Salvesen v. Administrator of Austrian Property* [1927] A.C. 641.

⁶⁰ *Ainslie v. Ainslie* (1927) 39 Commonwealth L.R. 381.

Comment

A divorce granted by a foreign court of competent jurisdiction⁶¹ has in England the same effects as an English divorce. Restrictions imposed by the foreign law on the freedom of the divorced parties, as to marriage or otherwise, which are not imposed by an English divorce, are here inoperative. But in order that a foreign sentence of divorce should be treated as a divorce in England the sentence must be complete and final; the parties to the marriage must under it be actually divorced; it must not be a sentence which has not become complete, but is to become complete at some future date if certain conditions are fulfilled, *e.g.*, if no appeal is made against it within, say, six months. After these conditions are fulfilled, the sentence is final, and the divorce is valid in England; but until they are fulfilled the parties are not in fact divorced; they have not acquired the rights of unmarried persons, and they will not be treated in England as divorced.⁶² The same principle applies to decrees of nullity of marriage, in so far at any rate as decrees based on domicile are concerned.⁶³ Presumably full recognition would be accorded to a judgment of a foreign court adjusting the property rights of the husband and wife on divorce or on declaration of nullity of marriage, as a similar power is freely exercised by the English court.

A foreign decree of judicial separation should on principle be regarded as effective in England, and as a bar to any claim for restitution of conjugal rights. But clearly the question of giving effect to a decree for restitution of conjugal rights could hardly arise.

Subject to the paramount consideration of the welfare of the children, effect would presumably be given in England to a foreign decree dealing with custody of children in connection with matrimonial questions, as a similar power belongs to English courts.⁶⁴

Fraud, collusion or non-disclosure of material facts which does not go to the jurisdiction of the foreign court does not affect the validity of a decree of divorce or presumably of nullity or judicial separation in England.⁶⁵ The proceedings might, of course, be re-opened in the country in which the decree was obtained, but this is not always possible, even if the fraud affected the jurisdiction of the foreign court.⁶⁶

⁶¹ See Rules 71, 72, *ante*

⁶² *Warter v. Warter* (1890) 15 P.D. 152; not followed in *Pezet v. Pezet* (1947) 47 S.R. (N.S.W.) 45, criticised by W. L. Morison in 21 Austr.L.J. 4.

⁶³ *Salvesen v. Administrator of Austrian Property* [1927] A.C. 641.

⁶⁴ *Radoyevitch v. Radoyevitch* [1930] S.C. 619; *Re McKee* [1948] 4 D.L.R. 339.

⁶⁵ *Ante*, pp. 370, 393-394.

⁶⁶ *Acutt v. Acutt* [1936] S.C. 336.

Illustrations

1. H, an Irishman, and W, an Irishwoman, marry in Ireland, where they are domiciled. They afterwards acquire a domicile in Cape Province. While they are there domiciled H is divorced from W by the sentence of a Cape court on account of W's adultery with X. The divorce is, under the law of the Cape, an absolute dissolution of the marriage, but does not allow a husband or wife divorced for adultery to re-marry whilst the injured party remains unmarried. H remains unmarried. X marries W, first at the Cape and afterwards in England. The marriage in England is valid.⁶⁷

2. W and X are respondent and co-respondent respectively in a divorce suit in India, instituted by H, the husband of W. A decree absolute dissolving the marriage of H and W is pronounced under the Indian Divorce Act, 1869, No. IV. S. 57 of that Act provides that the petitioner or the respondent may marry again after a period of six months from the date of the decree, if no appeal has been made, but not sooner. Within six months after the decree dissolving the marriage of H and W, X marries W in England. The marriage is invalid, because W's first marriage was not completely dissolved, whereas, in the previous illustration, W's marriage to H was completely dissolved and, although she was incapacitated from re-marrying for the time being under the colonial law, the incapacity was penal and would not be recognised outside the colony.⁶⁸

3. H is domiciled in Western Australia and there obtains a decree of judicial separation from W. H later acquires a domicile in England. W in England petitions for restitution of conjugal rights. The decree of separation bars the grant of the petition.⁶⁹

(4) JUDGMENT IN MATTERS OF SUCCESSION

RULE 94.⁷⁰—A valid foreign judgment in matters of succession is binding upon, and is to be followed by, the court.

Comment

Immovables.—A judgment as to the succession to immovables by the courts of the foreign country where the immovables are situate is, in so far as its effect can possibly demand the consideration of our judges,⁷¹ binding on English courts.

Movables.—When once the rights of succession to the movables (wherever situate) of a testator, or intestate, who has died domiciled in the view of English law in a foreign country, are determined by a court of that country, English tribunals will follow the decision of the foreign court.

In conformity with the Rule the English courts will grant or refuse probate (or administration *cum testamento annexo*) in

⁶⁷ *Scott v. Att.-Gen.* (1886) 11 P.D. 128.

⁶⁸ *Warter v. Warter* (1890) 15 P.D. 152, not followed in *Pezet v. Pezet* (1947) 47 S.R. (N.S.W.) 45; *Le Mesurier v. Le Mesurier* (1930) 99 L.J.P. 33. As to penal status, see Rule 111, *post*.

⁶⁹ *Ainslie v. Ainslie* (1927) 39 Commonwealth L.R. 381.

⁷⁰ *Doghoni v. Crispin* (1866) L.R. 1 H.L. 301; *Re Trufort* (1887) 36 Ch.D. 600. See as to jurisdiction, Rules 70, 74, 75, pp. 365, 386, *ante*. As regards the extent to which the English courts follow foreign grants of administration, see Rule 105, *post*.

⁷¹ See Chap. 3, Rule 20, p. 141, *ante*. See Rule 126, *post*.

accordance with the judgment of the court of the domicile as to the validity or otherwise of a foreign will.⁷² But the mere possibility of a foreign grant of probate is no bar to an English grant.⁷³ Nor will a probate action normally be stayed in England on the mere ground that a similar proceeding is pending abroad.⁷⁴

Illustrations

1. T, a former British subject, has under the Naturalisation Act, 1870, lost British nationality by being naturalised in Switzerland. He is at his death a Swiss citizen, but is domiciled in France. He leaves A, a son, whose legitimacy is disputed. T has bequeathed all his movables by will to X, which, if A is legitimate, he has not under Swiss law a right to do. Litigation takes place in Switzerland as to the claims of A and X respectively to T's movables. The Swiss court gives judgment (though probably on an erroneous view of English law⁷⁵) that A is legitimate, and entitled under Swiss law to succeed to nine-tenths of T's movables. According to a treaty between France and Switzerland, the right of succession to T depends on T's nationality, and the Swiss judgment is conclusive. T leaves movables in England. An action is brought in England by A to have the Swiss judgment enforced, *i.e.*, in effect, to have a judgment enforced which is held valid by the courts of T's domicile. The Swiss judgment is decisive, and is binding on the High Court.⁷⁶

2. T dies domiciled in Portugal leaving an illegitimate son, A. The Portuguese court gives judgment that A is entitled to part of T's movables. T leaves movables in England. The judgment of the Portuguese court is decisive, and binds the High Court when called upon to determine the right of A to T's movables in England.⁷⁷

3. ARBITRATION AWARDS

RULE 95.—A foreign arbitration award has no direct operation in England, but, if it fulfils the conditions requisite for the validity of a foreign judgment,⁷⁸ it may be enforced by an action at the discretion of the court.⁷⁹

Comment

While authority regarding the right to enforce by action in England a foreign arbitration award is scanty, it seems on principle that such an award duly pronounced in a foreign country, if it fulfils the conditions as to validity affecting foreign judgments,

⁷² See *Hare v. Nasmyth* (1816) 2 Add. 25; *Moore v. Darell* (1832) 4 Hagg.Ecc. 346; *Laneville v. Anderson* (1860) 2 Sw. & Tr. 24; *In Goods of Cosnahan* (1866) L.R. 1 P. & D. 183; *In Goods of Smith* (1868) 16 W.R. 1130; *Müller v. James* (1872) L.R. 3 P. & D. 4; *Re Peat* (1903) 22 N.Z.L.R. 997.

⁷³ *Irwin v. Caruik* [1916] P. 23; *In Estate of Cocquerel* [1918] P. 4.

⁷⁴ *In Goods of Bryan* (1904) 20 T.L.R. 290; compare *Duprez v. Veret* (1868) L.R. 1 P. & D. 583.

⁷⁵ As to mistake of law, see Rule 84, p. 401, *ante*.

⁷⁶ *Re Trufort* (1887) 36 Ch.D. 600.

⁷⁷ *Dogliani v. Crispin* (1866) L.R. 1 H.L. 301.

⁷⁸ See Rules 77-79, pp. 388-398, *ante*.

⁷⁹ *Norske Atlas Insurance Co. v. London, etc. Insurance Co.* (1927) 43 T.L.R. 541.

should be allowed to be enforced by an action, and this principle has been adopted by the legislature.

Illustrations

1. A, a Norwegian company, contracts regarding marine insurance with X, an English company, and agrees that any differences arising out of the contract shall be settled by arbitration at Oslo. The contract and an award duly made under it are valid in Norwegian law. A can recover by action from X the amount of the award, although the contract itself would not have been valid in English law, as it had not been embodied in a stamped policy.⁷⁹

2. An arbitration award is made in Germany against X in favour of A. The award is valid in Germany, but to be enforced requires the order of a court. A cannot recover by action in England the amount awarded in the absence of such an order.⁸⁰

RULE 96.⁸¹—(1) A foreign award

(a) in pursuance of an agreement, not governed by the law of England, to which the Protocol on Arbitration Clauses of September 24, 1923,⁸² is applicable ;

(b) between parties who are subject to the jurisdiction of States which are declared by Order in Council to be parties to the Convention on the Execution of Arbitral Awards of September 26, 1927 ;

(c) in a territory to which the Convention is declared to apply ;

shall be enforceable by action, or under the provisions of the Arbitration Act, 1889, s. 12, *i.e.*, by leave of the court, in the same manner as a judgment or order to the same effect.

(2) Such an award shall be treated as binding for all purposes on the persons as between whom it was made, and may be relied on by way of defence, set-off, or otherwise in any legal proceeding.

(3) To be enforceable an award must have—

(a) been made in pursuance of an agreement for

⁷⁹ *Merrifield Ziegler & Co. v. Liverpool Cotton Association* (1911) 105 L.T. 97. Compare *Bankers' and Shippers' Insurance Co. of New York v. Liverpool Marine and General Insurance Co.* (1924) 19 Ll.L.Rep. 385; 24 *ibid.* (H.L.) 85.

⁸¹ Arbitration (Foreign Awards) Act, 1930; Arbitration Clauses (Protocol) Act, 1924. See Rule 52, Sub-Rule 2, *ante*, p. 322. Cf. *Lorenzen, Chaps. 19 & 20; Graupner*, 59 L.Q.R. 227 (1943).

⁸² See Rule 52. Sub-Rule 2, *ante*.

- arbitration which was valid under the law by which it was governed ;
- (b) been made by the tribunal provided for in the agreement or constituted in manner agreed upon by the parties ;
- (c) been made in conformity with the law governing the arbitration procedure ;
- (d) become final in the country in which it was made ;
- (e) been in respect of a matter which may lawfully be referred to arbitration under the law of England ;

and the enforcement thereof must not be contrary to the public policy or the law of England.

Provided that an award shall not be deemed final if any proceedings for the purpose of contesting the validity thereof are pending in the country in which it was made.

(4) An award shall not be enforceable if the court dealing with the case is satisfied that—

- (a) the award has been annulled in the country in which it was made ; or
- (b) the party against whom it is sought to enforce the award was not given notice of the arbitration proceedings in sufficient time to enable him to present his case, or was under some legal incapacity,⁸³ and was not properly represented ; or
- (c) the award does not deal with all the questions referred or contains decisions on matters beyond the scope of the agreement for arbitration :

provided that, if the award does not deal with all the questions referred, the court may, if it thinks fit, either postpone the enforcement of the award or order its enforcement subject to the giving of such security by the person seeking to enforce it as the court may think fit.

(5) If a party seeking to resist the enforcement of a

⁸³ Presumably capacity would be judged according to the law which was applied by the arbitral tribunal, which is the natural conclusion to be drawn from Art. 2 of the Convention, whence the provisions of the Act are derived.

foreign award proves that there is any ground other than the non-existence of the conditions specified in paragraphs (a), (b) and (c) of s. 3 of this Rule, or the existence of the conditions specified in paragraphs (b) and (c) of s. 4 of this Rule entitling him to contest the validity of the award, the court may, if it thinks fit, either refuse to enforce the award or adjourn the hearing until after the expiration of such period as appears to the court to be reasonably sufficient to enable that party to take the necessary steps to have the award annulled by the competent tribunal.

Comment

The Protocol on Arbitration Clauses of 1923, which has been noted above, is supplemented by the Convention on the Execution of Foreign Arbitral Awards of 1927. Acceptance of the latter Convention is open only to States which are parties to the Protocol. Effect in England, Scotland and Northern Ireland is given to the Convention by the Arbitration (Foreign Awards) Act, 1930, while the States and territories to which the system applies are prescribed by Order in Council from time to time.⁸⁴ The terms of the Act follow closely those of the Convention.⁸⁵

The person seeking to enforce an award must produce the original or a certified copy, and evidence that the award has become final and that it complies with the conditions in s. 3 (a), (b) and (c) of the Rule. The nature of the evidence required may be specified by Rules of Court under section 99 of the Supreme Court of Judicature (Consolidation) Act, 1925. Authenticated translations of any foreign documents must be supplied.⁸⁶

The procedure permitted by the Rule is purely facultative. Its existence does not prejudice any rights which any person would have had of enforcing in England any award or of availing himself of any award if the Act had not been passed. It is therefore still open to bring an action in accordance with Rule 86.

⁸⁴ See S.R. & O. 1930, Nos. 674, 1096; 1931, Nos. 166, 669, 898, 1066; 1932, No. 674; 1933, Nos. 42, 544; 1935, No. 138; 1938, No. 137; 1939, Nos. 152, 1896.

⁸⁵ Section 1 (1) (b) of the Act in terms confines its effect to awards made between persons 'of whom one is subject to the jurisdiction of *some one* of such Powers as His Majesty, being satisfied that reciprocal provisions have been made, may by Order in Council declare to be parties to the said Convention, and of whom the other is subject to the jurisdiction to *some other* of the Powers aforesaid', a restriction achieved apparently in error and not contained in the Convention.

⁸⁶ See *Annual Practice* (1941), pp. 2561-2567.

EFFECT IN ENGLAND OF FOREIGN BANKRUPTCY; FOREIGN GRANT OF ADMINISTRATION

1. FOREIGN BANKRUPTCY ¹

(1) AS AN ASSIGNMENT

Bankruptcy in Ireland ² or Scotland.³

RULE 97.—An assignment of a bankrupt's property to the representative of his creditors ⁴—

(1) under the Irish Bankrupt and Insolvent Act, 1857 ⁵ (Irish Bankruptcy); or

(2) under the Bankruptcy (Scotland) Act, 1913 ⁶ (Scottish Bankruptcy);

is, or operates as, an assignment to such representative of the bankrupt's

(i) immovables (land);

(ii) movables;

wherever situate.⁷

¹ Cheshire, pp. 629-650; Wolff, ss. 531-538; Westlake, pp. 175-178; Nadelmann in (1943) 91 U. of Pa.L.R. 601; (1944) 93 U. of Pa.L.R. 58; (1943-44) 5 U. of Tor.L.J. 324; (1944) 38 American Journal of International Law 470; (1946) 59 Harv.L.R. 1025-1059 (American law); (1945) 67-72 Clunet, 64.

² See the Irish Bankrupt and Insolvent Act, 1857.

³ See the Bankruptcy (Scotland) Act, 1913.

⁴ In Ireland the 'assignees', in Scotland the 'trustee'.

⁵ See ss. 267, 268. See also the Bankruptcy (Ireland) Amendment Act, 1872. This Act still applies to Eire. See *Re Bullen* [1930] Ir.R. 82; *Re Bolton* [1920] 2 Ir.R. 324; *Re Corballis* [1929] Ir.R. 266. But see now *Re Reilly* [1942] Ir.R. 416, 420, 440. Compare *Callender Sykes & Co. v. Colonial Secretary of Lagos and Davies* [1891] A.C. 460, 466, and see above, Rule 54. And see also *Re Sykes* (1932) 101 L.J.Ch. 298.

⁶ See s. 97, with which compare s. 41.

⁷ The same rule applied to a bankruptcy under the Indian Insolvency Act, 1848; see s. 7. See now the Presidency-towns Insolvency Act, 1909, s. 17. And see the Provincial Insolvency Act, 1920. These Acts are not Imperial statutes. Compare *Re Macfadyen & Co.* [1908] 1 K.B. 675; *Official Assignee, Bombay v. Registrar, Small Causes Court, Amritsar* (1910) 26 T.L.R. 353; *Re Lawson's Trusts* [1896] 1 Ch. 175, really fell under the Act, but was decided as if under Rule 99; see *Re Anderson* [1911] 1 K.B. 896. See D. F. Mulla, *Law of Insolvency in British India*, pp. 58-60. Note that the Imperial Act of 1914, in so far as it claims extra-territorial effect, still applies in India: Indian Independence Act, 1947, s. 18 (1).

Comment

As to immovables.—An Irish or Scottish bankruptcy passes to the creditor's representative (conveniently described as the trustee) immovables of the bankrupt situate in any part of British territory. Thus it passes to the trustee lands, *e.g.*, in either part of Ireland, Scotland, England, the Isle of Man, India, or Victoria. It probably also purports to pass⁸ to the trustee immovables of the bankrupt situate in a country, *e.g.*, Italy, which does not form part of British territory, but passes such immovables in so far only as the Italian courts recognise the title of the Irish trustee.

As to movables.—An Irish or Scottish bankruptcy is an assignment to the trustee of the movables, *e.g.*, goods of the bankrupt, situate in any part of British territory, and also in so far as courts acting under the authority of the British Crown can determine the matter, of movables situate in countries not forming part of British territory.

Speaking generally, the statements made in the comment on Rule 54,⁹ with regard to the extra-territorial effect of an English bankruptcy as an assignment, apply with the necessary alterations to the extra-territorial effect of an Irish or Scottish bankruptcy as an assignment.

Bankruptcy¹⁰ in any Foreign Country, except Ireland or Scotland.

RULE 98.—An assignment of a bankrupt's property to the representative of his creditors, under the bankruptcy law of any foreign country,¹¹ other than Ireland or Scotland, is not, and does not operate as, an assignment of any immovables of the bankrupt situate in England. But in a proper case the English courts may authorise the sale of English immovables by such a representative.

⁸ Not, however, in the case of Scotland, for the Bankruptcy (Scotland) Act, 1913, s. 97, distinguishes between the effect of bankruptcy on movable property wherever situate (sub-s. (1)) and real property, confining the trustee's right to real estate situate in British territory (sub-s. (3)).

⁹ See pp. 328–330, *ante*. Compare *Jeffery v. McTaggart* (1817) 6 M. & S. 126. See *Galbraith v. Grimshaw* [1910] A.C. 508; *Singer & Co v. Fry* (1915) 113 L.T. 552.

¹⁰ The word 'bankruptcy', as applied to a foreign country, is here used in its very widest sense, and includes any proceeding, whatever its name, by which, under the authority of a court, the property of an insolvent debtor is distributed among his creditors; a bankruptcy in this wide sense is sometimes described as any 'process of divestiture and concurrence of creditors'. See Goudy, *Law of Bankruptcy in Scotland*, 4th ed., p. 598.

¹¹ For the position of Northern Ireland and Eire, see *ante*, p. 437, note 5.

Comment

No assignment of a bankrupt's property under the bankruptcy law of a foreign country, unless the bankruptcy takes place, as does a Scottish or Irish bankruptcy, under an Act of the Imperial Parliament, operates as an assignment of the bankrupt's immovables, *e.g.*, lands or houses in England, or, indeed, has any effect upon the title to them.

It may, indeed, be laid down in broad terms that, according to the doctrine maintained by English courts, a bankruptcy in one country has no effect as an assignment or otherwise (except, of course, where the bankruptcy takes place under an Act of Parliament) on land in another country.¹² But this statement is a little broader than the facts warrant. It must be admitted that English courts would probably decline to recognise the extra-territorial effect, as an assignment, of a bankruptcy in one country, *e.g.*, Victoria, on land of the bankrupt in another country, *e.g.*, New Zealand, which was given to a Victorian bankruptcy by the *lex situs*, *i.e.*, by an Act of the New Zealand legislature.¹³ However, while there is no provision in any Imperial Act giving extra-territorial validity to Commonwealth Acts as to the vesting of immovables in the trustee of a bankrupt, the requirement in the Bankruptcy Act, 1914, s. 122,¹⁴ that courts throughout the Empire should aid each other in effect enables a bankrupt's immovable property to be made available for his creditors in whatever part of British territory it is situate, subject, of course, to all charges on it valid by the *lex situs*—and subject to the discretion of the court whose aid is sought to determine what assistance ought to be given, to impose conditions and to require undertakings.¹⁵ Moreover, English courts will at their discretion confer authority

¹² See *Cockerell v. Dickens* (1840) 3 Moo. P.C. 98 (decided before the now repealed Indian Insolvency Act, 1848); *Frith v. Wollaston* (1852) 21 L.J.Ex. 108, 109; *Waite v. Bingley* (1882) 21 Ch.D. 674. Compare Rule 54, p. 327, *ante*; and compare *Araya v. Coghill* [1921] 1 Sc.L.T. 321; *Phosphate Sewage Co. v. Lawson* (1878) 5 R. 1125, 1138; *Macdonald v. Georgian Bay Lumber Co.* (1878) 2 S.C.R. 364; *Johnson, Conflict of Laws*, vol. 2, p. 518.

¹³ As regards the recognition among members of the British Commonwealth of the effects of bankruptcy not declared in virtue of an Imperial statute, see *Nadelmann* (1943-44) 5 U. of Tor.L.J., p. 324, at p. 346, citing, in favour of non-recognition, *Hall v. Woolf* (1908) 7 C.L.R. 207, 212; *Ex p. Bettie* (1895) 14 N.Z.L.R. 129; *Anantapadmanabhaswami v. Official Receiver of Secunderabad* [1933] A.C. 394, 398.

¹⁴ Section 122 provides that the bankruptcy courts throughout British territory are to act in aid of and be auxiliary to each other in all matters of bankruptcy, but this enactment is clearly insufficient to compel the courts in the United Kingdom to give effect to Acts passed in British territory purporting to vest real estate beyond the limits of this territory in the trustees in colonial bankruptcies, for enactments of this character are *ultra vires* colonial legislatures. See *MacLeod v. Att.-Gen. for New South Wales* [1891] A.C. 455, 458; *Waite v. Bingley* (1882) 21 Ch.D. 674; *Re Levy's Trusts* (1885) 30 Ch.D. 119, 123-125. But see *Re Osborn* (1931-32) 15 B. & C.R. 189. See also *Re Aylwin's Trusts* (1873) L.R. 16 Eq. 585. As to *Ex p. ante*, p. 437, note 5. See also *Home's Tr. v. Home's Trustees* [1926] Sc.L.T. 214.

¹⁵ *Re Osborn* (1931-32) 15 B. & C.R. 189.

on the trustee under a foreign bankruptcy (arising in a country other than Scotland, Northern Ireland, Eire or any other part of British territory) to sell English immovables and to apply the proceeds to meet claims against the bankrupt.¹⁶ The rule, therefore, approximates in effective result to the result of Rule 99.

RULE 99.¹⁷—An assignment of a bankrupt's property to the representative of his creditors under the bankruptcy law of any foreign country, to whose jurisdiction he is properly subject, whether the bankrupt is domiciled there or not, is or operates as an assignment of the movables of the bankrupt situate in England.

Comment

The general principle of English law seems to be that bankruptcy, or any proceeding in the nature of bankruptcy, in a foreign country, whether the bankrupt is domiciled there or is not, provided that he is properly subject to the jurisdiction of its courts, is an assignment to the trustee, assignees, curators, syndics, or others, who under the law of that country are entitled to administer his property, of all his movables, or, in other words, his chattels personal and choses in action in England, and, it would seem, as far as English courts can deal with the matter, of his movables situate in any other country.¹⁸

This Rule, however, has not been established without a considerable conflict of judicial opinion, it having been suggested in one case,¹⁹ and decided in others,²⁰ that the Rule was applicable only

¹⁶ *Re Kooperman* [1928] B. & C.R. 49; [1928] W.N. 101.

¹⁷ See *Solomons v. Ross* (1764) 1 H.Bl. 131 (n); Wallis-Lyne, *Irish Chancery Reports* (1839) 59 (n); *Jollet v. Deponthieu* (1769) 1 H.Bl. 132 (n); *Neale v. Cottingham* (1770) Finley's *Digest and Index of the Irish Reports* (1830) 36 (n); Wallis-Lyne, *Irish Chancery Reports* (1839) 54; 1 H.Bl. 132 (n); *Alison v. Furnival* (1834) 1 Cr.M. & R. 277; *Re Davidson's Trusts* (1873) L.R. 15 Eq. 383; *Re Lawson's Trusts* [1896] 1 Ch. 175; *Re Anderson* [1911] 1 K.B. 896; *Re Craig* [1916] W.N. 123; 86 L.J.Ch. 62; *Obers v. Paton's Trustee* (1897) 24 R. 719, 732; *Home's Trustee v. Home's Trustees* [1926] Sc.L.T. 214; *Williams v. Rice* [1926] 3 D.L.R. 225, 249. See Nadelmann (1946) 9 Mod.L.Rev. 154-168 for an exhaustive discussion of *Solomons v. Ross*. And see Nadelmann, 'Legal Treatment of Foreign and Domestic Creditors' in *Law and Contemporary Problems*, Vol. 11, No. 4 (1946), pp. 696-712, at p. 701, and (1948) 91 U. of Pa.L.Rev. 601.

¹⁸ See especially, Westlake, s. 134, pp. 175, 176.

¹⁹ *Re Artola Hermanos* (1890) 24 Q.B.D. (C.A.) 640; which, however, is not a decision on this point.

²⁰ *Re Blithman* (1866) L.R. 2 Eq. 23; followed *Re Hayward* [1897] 1 Ch. 905. Neither case is conclusive. See, on the other hand, *Re Davidson's Settlement Trusts* (1873) L.R. 15 Eq. 383; *Re Lawson's Trusts* [1896] 1 Ch. 175; *Re Anderson* [1911] 1 K.B. 896, 901, per Phillimore, J.; *Re Craig* (1917) 86 L.J.Ch. 62, per Eve, J.; *Re Burke* (1919) 54 L.Jo. 430; *Bergerem v. Marsh* [1921] B. & C.R. 195; *Macaulay v. Guaranty Trust Co. of New York* (1927) 44 T.L.R. 99.

to the case of a bankruptcy in the country of the bankrupt's domicile. This distinction, however, was obviously out of harmony with the practice of the English Bankruptcy Court whose jurisdiction to adjudicate a debtor a bankrupt was not confined to persons domiciled in England,²¹ and there is now a clear balance of judicial opinion in favour of the Rule as stated above.²²

The Scottish and Irish Acts define who may be adjudicated bankrupt and are binding on the English courts as being Imperial Acts. Moreover, as regards bankruptcies in British territory overseas, English courts must act in aid of the local bankruptcy courts,²³ but any unreasonable extension of jurisdiction would result in refusal to give effect to the bankruptcy in England.

The effect in England of the assignment of a debtor's property under the bankruptcy law of a foreign country is subject to certain limitations :—

(1) The assignment, of course, only takes place if under the law of the foreign bankruptcy provision is made for the extra-territorial effect of the bankruptcy. Moreover, the assignment will only apply in England to such movable property as, had it been situate in the foreign country, would have passed to the representative of the creditors to be administered for their benefit.

(2) The property in England passes subject to any existing charges upon it recognised by the law of England, even if these charges would be postponed under the law of the place of bankruptcy to the claim of the creditors, and even if under an English bankruptcy the charges would be defeated by the title of the trustee in bankruptcy.²⁴

²¹ See Rule 54, p. 327, *ante*.

²² It is assumed that the foreign court in adjudicating a debtor bankrupt does not extend its jurisdiction to cases beyond those recognised as being within the sphere of jurisdiction in bankruptcy of the English court. On this subject, in the absence of authority, it is impossible to frame any definite rules defining the extent of jurisdiction admitted to belong to foreign courts parallel to Rules 40–42, *ante*. In the cases cited in note 20, *ante*, and in *Re Kooperman* [1928] B. & C.R. 49, the debtor fell within the jurisdiction of the foreign court by submission in one form or other, or by having been a member of a bankrupt partnership: *Bergerem v. Marsh* [1921] B. & C.R. 195. Probably English courts would decline to recognise foreign bankruptcy proceedings against persons who were not connected with the foreign country in virtue of personal presence, submission (*semble*) or in circumstances similar to those enumerated in s. 1 (2) (b)–(d) of the Bankruptcy Act, 1914. Compare Wolff, s. 536; Schmitthoff, p. 254, and see *Re Anderson* [1911] 1 K.B. 896, at p. 902. It may be doubted whether the courts would recognise foreign bankruptcy proceedings against a non-resident on the sole ground that he has property within the jurisdiction: American Bankruptcy Act, 1898, s. 2. Compare *Re Artola Hermanos* (1890) 24 Q.B.D. (C.A.) 640, 649. The courts will not question a foreign adjudication on any grounds of irregularity of proceedings or insufficiency of evidence: *Williams v. Rice* [1926] 3 D.L.R. 225, 247; *Brand v. Green* (1900) 13 Man.L.R. 101. In the Indian legislation the English restrictions are closely followed; see D. F. Mulla, *Law of Insolvency in British India*, pp. 62–66.

²³ Bankruptcy Act, 1914, s. 122; *Re Firbank, Ex p. Knight* (1887) 4 Mor. 50; *Re Sykes* [1931–32] B. & C.R. 215.

²⁴ Compare *Galbraith v. Grimshaw* [1910] 1 K.B. (C.A.) 399; affirmed [1910] A.C. 508, which refers to a Scottish bankruptcy, and applies *a fortiori* to a

(3) Whether property in England is movable or immovable falls to be determined wholly by English law. Thus heirlooms, title deeds and other things held by English law to be immovables would not, if situate in England, pass under their owner's bankruptcy in New York to the American assignee.²⁵

(4) The fact that a foreign bankruptcy acts as an assignment of movables of the debtor situate in England does not affect in any way the right of the English courts to adjudicate bankrupt any debtors falling within the terms of the Bankruptcy Act, 1914, and these courts will exercise the right at their discretion as may seem most advisable in the interest of the collection of the bankrupt's estate for the benefit of his creditors.²⁶

(5) It has been disputed how far the trustee in a foreign bankruptcy can sue in that capacity for choses in action in England,²⁷ but he can make his title secure by obtaining an assignment from the debtor,²⁸ and it may probably be assumed that, on proof that receivers or assignees in bankruptcy have under the law of the country in which they have been appointed the right to sue in their own names for choses in action, an English court will recognise their right thus to sue in England.²⁹

(6) The execution of a deed of assignment in a foreign country by a debtor domiciled there may be an act of bankruptcy in the meaning of section 1 (1) of the Bankruptcy Act, 1914, if it is to operate in England, but it is not to be treated on the same footing as a foreign adjudication. The deed must be registered in accordance with the Deeds of Arrangement Act, 1914, in order to be effective in England.³⁰

foreign bankruptcy: *Singer & Co v. Fry* (1915) 113 L.T. 552; *Levasseur v. Mason and Barry, Ltd.* [1891] 2 Q.B. 73; *Goetze v. Aders* (1874) 2 R. 150; *Hunter v. Palmer* (1825) 3 S. 586. Compare *Anantapadmanabhaswami v Official Receiver of Secunderabad* [1933] A.C. 394, 398. See Nadelmann in (1944) 38 American Journal of International Law. 470, and in *Law and Contemporary Problems*, Vol. 11, No. 4 (1946), pp. 696 ff. at p. 701.

²⁵ See Chap. 21, Rule 126, p. 521, *post*. English law also decides whether choses in action created in England and governed by English law are property of the debtor for the purposes of bankruptcy. *Re Sawtell, Ex p. Bank of Montreal* [1933] 2 D.L.R. 392.

²⁶ See *Re Artola Hermanos* (1890) 24 Q.B.D. (C.A.) 640, 643, 644, judgment of Coleridge, C.J.; *Ex p. McCulloch* (1880) 14 Ch.D. (C.A.) 716; *Ex p. Robinson* (1883) 22 Ch.D. (C.A.) 816; *Re a Debtor* (737 of 1928) [1929] 1 Ch. 362.

²⁷ See *Jeffery v. McTaggart* (1817) 6 M. & S. 126; *Wolff v. Ozholm*, *ibid.* 92, 99; denying the right to sue, against *Smith v. Buchanan* (1800) 1 East 6; *O'Callaghan v. Thomond* (1810) 3 Taunt. 81; *Alvon v. Furnival* (1834) 1 C.M. & R. 277; Story, s. 565.

²⁸ See Judicature Act, 1873, s. 25 (6); now Law of Property Act, 1925, s. 136. It is clear that, as in the case of a foreign administrator, a foreign trustee in bankruptcy is not normally liable to suit because temporarily in England in his capacity as trustee, though it might be otherwise if by remaining out of his due place of administration he were seeking to defeat the just claims of creditors: see *Smith v. Moffatt* (1865) L.R. 1 Eq. 397.

²⁹ *Macaulay v. Guaranty Trust Co. of New York* (1927) 44 T.L.R. 99.

³⁰ Compare *Dulaney v. Merry & Son* [1901] 1 K.B. 536. The assignment here was held on the interpretation of the Bankruptcy Act, 1883, not to require registration under the Deeds of Arrangement Act, 1887. Dicey believed that

Illustrations

1 A debtor domiciled in Amsterdam stopped payment there on December 18, 1759. On January 2, 1760, he was declared bankrupt by the proper court there, and a curator or assignee of his property was appointed. On December 20, 1759, X, a creditor of the bankrupt, made affidavit in the Mayor's Court at London, and attached £1,200 in the hands of M, a debtor of the bankrupt. On March 8, 1760, X obtained judgment against M, and issued execution against M, who, being unable to pay, gave a note for £1,200 payable in a month. On March 12, A, the Dutch assignee, claimed the £1,200. It was held that the title of A as assignee was superior to that of X, the attaching creditor.³¹

2 A is appointed receiver under a bankruptcy in the State of Delaware X, a branch in London of a New York bank, is in possession of funds belonging to the bankrupt. A in Delaware can sue in his own name for the bankrupt's choses in action. A may similarly sue X for the bankrupt's funds.³²

English and Foreign Bankruptcy.

RULE 100.³⁴—Where a debtor has been made bankrupt in more countries than one, and, under the bankruptcy law of each of such countries, there has been an assignment of the bankrupt's property, which might, under any of the foregoing Rules,³⁵ operate as an assignment of his property in England, effect will be given in England to that assignment which is earliest in date.

Comment

(1) This Rule holds good when the earliest of several bankruptcies takes place within the United Kingdom.

(2) The Rule probably holds good where the earliest of several bankruptcies, and the assignment under it, takes place in a country

in view of the new provisions of the Bankruptcy Act of 1914 it would require registration under the Deeds of Arrangement Act, 1914, unless the debtor were not within the terms of Rule 40 (2), *ante*. It is believed, however, that the jurisdictional provisions of the Bankruptcy Act, 1914, have no bearing upon the question in what circumstances a foreign deed of arrangement must be registered in England in order to safeguard the title of the trustees. See *ante*, Chap. 7, p. 280, n. 12. And see *Re Nelson*, *ex p. Dare and Dolphin* [1918] 1 K.B. 456, 469, 476, 477.

³¹ *Solomons v. Ross* (1764) 1 H.Bl. 181 (n). The case was decided without reference to domicile. See *Loughborough, L.*, in *Folliott v. Ogden* 1 H.Bl. 192. The claim of the attaching creditor would (*semble*) now be preferred. *Ante*, p. 441, note 24; p. 440, note 17. Compare *Odwin v. Forbes* (1817) Buck 57, 59.

³² *Macaulay v. Guaranty Trust Co. of New York* (1927) 44 T.L.R. 99. In that case the bankrupt was a corporation.

³⁴ *Geddes v. Mowat* (1824) 1 Gl. & J. 414; *Re O'Reardon* (1873) L.R. 9 Ch. 74. Compare *Ex p. McCulloch* (1880) 14 Ch.D. (C.A.) 716; and *Ex p. Robinson*, (1888) 22 Ch.D. (C.A.) 816. See the Bankruptcy Act, 1914, s. 12, as to the power of a court to deal with cases where a receiving order has been made by a court against a debtor whose estate ought to be distributed under Irish or Scottish bankruptcy law. And see to the same effect: *Bankruptcy* (Scotland) Act, 1913, s. 43. Compare *Re Clarke & Co.* [1928] 1 D.L.R. 718; *Re Temple* [1947] Ch. 345.

³⁵ See Rule 54, p. 327, *ante*; Rules 97-99, *ante*.

beyond the limits of the United Kingdom, *e.g.*, Victoria³⁶ or France.

Illustrations

1. On January 1 a debtor is adjudicated bankrupt in Northern Ireland, and his property thereupon passes, or is assigned, to the Northern Irish assignees, and this whether his property is situate in Northern Ireland or in England. On January 2 he is adjudicated bankrupt in England, and his property (if any) passes or is assigned to the English trustee, but it is in reality the assignment under the Northern Irish bankruptcy which operates in England; for by January 2 the immovables or movables, which were the property of the bankrupt on December 31, have on January 1 ceased to belong to him, and have been vested in the Northern Irish assignees. These immovables or movables, therefore, cannot on January 2 pass to the English trustee as property of the bankrupt.^{36a}

2. N is adjudicated bankrupt in England in 1927 and never discharged. In 1942 he is adjudicated bankrupt in India and discharged in 1945. In 1944 he becomes entitled to property in England under his mother's will. The property passes to the trustee in N's English bankruptcy.³⁷

3. N, while resident, but not domiciled in New Zealand, is made bankrupt, and in due course receives his discharge. Later in England he is again made bankrupt, and it appears that he has a reversionary interest in a trust fund, which is situate in England and which he omitted to disclose to A, the trustee in his New Zealand bankruptcy. X, the trustee in the English bankruptcy, gives notice of a claim to the interest to the trustee of the fund. A has a superior claim to the bankrupt's interest in the fund.^{37a}

(2) AS A DISCHARGE

RULE 101.³⁸—A discharge from any debt or liability under the bankruptcy law of a foreign country is a discharge therefrom in England if it is a discharge under the proper law of the contract.³⁹

Comment

Dicey stated that it was difficult to discover the basis on which rest the rules as to the extra-territorial effect of a discharge in bankruptcy, or in other words that it was difficult to discover in what circumstances an English court must recognise a discharge

³⁶ See *Re Anderson* [1911] 1 K.B. 896; contrast *Re Macfadyen & Co.* [1908] 1 K.B. 675; *Re a Debtor* (737 of 1928) [1929] 1 Ch. 362.

^{36a} Priority, for the purpose of this Rule, depends on the date of the assignment, and not on the date of the commission of the act of bankruptcy. See *Geddes v. Mowat* (1824) 1 Gl. & J. 414. It should be noted that, as regards a Scottish bankruptcy, though it is the act and warrant of confirmation which vests the bankrupt's property in the trustee, it is then vested as at the date of the sequestration. See Bankruptcy (Scotland) Act, 1913, ss. 97 and 41. But see *Re a Debtor* [1922] 2 Ch. 470 (C.A.).

³⁷ *Re Temple* [1947] Ch. 345.

^{37a} See *Re Anderson* [1911] 1 K.B. 896.

³⁸ Story, ss. 331-340; Westlake, ss. 240-242 a; Foote, pp. 483, 484; Cheshire, pp. 648-650. See Rule 54, p. 327, *ante*.

³⁹ As to the meaning of 'proper law of the contract' see Rule 136, *post*; as to discharge, see Rule 148, *post*.

from any debt or liability under a foreign bankruptcy law.⁴⁰ The solution, he pointed out, depends upon the answer to the question whether a discharge must be regarded (1) as a command given by the sovereign of a country to the courts thereof that they shall treat the *person* of the bankrupt debtor as freed from liability for his debts, or (2) as a mode of terminating liability under a contract. In the first case the discharge is limited to the territory of the sovereign who issues the command; in the second, the recognition of the foreign discharge depends upon whether the law under which the debtor is made bankrupt is also the law which governs the liability under the contract. This distinction must be accepted, but it does not provide a final solution. The question whether a foreign discharge bars the remedy or destroys the right, is a question of characterisation. If the discharge has only procedural effects, English courts will not recognise it; if the discharge in the foreign bankruptcy affects the substance of the liability, it remains necessary to determine under what system of law the liability must have terminated before the discharge can be recognised in England. Dicey stated that the relevant rule of English conflict of laws 'is well established, but there has been some little doubt as to its exact extent'.⁴¹ He held that a discharge of a debt under the bankruptcy law of the country where it was made payable (*lex loci solutionis*) was clearly a valid discharge in England,⁴² and that if no definite place was fixed for performance, a discharge would *prima facie* be valid only if granted under the law of the place where the contract was made (*lex loci contractus*).⁴³ He admitted that if a discharge in bankruptcy were to be regarded as destroying the right, 'the extra-territorial operation of a discharge in bankruptcy must depend on the result of the inquiry whether the law under which the debtor is made bankrupt is also the proper law of the contract',⁴⁴ but he doubted whether the discharge was only effective if it depended 'wholly upon the proper law of the contract under which the liability from which a bankrupt is discharged has arisen'.⁴⁵ He found that English courts had frequently asserted 'that the discharge of a debt under the bankruptcy law of the country where the debt is incurred (*lex loci contractus*) is a valid discharge in England'.⁴⁶ He believed, however, that in these cases 'the place where the debt is incurred is the place where it should be discharged',⁴⁷ and that where difficulties had arisen because the *lex loci contractus* and the *lex loci solutionis* were different, these difficulties were due to the doubt whether the *lex loci solutionis* or

⁴⁰ 5th ed., Appendix, Note 18.

⁴¹ 5th ed., p. 503, Rule 126, Comment; Appendix, Note 18, p. 947.

⁴² 5th ed., p. 505, Rule 126, Comment; Appendix, Note 18, pp. 948, 949.

⁴³ 5th ed., p. 505, Rule 126, Comment.

⁴⁴ Appendix, Note 18, p. 948.

⁴⁵ Appendix, Note 18, p. 947.

⁴⁶ 5th ed., p. 503, Rule 126, Comment.

⁴⁷ *Ibid.*, p. 504.

the *lex loci contractus* was the proper law of the contract.⁴⁸ It is equally justifiable to ask whether Dicey's own difficulties were not due to doubts on his part which of the two, the *lex loci contractus* or the *lex loci solutionis*, was the proper law of the contract. For, in his own words: 'the validity in England of the discharge from a contract under the bankruptcy law of a foreign country depends, as does the validity of every other discharge, on its being a discharge under the proper law of the contract'.⁴⁹

An examination of the practice of the English courts leads to the following conclusions:

(1) From an early date onwards a discharge of a debt under the bankruptcy law of the country which governs the debt has been treated as a valid discharge in England,⁵⁰ but in accordance with the view held in the past the law of the country where the debt was contracted (*lex loci contractus*) was regarded as the proper law of the contract.⁵¹

(2) A discharge under a law other than the proper law is not recognised in England.⁵²

(3) A discharge under an Imperial statute is recognised no matter where the debt was contracted,⁵³ but a discharge under a local colonial statute which has no extra-territorial effect is not recognised, unless the local law is also the proper law of the contract.⁵⁴

(4) A discharge under the English law of bankruptcy is a valid discharge in England, no matter whether English law is the proper law of the contract or not.⁵⁵

The discharge from any liability which does not arise from a contract, e.g., liability to pay damages for a tort, under the

⁴⁸ Appendix, Note 18, pp. 948-49.

⁴⁹ 5th ed., p. 507, Rule 127, Comment.

⁵⁰ *Burrows v. Jemino* (1726) 2 Stra. 733; *Ballantine v. Golding* (1783), Cooke, *Bankrupt Laws* (8th ed.) 487; *Potter v. Brown* (1804) 5 East 124; *Quelin v. Moisson* (1827) 1 Knapp P.C. 265 (n.); *Odwin v. Forbes* (1817) Buck 57; *Gardiner v. Houghton* (1862) 2 B. & S. 743; *Ellis v. M'Henry* (1871) L.R. 6 C.P. 228, 234; *Gibbs v. Société Industrielle et Commerciale des Métaux* (1890) 25 Q.B.D. 399, 405 (C.A.) Compare *Rose v. McLeod* (1825) 4 S. 311.

⁵¹ See in particular *Potter v. Brown* (1804) 5 East 124; *Gardiner v. Houghton* (1862) 2 B. & S. 743; *Ellis v. M'Henry* (1871) L.R. 6 C.P. 228. The place where the debtor resides is not decisive: see *Ballantine v. Golding* (*supra*) and compare *Pedder v. McMaster* (1800) 8 T.R. 609; Story, s. 342.

⁵² *Smith v. Buchanan* (1800) 1 East 6.

⁵³ *Royal Bank of Scotland v. Guthbert* (1813) 1 Rose 462, 486; *Philpotts v. Reed* (1819) 1 Br. & B. 294; *Sidaway v. Hay* (1824) 3 B. & C. 12; *Ferguson v. Spencer* (1840) 1 Man. & G. 987; *Edwards v. Ronald* (1830) Knapp P.C. 259; *Gill v. Barron* (1868) L.R. 2 P.C. 157; *Simpson v. Mirabita* (1869) L.R. 4 Q.B. 257; *Ellis v. M'Henry* (1871) L.R. 6 C.P. 228; and compare *Phillips v. Allan* (1828) 8 B. & C. 477; *Armani v. Castrique* (1844) 13 M. & W. 443, 447, per Pollock, B.

⁵⁴ *Quin v. Keefe* (1795) 2 H.B.L. 554; *Lewis v. Owen* (1821) 4 B. & Ald. 654; *Phillips v. Allan* (1828) 8 B. & C. 477; *Bartley v. Hodges* (1861) 1 B. & S. 375. See post, Rule 102. For India see *Lakshmiram Kavalram v. Poonamchand Pitamber* (1921) 45 Bom. 550.

⁵⁵ It is irrelevant where the debt is to be paid or to be satisfied. See post, Rule 103.

bankruptcy law of the country where the liability has arisen (*lex loci delicti commissi*) is a valid discharge in England.⁵⁶

A discharge, be it noted, cannot have a greater extra-territorial effect than it has under the law of the country where it is obtained, even in those cases where discharges operate extra-territorially by virtue of Imperial legislation (Rule 103). A bankruptcy, *e.g.*, in Scotland, will in no case free a debtor in England from any liability from which he is not discharged under the Scottish bankruptcy law; nor, conversely, will an English bankruptcy free him in Scotland from any debt from which he is not discharged under the English Bankruptcy Act.⁵⁷

A discharge, again, under the law of a foreign country, will not operate in England unless it is an extinction of the debt or liability; if, in the country where it is obtained, it interferes merely with the remedies or the procedure for enforcing the bankrupt's liabilities, it will not be a discharge in England.⁵⁸

Illustrations

1. X incurs a debt to A in Victoria for goods there sold and delivered by A to X. Afterwards X obtains a discharge under the Victorian insolvency law. The discharge is an answer to an action for the debt in England.⁵⁹

2. A bill is drawn in one of the United States by X in favour of A on a person in England. It is dishonoured by non-acceptance. The drawer is discharged in America under the bankruptcy law there in force. The discharge is valid in England.⁶⁰

RULE 102.⁶¹—Subject to Rule 103, the discharge from any debt or liability under the bankruptcy law of a foreign country is not a discharge therefrom in England if it is not a discharge under the proper law of the contract.

Comment

The effect of Rules 101 and 102 is, that the validity in England of the discharge from a contract under the bankruptcy law of a foreign country depends (in so far as the case does not fall within

⁵⁶ See *Phillips v. Eyre* (1870) L.R. 6 Q.B. 1, 28, compared with *Ellis v. M'Henry* (1871) L.R. 6 C.P. 228, 234, and *Westlake*, s. 240.

⁵⁷ For such debts, see Bankruptcy Act, 1914, s. 30.

⁵⁸ See *Ellis v. M'Henry* (1871) L.R. 6 C.P. 228, 238; and *Story*, s. 338. Compare *Frith v. Wollaston* (1852) 21 L.J.Ex. 108; *Ex p. Burton* (1744) 1 Atk. 255; *Phillips v. Allan* (1828) 8 B. & C. 477.

⁵⁹ *Gardiner v. Houghton* (1862) 2 B. & S. 748; *Quelin v. Moisson* (1827) 1 Knapp, P.C. 265 (n.); *Smith v. Buchanan* (1800) 1 East 6; *Potter v. Brown* (1804) 5 East 124.

⁶⁰ *Potter v. Brown* (1804) 5 East 124. Compare *Symons v. May* (1851) 6 Ex. 707; 20 L.J.Ex. 414.

⁶¹ *Gibbs v. Société Industrielle* (1890) 25 Q.B.D. (C.A.) 399, 406; *Ellis v. M'Henry* (1871) L.R. 6 C.P. 228, 234; *Smith v. Buchanan* (1800) 1 East 6; *Lewis v. Owen* (1821) 4 B. & Ald. 654; *Phillips v. Allan* (1828) 8 B. & C. 477; *Bartley v. Hodges* (1861) 1 B. & S. 375; *Taylor v. Holland* [1902] 1 K.B. 676, 682.

Rule 103), as does the validity of every other discharge, on its being a discharge under the proper law of the contract. But it should be borne in mind that, in determining the extra-territorial effect of a discharge in bankruptcy as in other matters, the courts during the formative period of the rules of the conflict of laws were ready to assume in cases of doubt that the law of a country where a contract was made (*lex loci contractus*) was the proper law of the contract.⁶²

Illustrations

1. X, a Frenchman domiciled in France, makes a contract with A, an Englishman, for the purchase of copper. The copper is, under the contract, to be delivered by A to X at Liverpool, and X is to pay for it in London. The contract, moreover, is made subject to the rules of the London Metal Exchange. X makes default in accepting the copper, and afterwards obtains in France from a French court a discharge in bankruptcy or liquidation. Such a discharge frees X under French law from liability for the breach of the contract. A brings an action against X in England for breach of contract. The discharge under the French bankruptcy is not an answer to the action, *i.e.*, it is not a valid discharge.⁶³

2. A draws, and X accepts, a bill in England, and X also borrows money from and states accounts with A in England. X after this becomes bankrupt in Victoria, and obtains his discharge under the Victorian bankruptcy laws. A brings an action in England against X on the bill for money lent and on the accounts stated. The discharge in Victoria is not a defence to the action, *i.e.*, it is not a valid discharge.⁶⁴

RULE 103.⁶⁵—A discharge from any debt or liability under a Bankruptcy Act of the Imperial Parliament, and hence under—

- (1) an English bankruptcy⁶⁶; or
- (2) an Irish bankruptcy⁶⁷; or

⁶² The bankrupt's domicile has no bearing on the extra-territorial effect of a discharge. See *Gibbs v. Société Industrielle* (1890) 25 Q.B.D. (C.A.) 399, 407, 410, compared with *Gardner v. Houghton* (1862) 2 B. & S. 743. Cf pp. 440, 441, *ante*. As to the meaning of 'proper law of the contract', see Rule 136, *post*; as to discharge, see Rule 143, *post*.

⁶³ *Gibbs v. Société Industrielle, etc.* (1890) 25 Q.B.D. (C.A.) 399.

⁶⁴ *Bartley v. Hodges* (1861) 1 B. & S. 375.

⁶⁵ Westlake, ss. 241-242 a; Cheshire, pp. 639-40; *Ellis v. M'Henry* (1871) L.R. 6 C.P. 228; *Gill v. Barron* (1866) L.R. 2 P.C. 157, 175, 176; *Odwin v. Forbes* (1817) Buck. 57; *Ferguson v. Spencer* (1840) 2 Scott N.R. 229; 1 M. & G. 987; *Edwards v. Ronald* (1880) 1 Knapp, P.C. 259; *Sidaway v. Hay* (1824) 3 B. & C. 12; *Royal Bank of Scotland v. Cuthbert* (1813) 1 Rose 462, 486; *Philpotts v. Reed* (1819) 1 Br & Bing. 294. This case is specially instructive, as the discharge, though directly under an Imperial Act of Parliament enacted for Newfoundland (not now operative), was a colonial discharge. But Rule 103 does not apply to a discharge under a winding-up order within the Companies Act, 1948. See Rule 56, p. 333, *ante*. As regard Eire, see Rule 97, p. 437, note 5, *ante*.

⁶⁶ *I.e.*, under the Bankruptcy Act, 1914. See Rule 55, p. 333, *ante*.

⁶⁷ *I.e.*, under the Irish Bankrupt and Insolvent Act, 1857. See also the Bankrupt (Ireland) Amendment Act, 1872; *Simpson v. Mirabita* (1869) L.R. 4 Q.B. 257; contrast *Quin v. Keefe* (1795) 2 H.Bl. 554; *Lewis v. Owen* (1821) 4 B. & Ald. 654 (decided under an Irish Act).

(3) a Scottish bankruptcy,⁶⁸ is, in any British territory, a discharge from such debt or liability, wherever, or under whatever law, the same is to be paid or satisfied.⁶⁹

Comment

An Act of the Imperial Parliament discharging a debtor from a debt takes effect throughout the whole of the Crown's territories, and a discharge under such an Act is valid in every part of British territory, and this irrespective of the question where it is that the debt or other liability ought to be paid or discharged, or what may be the proper law of the contract under which it has been incurred.⁷⁰ A discharge, therefore, under the English Bankruptcy Act, 1914, is a valid discharge, *e.g.*, in Scotland or in Victoria, of debts or liabilities incurred, whether in Scotland, or in Victoria, or elsewhere; whilst a discharge under the Scottish Bankruptcy Act,⁷¹ or under the Irish Bankruptcy Act, is a valid discharge, *e.g.*, in England or in Victoria, of debts or liabilities wherever incurred.

Rule 103, combined with Rule 102, leads to the result that a discharge under an English Bankruptcy Act is, in Victoria, a discharge from a debt payable in Victoria or elsewhere, whilst a discharge under a Victorian Bankruptcy Act is not in England a discharge unless it is a discharge under the proper law of the contract.

Question 1.—Is the discharge under the bankruptcy law of a foreign country impeachable in England on the ground that the courts of the foreign country had no jurisdiction to make the debtor a bankrupt?

The reply must, it is submitted, be in the negative.

If the bankruptcy takes place in Ireland or Scotland, it is

⁶⁸ *I.e.*, under the Bankruptcy (Scotland) Act, 1913. See especially, ss. 137, 143, 144.

⁶⁹ Formerly, like effect belonged to a discharge under the Indian Insolvency Act, 1848, s. 60. But see p. 437, note 7, *ante*; D. F. Mulla, *Law of Insolvency in British India*, p. 280.

⁷⁰ *Ellis v. M'Henry* (1871) L.R. 6 C.P. 228, 234-236; *Sidaway v. Hay* (1824) 3 B. & C. 12 (Scottish bankruptcy); *Ferguson v. Spencer* (1840) 1 M. & G. 987 (Irish bankruptcy); *Simpson v. Mirabita* (1869) L.R. 4 Q.B. 257; *Gill v. Barron* (1868) L.R. 2 P.C. 157, 175, 176, *per curiam*. For the effect in India, compare s. 18 (1) of the Indian Independence Act, 1947.

⁷¹ The Scottish Bankruptcy Act, 1913, ss. 137, 144, specially provides that a discharge under the Act shall have effect throughout the territories of the Crown. The English and Irish Bankruptcy Acts do not contain a similar provision, but the effect of a discharge under either of them is none the less extensive. A composition with creditors under the Irish Act, ss. 343-347, has no such effect. *Re Nelson, Ex p. Dare and Dolphin* [1918] 1 K.B. (C.A.) 456. So formerly in the case of the now obsolete Scottish *cessio bonorum*: *Phillips v. Allan* (1828) 8 B. & C. 477.

extremely doubtful whether an English court can question the jurisdiction of the Irish or Scottish Bankruptcy Court.⁷²

If the bankruptcy takes place in a country outside the United Kingdom, *e.g.*, in Victoria or New York, then, if the discharge is to operate in England at all, the debtor must have been relieved from liability to pay his debt under the proper law of the contract, and, this being so, the discharge ought to be operative in England independently of the jurisdiction of the foreign court to make the debtor a bankrupt.

Question 2.—Can a discharge under the bankruptcy law of a foreign country be impeached in England for fraud?

The answer apparently is that it can. The grounds on which a foreign judgment, even when given by a court of competent jurisdiction, is impeachable for fraud⁷³ seem equally applicable to a discharge in bankruptcy.

2. FOREIGN GRANT OF ADMINISTRATION

RULE 104.⁷⁴—A grant of administration or other authority to represent a deceased person under the law of a foreign country has no operation in England.

This Rule must be read subject to the effect of Rules 108 to 110.

Comment

A foreign representative of the deceased who wishes to represent him in England must obtain a grant of administration here, and cannot in general sue or be sued here in his character of foreign personal representative.⁷⁵ Our Rule is, in short, an application of the general principle that no person will be recognised by English courts as personal representative of the deceased unless and until he has obtained an English grant of probate or letters of administration; if anyone acts in a manner only open to a personal representative he incurs all the liabilities, but none of the privileges,

⁷² See p. 331, *ante*, as to the analogous question, whether any court in British territory can question the jurisdiction of an English Bankruptcy Court.

⁷³ See Rule 78, *ante*, p. 390.

⁷⁴ *Carter and Crost's Case* (1585) Godb. 38; *Tourton v. Flower* (1735) 3 P. Will. 368, 370; *Att.-Gen. v. Cockerell* (1814) 1 Price, 165, 179; *Bond v. Graham* (1842) 1 Hare, 482; *In Goods of Murray* (1867) 16 L.T. 266; *Partington v. Att.-Gen.* (1869) L.R. 4 H.L. 100; *Eames v. Hacon* (1881) 18 Ch.D. 347, 349, 353; *New York Breweries Co., Ltd. v. Att.-Gen.* [1899] A.C. 62; *Re Vallance* (1888) 24 Ch.D. 177; *Re Lawson's Trusts* [1896] 1 Ch. 175. The same rule applies at common law in America. It was there recognised as early as 1648: *Goodwin v. Jones*, 3 Mass. 514; *Goodrich*, s. 182. For a curious departure from the rule in Ontario: *Re Green and Platt* (1913) 29 O.L.R. 103; *National Trust Co. v. Mendelson* [1942] 1 D.L.R. 488; see Falconbridge, Chap. 27.

⁷⁵ As to this, see Rule 107, p. 458, *post*.

of such a representative.⁷⁶ It contrasts curiously with the fact that, *e.g.*, in England a trustee in bankruptcy has his title recognised as a matter of course, but it has been justified as the most effective means of securing the interests of local creditors. But the Rule does not operate to prevent an executor bringing an action⁷⁷ or obtaining payment of a legacy⁷⁸ before a grant of probate, nor to prevent a suit against an executor,⁷⁹ for his title derives ultimately from the will and not from the grant.⁸⁰

Illustrations

1 An Englishman dies intestate domiciled in New York leaving goods there. A takes out administration in New York. X, in England, owes a debt to the deceased. A cannot bring an action in England against X until he has obtained an English grant of administration.⁸¹

2 An Englishman dies at Geneva, where his will is proved. A is X's personal representative under the law of Geneva. A sum of £34 is due to the deceased, and has been paid into court. A has not taken out probate in England. He applies for payment of the £34. Payment is refused.⁸²

RULE 105.⁸³—Where a person dies domiciled in a foreign country, leaving movables in England, the court will in general make a grant⁸⁴ to his personal representative under the law of such foreign country.

Comment

A foreign personal representative has, as such, no authority in England; but our courts recognise the primary, though certainly not the exclusive,⁸⁵ jurisdiction of the courts of a deceased person's

⁷⁶ See as to executor *de son tort*, *New York Breweries Co. v. Att.-Gen.* [1899] A.C. 62.

⁷⁷ *Hornsgold v. Bryan* (1615) 3 Bulst. 72.

⁷⁸ *Re Dacre* [1916] 1 Ch. 344, 346.

⁷⁹ *Blewitt v. Blewitt* (1832) Younge 541.

⁸⁰ See Rule 48, *ante*, p. 297.

⁸¹ *Carter and Crost's Case* (1585) Godb. 33; *Tourton v. Flower* (1735) 3 P.Will. 368; *Fernandes' Executors' Case* (1870) L.R. 5 Ch. 314; *Re Vallance* (1888) 24 Ch.D. 177; *New York Breweries Co. v. Att.-Gen.* [1899] A.C. 62. The decision in *Macmahon v. Rawlings* (1848) 16 Sim. 429, must be regarded as unsound.

⁸² *Lasseur v. Tyrconnel* (1846) 10 Beav. 28.

⁸³ *Hare v. Nasmith* (1816) 2 Add. 25; *In Goods of Cosnahan* (1866) 1 P. & D. 183; *In Goods of Rogerson* (1840) 2 Curt. 656; *Re Bianchi* (1859) 1 Sw. & Tr. 511; *In Goods of Earl* (1867) L.R. 1 P. & D. 450; *Laneville v. Anderson* (1860) 2 Sw. & Tr. 24; *In Goods of Smith* (1868) 16 W.R. 1180; *In Goods of Hill* (1870) L.R. 2 P. & D. 89; *In Goods of Prince Oldenburg* (1884) 9 P.D. 234; *In Goods of Dost Ali Khan* (1880) 6 P.D. 6; *In Estate of Humphries* [1934] P. 78; *Miller v. James* (1871) L.R. 3 P. & D. 4. See also *Moore v. Darell* (1832) 4 Hagg.Ecc. 346; *Soona Chetty v. Navena Chetty* (1916) 85 L.J.P.C. 179; *Re Medbury* (1906) 11 O.L.R. 429; *Lewis v. Balshaw* (1935) 54 C.L.R. 188. Conf. *In Goods of Whitelegg* [1899] P. 267.

⁸⁴ See, for meaning of 'grant', Rule 48, p. 297, *ante*.

⁸⁵ See *Enohun v. Wylie* (1862) 10 H.L.C. 1; and contrast pp. 13-16, language of Westbury, C., with p. 19, language of Lord Cranworth; and pp. 23, 24, language of Lord Chelmsford; *Re Trufort* (1887) 36 Ch.D. 600, 611, judgment

domicile to administer his movable property, that is, to decide what testamentary dispositions he has made and how far they are valid, and to determine who is the person entitled to deal with such property.⁸⁶ When, therefore, any person, under whatever name, is appointed by the courts of the domicile to represent the deceased, such representative has, as a rule, a claim,⁸⁷ though not an absolute right, to an English grant, and such grant will usually be made to him by the court, which will moreover, in general, though not always,⁸⁸ follow the foreign grant so as to give the foreign personal representative no more than such powers as are required for the performance by him in England of the duties imposed upon him under the law of the deceased person's domicile,⁸⁹ despite the rule that limited grants are not normally made.⁹⁰ This may apply no less where the foreign grant is to a corporation⁹¹ or where the original foreign grant has been replaced by another,⁹² though in the latter case the chain of representation must, of course, be kept up by successive English grants.⁹³

It may happen that under the law of the foreign domicile no person is appointed by any court to represent the deceased. In this case that person will be treated as his representative who has, under the law of the foreign country, a right, e.g., as heir or universal successor, to deal with the property of the deceased.⁹⁴

Where a foreign will is propounded, its validity according to the law of the domicile should be averred⁹⁵ and, if it be in dispute,

of Stirling, J.; *Re Bonnefoi* [1912] P. (C.A.) 233, 236-239, judgment of Cozens-Hardy, M.R.; *Re Lorillard* [1922] 2 Ch. (C.A.) 638.

⁸⁶ *Ibid.*, and compare *In Goods of Briesemann* [1894] P. 260; *In Goods of Earl* (1867) L.R. 1 P. & D. 450; *In Goods of Lemme* [1892] P. 89; *In Goods of Von Linden* [1896] P. 148, *In Goods of Moffatt* [1900] P. 152, *In Goods of Meatyard* [1903] P. 125.

⁸⁷ *In Goods of Earl* (1867) L.R. 1 P. & D. 450, *In Goods of Hill* (1870) L.R. 2 P. & D. 89.

⁸⁸ *In Goods of Levy* [1908] P. 108; *In Estate of Von Brentano* [1911] P. 172.

⁸⁹ *In Goods of Earl* (1867) L.R. 1 P. & D. 450, 453, judgment of Sir J. P. Wilde, *In Goods of Smith* (1868) 16 W.R. 1130; *In Goods of Briesemann* [1894] P. 260, 261; *In Goods of Steigerwald* (1864) 10 Jur.(n.s.) 159; *Viesca v d'Aramburu* (1839) 2 Curt. 277; *In Goods of Moffatt* [1900] P. 152; *In Goods of Vannini* [1901] P. 330; *In Goods of Von Linden* [1896] P. 148; *In Goods of Tréfond* [1899] P. 247; *In Estate of Groos* [1904] P. 269.

⁹⁰ See ante, p. 299.

⁹¹ *Re McLoughlin* [1922] P. 235; *Re Barlow* [1933] P. 184.

⁹² *In Goods of Goldschmidt* (1898) 78 L.T. 763; *In Goods of Black* (1887) 13 P.D. 5; *Re Rendell* [1901] 1 Ch. 280; see also *Re Murguia* (1884) 9 P.D. 236.

⁹³ *In Goods of Gaynor* (1869) L.R. 1 P. & D. 723; *Twyford v Trail* (1834) 7 Sim. 92.

⁹⁴ *Laneuville v. Anderson* (1860) 2 Sw. & Tr. 24; *In Goods of Oliphant* (1860) 30 L.J.P. & M. 82; *In Goods of Stewart* (1838) 1 Curt. 904; *In Goods of Dost Aly Khan* (1880) 6 P.D. 6; *In Goods of Abdul Hamid Bey* (1898) 67 L.J.P. 59; *Re Achilopoulos* [1923] Ch. 433. Even a creditor: *In Goods of Maraver* (1828) 1 Hagg.Ecc. 498; compare *Re Dyas* [1937] Ir.R. 479; *In Estate of Leguia* [1934] P. 80; (No. 2) (1936) 105 L.J.P. 72.

⁹⁵ *Isherwood v. Cheetham* (1862) 31 L.J.P. & M. 99; *In Goods of Maraver* (1828) 1 Hagg.Ecc. 498; *In Goods of Rolland* (1893) 14 N.S.W.L.R. (B. & P.) 102.

an application for probate may be ordered to stand over.⁹⁶ If it refer only to foreign property, it will not generally be probated.⁹⁷ The foreign original will or, at least a translation of it, will usually be required to be produced.⁹⁸

The court, however, may in its discretion decline to grant administration to the foreign personal representative of the deceased and will constantly vary the person selected and the form of the grant if a variation is needed by the requirements of English law. Thus administration *cum testamento annexo* may be granted in lieu of probate.⁹⁹ Or if the deceased was a British subject and died domiciled abroad leaving a will valid under Lord Kingsdown's Act the grant may be of probate of the will, provided at least no appointment has been made in the country of domicile.¹ Or the next of kin may be preferred to the foreign administrator who is not the next of kin.² Or, under treaty, the grant may be to a foreign consul.³ In time of war in the case of domiciled alien enemies, a grant may appropriately be made to the Public Trustee⁴; similarly, in view of the appropriation of enemy property by a treaty of peace, the enemy next of kin of an enemy may be ignored.^{5 6} But the rule of English law under the Supreme Court of Judicature (Consolidation) Act, 1925, s. 160, that, where there is a minority or a life interest, administration must be granted to a trust corporation, with or without an individual, or to not less than two individuals, presumably refers only to cases of grants in respect of English domicile.

The reason for making a grant to the personal representative

⁹⁶ *Hare v. Nasmyth* (1816) 2 Add. 25; *De Bonneval v. De Bonneval* (1838) 1 Curt. 856.

⁹⁷ *In Goods of Smart* (1884) 9 P.D. 64; compare *In Goods of Bolton* (1887) 12 P.D. 202.

⁹⁸ *In Goods of De Vigny* (1865) 4 Sw. & Tr. 13; *In Goods of Clarke* (1867) 36 L.J.P. & M. 72; *In Goods of Rule* (1878) L.R. 4 P.D. 76; *In Goods of Petty* (1880) 41 L.T. 529; *In Goods of Prince Oldenburg* (1884) L.R. 9 P.D. 284; compare *In Goods of Dost Aly Khan* (1880) L.R. 6 P.D. 6; *In Goods of Turner* (1866) 36 L.J.P. & M. 82.

⁹⁹ See *In Goods of Cosnahan* (1866) L.R. 1 P. & D. 183; *In Goods of Earl* (1867) L.R. 1 P. & D. 450; *In Goods of Read* (1828) 1 Hagg.Cons. 474; *In Goods of Mackenzie* (1856) Deane 17; *In Goods of Scurr* (1899) 80 L.T. 296; *In Estate of Leguia* [1934] P. 80; (No. 2) (1936) 105 L.J.P. 72.

¹ *In Goods of Cocquerel* [1918] P. 4.

² See *In Estate of White* (1862) 31 L.J.P. & M. 161; *Re O'Brien* (1883) 3 O.R. 326; compare *In Goods of Probart* (1866) 36 L.J.P. & M. 71. See also *In Goods of Weaver* (1866) 36 L.J.P. & M. 41; *In Goods of Ewing* (1881) 6 P.D. 19.

³ *In Goods of Migazzo* (1894) 70 L.T. 246; *In Goods of Aikyo* (1924) 130 L.T. 32; compare *In Goods of Beggia* (1922) 1 Add. 340; see also Domicile Act, 1861, s. 4.

⁴ *In Estate of Grundt* [1915] P. 126; *In Estate of Sanpietro*, *In Estate of Van Tuyll van Serooskerken* [1941] P. 16; compare *In Estate of Schiff* [1915] P. 86; *In Estate of Fischer* (1940) 56 T.L.R. 560.

⁵ *In Goods of Van dem Busche* [1922] P. 30; *In Goods of May* (1922) 38 T.L.R. 210; *In Goods of Bluhm* [1921] P. 127; *In Estate of Woolf* [1918] W.N. 205.

⁶ For the examples of grants to public officials see *Aspinwall v. Queen's Proctor* (1839) 2 Curt. 241; *In Goods of Wyckoff* (1862) 3 Sw. & Tr. 20; see also *In Goods of Black* (1887) 13 P.D. 5.

of the deceased is the fairness and expediency of allowing him to deal with all the movable property of the deceased, the beneficial succession to which is governed by the law of the deceased's foreign domicile. This reason does not apply to English immovables, the beneficial succession to which is governed by the law of England. There is, therefore (it is submitted), a possibility that the Administration of Estates Act, 1925, which vests the English real estate of a deceased person in his personal representative, may, under some circumstances, afford good ground for not making a grant to the representative of a deceased person who has died domiciled in a foreign country.⁷

Illustrations

1 T dies domiciled in Mauritius, leaving a will and codicil signed but not witnessed. Probate is granted in Mauritius to A. The court makes a grant to A.⁸

2 N dies domiciled in Brazil intestate. P is appointed by a Brazilian court guardian of N's children. P appoints Q, the Brazilian Minister at Turin, his attorney in the matter, with power of substitution, and issues letters of request to judicial authorities in England to deliver property of deceased to Q or his representative. Q appoints A, resident in England, his substitute. The court makes a grant to A.⁹

3 T, an Englishman, dies domiciled in France. He appoints under his will an *exécuteur testamentaire*. It is determined by a French court that the time limited by French law for the execution of such executorship has passed; that such executor has no longer a right to intermeddle in T's estate; and that A and B, the parties beneficially entitled, are the only persons who have a right to intermeddle. The executor applies for an English grant. The court refuses to make a grant to the executor, and grants administration to A and B.¹⁰

4 T is a British subject who dies domiciled in France. At the time of his death he possesses in France both movables and immovables. He possesses in England £500, lying at a bank, and real property of great value. He has executed a will leaving the whole of his property to a stranger, A. The will is in a form which is valid by the law of France, but, being unattested, is, though valid as to the £500 lying in the English bank, invalid as to T's real property in England.¹¹ The court would (*semble*) make a grant to T's next of kin, and not to A.

5 T dies domiciled in France. A, a French citizen, also domiciled in France, is under French law entitled to represent T, and to the possession of T's property. A is, according to English law, an infant. A applies for a grant of administration, with the will annexed, of the goods of T in England. The grant is refused, on the ground that in England a grant cannot be made to an infant.¹² But a grant would be made to A's guardian.¹³

⁷ See *Lewis v. Balshaw* (1935) 54 Com.L.R. 188.

⁸ *In Goods of Smith* (1850) 2 Rob.Ecc. 332. See *In Goods of Mackenzie* (1856) Deane 17.

⁹ *Re Bianchi* (1859) 1 Sw. & Tr. 511.

¹⁰ *Laneville v. Anderson* (1860) 2 Sw. & Tr. 24. Contrast *Re Goenaga* [1948] W.N. 463.

¹¹ See Chap. 81, Rule 181, and Exception 1 *post*.

¹² *In Goods of Duchess d'Orléans* (1859) 1 Sw. & Tr. 253; *In Goods of Meatyard* [1903] P. 125, 129; contrast *Re Da Cunha* (1828) 1 Hagg.Ecc. 237, which would not now be followed.

¹³ *In Goods of Sartoris* (1838) 1 Curt. 910.

RULE 106.¹⁴—(1) A foreign personal representative has (*semble*) a good title in England to any movables of the deceased (whether tangible, *i.e.*, goods; or intangible, *i.e.*, debts or other choses in action) to which he has in a foreign country acquired a good title under the *lex situs*¹⁵ and has reduced into possession.¹⁶

(2) A foreign personal representative, appointed by a court of the domicile of the deceased, or a beneficiary whose position under the law of the domicile of the deceased is equivalent to that of a personal representative,¹⁷ may apply to the court in England for an order for the transfer to him for distribution of the net balance of assets under the English administration of the estate of the deceased, but is not entitled as of right to such an order.

Comment

The second part of this Rule is certain, but the first part of the Rule, especially in so far as it relates to goods, rests on but slight authority. It is, however, supported by writers of weight, and is in the main a deduction from the principle contained in Rules 129 to 185.¹⁸

(i) *As to goods*.—‘The corporeal chattels [goods] of a deceased person belong’, ‘to the heir or administrator who first reduces them into possession within the territory from the law or jurisdiction of which he derives his title or his grant’.¹⁹

So if a foreign representative himself brings the former property of a deceased person into another territory the goods may not be made subject to administration therein.

It has been further suggested that our Rule should be more broadly stated, and that a foreign personal representative who has in a foreign country acquired a title to goods in accordance with

¹⁴ Compare Westlake, s. 95, and Story, s. 516. And see *Currie v. Borcham* (1822) 1 D. & R. 35; *Jauncy v. Sealey* (1886) 1 Vern. 397; *Logan v. Fairlie* (1825) 1 My. & Cr. 59, per Sir J. Leach; *Re Welsh* [1931] Ir.R. 161; *Vanquelin v. Bouard* (1863) 15 C.B.(N.S.) 341; 33 L.J.C.P. 78; *Whyte v. Rose* (1842) 3 Q.B. 493, 506, *post*. For American usage, see Goodrich, s. 182. See also Rules 59, p. 337, *ante*, 107, p. 458, and 176, p. 811, *post*.

¹⁵ For meaning of *lex situs*, see pp. 41, 47, *ante*.

¹⁶ *Re Macnichol* (1874) L.R. 19 Eq. 81; *Vanquelin v. Bouard* (1863) 15 C.B.(N.S.) 341. This is clearly recognised in *Currie v. Borcham* (1822) 1 D. & R. 35. It is law in America; Goodrich, s. 185. It seems to explain *Huthwaite v. Phaire* (1840) 9 L.J.C.P. 259; see also 1 M. & G. 159, 162.

¹⁷ *Re Achilopoulos* [1928] Ch. 433.

¹⁸ See Chap. 23, pp. 557–578, *post*. Compare Rule 59, p. 337, *ante*.

¹⁹ Westlake, s. 95. This view is based on dicta in *Whyte v. Rose* (1842) 3 Q.B. 493, 504–506. See also Story, s. 520; Cheshire, 676; and compare Inland Revenue (Stamp Duties) Act, 1864, s. 4.

the *lex situs* has the rights of an owner in England, even in the rare cases where he has acquired a title to without obtaining possession of the goods. But for this there seems to be no authority whatever, and it appears much more reasonable to hold that, if the property of a deceased person has come to this country, without ever being in the possession of the foreign personal representative, it will form a basis for administration in England and the grantee of administration under English law will alone have a good title to take possession of it. See also Rule 107, proviso (1).

(ii) *As to debts*.—The *situs* of a chose in action²⁰ being always more or less of a fiction,²¹ a debt may be considered situate at the place where it is reduced into possession, *e.g.*, by payment, or by the obtaining of judgment for it; whence it would naturally follow that the personal representative who has thus reduced it into possession has a title to it in England or elsewhere.²² But the judgment must of course be valid to be enforceable in England.²³

Question 1.—What is the position of a foreign personal representative who receives payment of debts in England?

He is apparently in the position of an executor *de son tort*; he has no right to collect debts due to the deceased in England, he cannot (*semble*) retain the money paid him against an English administrator.²⁴

Question 2.—Is payment by a debtor to a foreign personal representative a discharge from the debt in England as against the English administrator?

(1) Such a payment, when made in England, can hardly (it would seem) be a discharge. The debtor is under no compulsion to pay the foreign administrator who cannot as such sue for the debt, but the debtor from the mere fact of being in England is liable at any moment to be sued by the English administrator. This would seem to follow from the undoubted principle that the status of a foreign administrator is not recognised in England. But there is no authority and much room for doubt on the point.²⁵

(2) The effect of such a payment when made in a foreign country would as a matter of logic seem to depend essentially upon

²⁰ It should be noted that negotiable instruments payable to bearer are sometimes considered as goods. See Story, s. 517, and Westlake, s. 96. There is no explicit English authority as to the right of the foreign administrator to indorse negotiable instruments so that the indorsee can sue without taking out a grant, but it is clear law in America: Goodrich, s. 182. For Canada, see *Crosby v. Prescott* [1923] S.C.R. 446. An administrator may, of course, sue on a bearer security: Goodrich, s. 180.

²¹ See pp. 303–309, *ante*.

²² *Re Macnichol* (1874) L.R. 19 Eq. 81; *Vanquelin v. Bouard* (1863) 15 C.B. (N.S.) 341.

²³ See Rules 76–81, pp. 388–400, *ante*.

²⁴ Story, s. 514.

²⁵ Story, ss. 514–515a; Westlake, s. 98; Cheshire, p. 675. There is American authority that such payment is a valid discharge: Goodrich, s. 183.

the *situs* of the debt,²⁶ or in other words upon the place where the debt is most properly recoverable, at the moment of the death of the creditor, its *situs* being then fixed. If a debtor of a deceased person dying domiciled in New York, who is himself resident in New York at the time of his creditor's death, pays the debt to the New York administrator, such payment would, it is submitted, be a discharge from the debt in England as against any claim of the English administrator, and the same result should follow if the debtor making the payment is resident in New York at the time of his creditor's death, even though the deceased died domiciled in England. If, on the other hand, a debtor resident in England at the time of his creditor's death, indebted to a deceased person dying domiciled in England, were in New York voluntarily to pay the debt to the New York administrator, the payment may not be a discharge as against the English administrator, and the same remark should hold good even though the deceased creditor died domiciled in New York. If, of course, the debt were definitely payable in one country or the other, payment in the country not being that designated would be no discharge as against a claim by the administrator in the proper forum. Otherwise it is impossible to foretell with any confidence the view of the court, which might hold that payment by a debtor to a foreign administrator in the country where he holds that office is always a discharge of a debt not payable in any fixed place, or, more probably, would seek to find some indication of the natural place of payment. In the case of a mortgage debt this would clearly be the *locus situs*.²⁷ The question whether payment to the foreign personal representative under compulsion, *e.g.*, in satisfaction of a judgment, discharges the debtor is equally unsettled,²⁸ though the argument that it should do so is of course much stronger.

Illustrations

1. Deceased has died leaving goods in New York. A is his administrator under the law of New York. A takes possession as administrator of goods of the deceased. The goods are taken to England. A is the owner of the goods, and can bring an action in England against X who converts them.²⁹

2. Deceased has died leaving goods in New York. After A has taken out administration in New York, but before A has obtained possession of the goods, X takes them without A's authority to England, where B has obtained a grant of administration as personal representative of the deceased.

²⁶ Compare *Daniel v. Luker* (1571) Dyer 305 a; *Shaw v. Staughton* (1670) 3 Keble 163; *Whyte v. Rose* (1842) 3 Q.B. 493; *Huthwaite v. Phaire* (1840) 1 M. & G. 159. See also *Preston v. Melville* (1841) 8 Cl. & F. 1, 12, 14.

²⁷ See Falconbridge, Ch. 31, § 1, who cites *Whyte v. Rose* (1842) 3 Q.B. 493, 509; *White v. Hunter* (1841) 1 U.C.R. 452; *Fidelity Trust Co. v. Fenwick* (1921) 64 D.L.R. 647; *Crosby v. Prescott* [1923] S.C.R. 446.

²⁸ See Story, s. 515, note 1.

²⁹ Compare *Currie v. Bircham* (1822) 1 D. & R. 35; *Whyte v. Rose* (1842) 3 Q.B. 493, 504, 506.

Whether A is in England owner of the goods, and whether he can bring there an action of trover against X?³⁰

3. Deceased has died intestate in India, where A takes out letters of administration. A sends proceeds of deceased's effects to X, her agent in England. B, the English administrator, cannot bring an action against X for the money of the intestate received by him, *i.e.*, it is money belonging to A.³¹

4. A, the Indian administrator of N, obtains in India a judgment against X for £5,000 due to N. A can bring an action against X in England in A's own name without taking out a grant of administration in England, *i.e.*, the debt having been reduced into possession, A has a good title to it.³²

RULE 107.³³—A foreign personal representative is not, as such, under any liability in England, and cannot, as foreign personal representative, be sued in England.

Provided that

- (1) if the foreign personal representative sends or brings into England movables of a deceased which have not been so appropriated as to lose their character as part of the property of the deceased, an action, to which the English administrator must be a party, may be brought for their administration in England³⁴;
- (2) the foreign personal representative may by his dealing with the property of the deceased incur personal liability in England as a trustee or a debtor.³⁵

Comment

Though a foreign administrator or other personal representative cannot in England be made liable for property held, or acts done by him in his character of foreign administrator, yet he may by his

³⁰ See pp. 455-456, *ante* Story, s. 520.

³¹ *Currie v. Burcham* (1822) 1 D. & R. 35.

³² *Re Macnichol* (1874) L.R. 19 Eq. 81; *Vanquelin v. Bouard* (1863) 15 C.B.(N.S.) 941.

³³ Story, s. 513; *Beavan v. Hastings* (1856) 2 K. & J. 724; *Hervey v. Fitzpatrick* (1854) Kay 421; *Flood v. Patterson* (1861) 29 Beav. 295; Cheshire, pp. 676-677. So in America, Goodrich, s. 186.

³⁴ See, especially, Westlake, s. 99. See also *Lowe v. Fairlie* (1817) 2 Madd. 101; *Logan v. Fairlie* (1825) 2 S. & St. 284, 291, judgment of Leach, V.-C.; *Sandilands v. Innes* (1829) 3 Sim. 263, 264, judgment of Leach, V.-C.; *Tyler v. Bell* (1837) 2 My. & Cr. 89; *Bond v. Graham* (1842) 1 Hare 482; *Hervey v. Fitzpatrick* (1854) Kay 421. Contrast *Arthur v. Hughes* (1841) 4 Beav. 506.

³⁵ See Westlake, s. 100; *Anderson v. Caunter* (1838) 2 My. & K. 763; *Twyford v. Trail* (1834) 7 Sim. 92; *Harvey v. Dougherty* (1886) 56 L.T. 322; *Re MacSweeney* [1919] 1 Ir.R. 16; see also *Re Lane* (1885) 55 L.T. 149; *Ewing v. Orr-Ewing* (1885) 10 App.Cas. 453.

conduct place himself in some position in which he, speaking broadly, as a trustee, or as a debtor,³⁶ incurs legal liabilities which can be enforced in England.³⁷ The most obvious case is where the administrator enters into a contract in England in respect of the estate, when he acquires the right to sue and may be sued personally as contractor. Moreover, if the administrator intermeddles with English property of the deceased, he will make himself liable as executor *de son tort*.³⁸ But it does not appear that even an ancillary administrator can be sued merely because he is in England and in control of the net balance of the deceased's assets resulting from his local administration. This is explicable on the ground that he must be responsible in the country where he has been appointed administrator and should not therefore be also liable in England. But some of the older cases suggest that at one time the English courts were prepared to exercise a wider control over administrators, *e.g.*, in India, and it seems probable that they would be able to exercise jurisdiction if the foreign administrator by staying too long in England frustrated efforts to compel him to account in the place of his administration.

Illustrations

1. T dies leaving property in Italy. X is in Italy his personal representative. A is his English administrator. A cannot maintain in England an action against X as personal representative of T, *e.g.*, to obtain discovery of T's personal estate or to secure payment of the balance of assets in the foreign administration.³⁹

2. X is T's administrator under an Indian grant of administration. X comes to England bringing with him personal property of T's which is still unappropriated, and part of T's estate, not being the balance of the assets realised. A, T's English administrator, can bring an action for the administration of such money.⁴⁰

3. X is the foreign personal representative of T who dies in a foreign country. X is guilty of a breach of trust in omitting to invest moneys left under T's will for the benefit of N. X, when in England, is liable, not as foreign personal representative, but as trustee, to an action for breach of trust.⁴¹

4. N, an Englishman, dies intestate in a foreign country, where he is possessed of real and personal property. X, his brother, who resides in England, is personal representative of N under the law of such foreign country, and there takes succession to N without benefit of inventory, *i.e.*, in a manner which renders X personally liable for the debts of N. A, a creditor of N, can maintain an action in England against X for a debt due from N, *i.e.*, X is liable, not as personal representative of N, but as being himself a debtor under the law of a foreign country.⁴²

5. X, a foreign administrator, agrees to sell A the Paris house of the

³⁶ See Illustrations 2-4.

³⁷ See as to service Rule 28, Exception 4, p. 188, *ante*.

³⁸ See p. 451, note 76, *ante*.

³⁹ *Jauncy v. Sealey* (1686) 1 Vern. 397; *Hervey v. Fitzpatrick* (1854) Kay 421.

⁴⁰ *Lowse v. Fairlie* (1817) 2 Mad. 101; *Sandilands v. Innes* (1829) 3 Sim. 263; *Bond v. Graham* (1842) 1 Hare 482; *Tyler v. Bell* (1837) 2 My. & Cr. 59.

⁴¹ *Treyford v. Trail* (1894) 7 Sim. 92, 108.

⁴² See *Beavan v. Hastings* (1856) 2 K. & J. 724, though the decision is on another point.

deceased and its furniture. He obtains payment but does not carry out his bargain. A can recover damages in an action against X in his own name as guilty of breach of contract.

Extension of Northern Irish Grant and Scottish Confirmation to England.

RULE 108.⁴³—A Northern Irish⁴⁴ grant in respect of the personal estate of a person who died domiciled in Northern Ireland will, on production of the said grant to, and deposit of a copy thereof with, the proper officer of the High Court of Justice in England, be sealed with the seal of the said court, and be thereupon of the like force and effect, and have the same operation in England, as an English grant.⁴⁵

RULE 109.⁴⁶—A Scottish confirmation of the executor of a person duly stated to have died domiciled in Scotland, which includes besides the personal estate situate in Scotland also personal estate situate in England, will, on production of such confirmation in the High Court in England and deposit of a copy thereof in the principal probate registry, be sealed with the seal of the said court, and have thereupon in England the like force and effect as an English grant.

Comment

In accordance with this Rule a Scottish confirmation, which is equivalent to an English grant of probate or letters of administration may, by formal proceedings, be extended to England so as to have there the operation of an English grant as regards personal

⁴³ Supreme Court of Judicature (Consolidation) Act, 1925, s. 169, as amended by Administration of Justice Act, 1928, s. 10. See also Non-Contentious Probate Rules, s. 108.

⁴⁴ As to Eire, see Rule 110, *post*.

⁴⁵ See Comment on Rule 109, *post*.

⁴⁶ Confirmation of Executors (Scotland) Act, 1858, s. 12. Similarly a confirmation granted under the Intestates' Widows and Children (Scotland) Act, 1875, or the Small Testate Estates (Scotland) Act, 1876, must be sealed on application to the principal probate registry.

See, further, the Sheriff Court (Scotland) Act, 1876, s. 41; the Finance Act, 1894, ss. 1, 6, 22; the Supreme Court of Judicature (Consolidation) Act, 1925, s. 168. See also Non-Contentious Probate Rules, s. 101.

And see Rule 62, p. 342, *ante*, and Comment thereon.

and real estate there. Such a confirmation is applicable to land.⁴⁷ There is no power in the English court to refuse sealing.⁴⁸

Note, however, that a Scottish confirmation can be extended to England only when the deceased is therein stated by the proper Scottish official, the sheriff clerk, to have died domiciled in Scotland, and has left personal estate both in Scotland and in England. The statement that he has died domiciled in Scotland is not conclusive for any other purpose.⁴⁹

Extension of Colonial, Indian, etc. Grant to England.

RULE 110.⁵⁰—Whenever the Colonial Probates Act, 1892, is by Order in Council made applicable to any British possession, *i.e.*, to any part of British territory not forming part of the United Kingdom, or to any protectorate, protected State, or (former) mandated territory, the grant of probate or letters of administration may, on

(1) payment of the proper duty ; and

(2) production of the said grant to, and deposit of a copy thereof with, the High Court in England, be sealed with the seal of the said court, and shall thereupon be of the like force and effect, and have the same operation in England, as an English grant.

Comment

It is not necessary that the testator or intestate should have been domiciled in the Dominion, State, colony, etc., but if it is not made to appear by the grant or an affidavit that he was so domiciled, resealing is only permitted if the grant is such as would be issued by the High Court. Thus in the case of an infancy or a life interest under English law the grant must be to a trust corporation with or without an individual or to two individuals at least under

⁴⁷ *Re Howden and Hyslop's Contract* [1928] Ch. 479; see also *Hood v. Lord Barrington* (1868) L.R. 6 Eq. 218.

⁴⁸ *In Estate of Rankine* [1918] P. 134.

⁴⁹ *Hawarden v. Dunlop* (1861) 31 L.J.P. & M. 17; see also *Re De Penny* [1891] 2 Ch. 63.

⁵⁰ Colonial Probates Act, 1892, s. 2 (1) (2). See, further, s. 6 and Interpretation Act, 1889, s. 18 (2); p. 343, *ante*; s. 2 of the Irish Free State (Consequential Adaptation of Enactments) Order, 1923. The Act is capable of being made applicable to Eire. The Act applies to all parts of the United Kingdom, but the present Rule is concerned only with its effect in England. See Rule 63, p. 343, *ante*. And see *In Goods of Sanders* [1900] P. 292; *In Goods of Smith* [1904] P. 114; *Re McLaughlin* [1922] P. 235. Compare Non-Contentious Probate Rules, ss. 92-99.

s. 160 of the Supreme Court of Judicature (Consolidation) Act, 1925. By the Colonial Probates (Protected States and Mandated Territories) Act, 1927, probates issued by courts in such territories can similarly be sealed.⁵¹ In Canada, probates are granted by provincial courts, in Australia by State courts.

⁵¹ For Palestine, see s. 3 (3) of the Palestine Act, 1948, and Second Schedule, para. 4.

PART THREE

CHOICE OF LAW

THE Rules contained in Part 3, deal solely with the Choice of Law. Their object is the determination of the body of law¹ which is to be selected by the High Court when called upon to decide any case which has in it a foreign element.

The Rules contained in Part 3 have nothing to do with the jurisdiction either of the High Court² or of foreign courts.³

But, though a question as to the choice of law is in itself a totally different thing from a question of jurisdiction, there exists occasionally a difficulty in discriminating at a glance between the two inquiries; for a question as to the choice of law may look like a question as to jurisdiction. That this is so may be shown by the following illustration: A brings in England an action against X for an assault in Paris; X's defence is that the assault was by French law justifiable, and that A therefore cannot, in an English court recover damages for it. The defence looks like an objection to the jurisdiction of the court; but this appearance will be found on examination to be delusive. Whatever be the technical form of X's defence, he in substance pleads, not that the High Court has no right to adjudicate upon an assault committed in France, but that the question whether X was or was not guilty of an assault, *i.e.*, of an unlawful attack upon A, must be determined in England by reference, not to the law of England, but to the law of France. X therefore raises a question as to the choice of law.⁴

¹ The body of law, whether English or foreign, which ought to be chosen for the determination of a particular case, or class of cases, depends upon the nature of the right which is in dispute, and rights are naturally divided in accordance with their subject-matter. Hence the Rules as to the Choice of Law are conveniently distributed under the following heads:—

- (1) Status or Capacity.—Chaps. 18 and 19, *post*.
- (2) Family Relations.—Chap. 20, *post*.
- (3) Immovables.—Chap. 22, *post*. See also Chap. 21.
- (4) Movables.—Chap. 23, *post*. See also Chap. 21.
- (5) Contracts.—Chaps. 24 and 25, *post*.
- (6) Quasi-Contracts.—Chap. 26, *post*.
- (7) Marriage.—Chap. 27, *post*.
- (8) Torts.—Chap. 28 *post*.
- (9) Administration in Bankruptcy.—Chap. 29, *post*.
- (10) Administration and Distribution of Deceased's Movables.—Chap. 30, *post*.
- (11) Succession to Movables.—Chap. 31, *post*.
- (12) Procedure.—Chap. 32, *post*.

This distribution of our subject, though convenient, makes no claim to any special logical precision.

² As to the jurisdiction of the High Court, see Part 2, § 1, pp. 131-344, *ante*.

³ As to the jurisdiction of foreign courts, see Part 2, § 2, pp. 345-462, *ante*.

⁴ As to law governing torts, see Chap. 28, p. 799, *post*.

STATUS

RULE 111.¹—Transactions taking place in England are not affected by any status existing under foreign law which is penal.

Comment

Status.—Every person has a certain civil status,² consisting of his capacity or incapacity under the laws of his country for the acquisition and exercise of legal rights and for the performance of legal acts. Thus A's status or personal condition may be that of the ordinary or average citizen, who is of full age, legitimate, unmarried, and so forth, and has incurred no legal disability. Such a person has in England the capacity to inherit, to make a will, to bind himself by contracts, to change his domicile, and the like. His status, just because it is the average or ordinary condition, receives no special name. A's condition or status, on the other hand, may differ from the ordinary standard in that he has legal capacities which either fall short of or exceed those of the ordinary citizen, so that he occupies a position by virtue of which, as it has been expressed,³ what is law for the average citizen is not law for him. Thus, if he is illegitimate, he does not inherit in cases in which the average citizen would do so. If he is an infant, he is not bound by contracts which bind others. If he is married, he has rights and incurs liabilities beyond those of the ordinary or average citizen. As A's position is in these instances marked off from, and contrasted with, the condition of ordinary citizens, it receives a name such as that of illegitimacy, infancy, etc., and is clearly recognised as a status; and A has a status which may, in

¹ Compare Intro, General Principle No. 2 (B), p. 18, *ante*, and Rule 22, p. 152, *ante*. See Story, ss. 91, 92, 94-104, 620-625 c.

How far does the Rule apply to countries subject to the British Crown? The answer is doubtless that the same rules will be applied to these countries. It would make no difference to English courts that civil death or religious disability was recognised in Quebec (Lafleur, *Conflict of Laws*, pp. 46, 47); it would treat in England persons under this status by the law of Quebec just as it treats those persons who under, *e.g.*, the law of Spain, are in this position. It is noteworthy that in Quebec itself the English rule is followed; see *Addams v. Worden* (1856) 6 L.C.R. 237.

² See Cheshire, pp. 256-257; Restatement, ss. 119-120; Wolff, pp. 282-285; Allen, 46 L.Q.R. 277 (reprinted in *Legal Duties*, p. 28); Paton, *Jurisprudence*, pp. 255 *et seq.* For Roman-Dutch law see *Seedat's Executors v. The Master* [1917] A.D. 302.

³ See Westlake, 1st ed., s. 89.

very general terms, be described as being 'the legal position of [A] in or with regard to the rest of a community'.⁴

From the nature of status it is apparent that the meaning of any special form of status is a relative one, varying according to the laws of different communities. A man, for example, may be legitimate if his status is to be determined by the law of France, illegitimate if it is to be determined by the law of England. In no matter, moreover, do the laws of different countries differ more widely than in their rules as to status. Conditions, such as that of slavery, monastic celibacy, or civil death, which are known to the law of one State, are unknown or absolutely repugnant to the legal system of another. Conditions, again, which in one form or another exist throughout the civilised world, are in different countries governed by different rules, and involve different incidents. Infancy, to take one example, may terminate under one law at 21, under another at 18, under a third at 25, and it may safely be asserted that in almost every different country the incapacities or the privileges of an infant are somewhat different.

When, therefore, it is necessary to determine what is a person's status, and how far his rights or acts are affected thereby, it is necessary, further, to determine what is the law with reference to which his status or condition must be fixed. Whether our courts have on this subject adopted any one invariable principle may be doubted; but they have, of recent years, gone so far as to hold that an individual's legal condition is, in many cases, liable to be affected by the law of his domicile,⁵ and perhaps they may be said to have adopted, in a very general way, the rule that status depends *prima facie* on domicile; but in practice this principle is subjected to limitations and exceptions which often go near to invalidating it.⁶ In *Baindail v. Baindail*,⁷ Lord Greene, M.R., said: 'It would be wrong to say that for all purposes the law of the domicile is necessarily conclusive as to capacity arising from status . . . There cannot be any hard and fast rule relating to the application of the law of the domicile as determining status and capacity for the purpose of transactions in this country'. The most fruitful method of approach is perhaps to distinguish status from capacity⁸: an English court may concede that a Hungarian aged 23 possesses the status of infancy by his *lex domicilii*, without necessarily holding that for the purpose of his transactions in England, he is subject to the local incapacities of infants.

⁴ *Niboyet v. Niboyet* (1878) 4 P.D. (C.A.) 1, 11, *per* Brett, L.J.

⁵ See *Sottomayor v. De Barros* (1877) 3 P.D. (C.A.) 1; *Udny v. Udny* (1869) L.R. 1 Sc.App. 441; *Re De Wilton* [1900] 2 Ch. 481. Compare the dissenting judgment of Scott, L.J., in *Re Luck* [1940] Ch. 864, esp. at pp. 894, 907, criticised by Falconbridge, pp. 599-600.

⁶ See *Male v. Roberts* (1800) 3 Esp. N.P. 163. See, e.g., Rule 139, *post*.

⁷ [1946] P. 122, 128.

⁸ See Allen, 'Status and Capacity', in 46 L.Q.R. 277, reprinted in *Legal Duties*, p. 28; Cheshire, pp. 256-257; Falconbridge, p. 600; and Welsh in 63 L.Q.R. (1947) pp. 73 *et seq.*

Status unknown to English Law.—Dicey's view^{8a} was that 'the law of England will not (*seem*) in England allow any status (such, for example, as slavery or relationship arising from adoption), which is unknown to English law, to have legal effects as regards transactions in England. Thus, even at the time when slavery existed in the English colonies, the status of a slave was not recognised in England, and a master who brought his slave there lost the right of ownership over him whilst in England.'⁹ "Slavery", it was laid down, "is a local law, and therefore, if a man wishes to preserve his slaves, let him attach them to him by affection, or make fast the bars of their prison, or rivet well their chains; for the instant they get beyond the limits where slavery is recognised by the local law they have broken their chains, they have escaped from their prison and are free".¹⁰ Nor will English courts give any effect in England to disabilities arising from religious vows, from caste,¹¹ from religious belief (as, for instance, where Jews or Protestants are under disabilities by the law of their domicile), or from "civil death" or "infamy",¹² or from a person being declared a "prodigal", and, therefore, under the law of a foreign country, incapable of suing'.¹³

Dicey's view that the English courts will not give effect to any status unknown to English law was generally accepted by academic writers,¹⁴ with the recent and significant exception of Cheshire, who described it as 'obviously unacceptable'.¹⁵ Most of Dicey's examples are equally explicable on the ground of public policy, which would restrain an English court from giving effect to a foreign status of slavery, civil death or infamy, or to foreign disabilities based on colour, caste, or religion. The cases on foreign prodigals are more difficult, but Cheshire has shown that even there the foreign status was regarded (perhaps unjustifiably) as penal.¹⁶ Again, Dicey said baldly that 'English courts will not in England give effect to a polygamous marriage'.¹⁷ That view rested on a

^{8a} 3rd ed., pp. 501-502.

⁹ *Sommersett's Case* (1772) 20 St.Tr. 1. See *The Slave Grace* (1827) 2 Hagg. Ad. 94.

¹⁰ *Forbes v. Cochrane* (1824) 2 B. & C. 448, 467, *per* Best, J.

¹¹ *Chetti v. Chetti* [1909] P. 67, 77, 78. Incapacity on ground of religious vows in a foreign domicile was not recognised in England even when such a status was known there: *Westlake*, s. 16, citing *Co.Latt.* 132 b; *Re Metcalfe* (1864) 2 De G.J. & S. 124.

¹² See *Story*, ss. 91, 92, 620-624; 1 Blackst. Comm., pp. 132, 133; *Commonwealth v. Green* (1822) 17 Mass. 515 (infamy); *Wilson v. King* (1894) 59 Ark. 32 (civil death); *Kynnaird v. Leslie* (1866) L.R. 1 C.P. 389 (marriage of attainted person abroad not invalid). This is followed in Quebec, though civil death is there known: *Addams v. Worden* (1856) 6 L.C.R. 237, and in Ontario: *Stuart v. Prentiss* (1861) 20 U.C.R. 513 (nun).

¹³ See *Worms v. De Valdor* (1880) 49 L.J.Ch. 261; and compare *Re Selot's Trust* [1902] 1 Ch. 488.

¹⁴ *Halsbury*, Vol. 6, p. 198 (f); *Foote*, p. 543; *Allen*, 46 L.Q.R. (1930) pp. 306 *et seq.* (*Legal Duties*, p. 66 ff.).

¹⁵ At p. 198.

¹⁶ At pp. 194-195.

¹⁷ 3rd ed., p. 502.

misunderstanding of *Hyde v. Hyde*¹⁸; and it has been established by two recent cases that a polygamous marriage contracted abroad may be recognised in England as a valid marriage and an effectual bar, for the purposes of a nullity suit, to a subsequent monogamous marriage in England.¹⁹

These cases establish beyond doubt that Dicey's view was unsound,²⁰ and Rule 111 has been amended accordingly. Some difficulty may still arise in connection with the rights flowing from a foreign adoptive relationship. Dicey, writing before the Adoption of Children Act, 1926, thought that no effect would be given in England to such rights.²¹ Thus, if X dies domiciled in England leaving a bequest to 'the children of Y', Y's adoptive child has no claim thereto, even though by the law of Y's foreign domicile Y's child has the full rights of a legitimate child. This view has been adopted, though not without criticism,²² in Canada.²³ An English court might approach the matter in either of two ways.²⁴ It might rigorously apply the *lex successionis* and deny the claim of the adoptive child; or, alternatively, it might hold that whether the claimant was a 'child of Y' is a question of status to be determined by the child's *lex domicilii*. In the latter case, the fact that the incidents of adoption by the *lex domicilii* differ from those accorded by English domestic law (which does not allow adoptive relationship to affect rights of property²⁵) would be irrelevant. The English courts conceded rights of succession to children legitimated under a foreign law for many years before legitimation *per subsequens matrimonium* became a part of English domestic law,²⁶ and it might be argued that there is no reason why they should not pursue a like course now in cases where by the foreign *lex domicilii* adoption confers the full status of legitimacy.

Penal status.—A penal status means one which is imposed upon a person in order to deprive him of rights or to inflict punishment upon him, as where X is affected with attainder. Such a penal status, though inflicted by the law of the country where X is

¹⁸ (1866) L.R. 1 P. & D. 180 (the only authority cited by Dicey).

¹⁹ *Srini Vasan v. Srini Vasan* [1946] P. 67; *Baird v. Baird* [1946] P. 122 (C.A.). As to the legitimacy of the children of polygamous marriages, see Welsh in 63 L.Q.R. (1947) pp. 88-91; and see *ante*, pp. 225-228; *post*, pp. 488-489.

²⁰ Welsh, 63 L.Q.R. p. 88; Cheshire, pp. 193-194.

²¹ 3rd ed., pp. 502, 503.

²² See an anonymous annotation in [1929] 2 D.L.R. at p. 248; and Falconbridge, Ch. 38.

²³ *Burnfiel v. Burnfiel* [1926] 2 D.L.R. 129 (a case of intestacy); *Re Donald* [1928] 4 D.L.R. 181; [1929] 2 D.L.R. 244 (a bequest to 'children'); contrast *Re Pearson* [1946] V.L.R. 356.

²⁴ Cf. 63 L.Q.R. (1947) pp. 65-6. For fuller discussion, see *post*, pp. 511-514.

²⁵ See Adoption of Children Act, 1926, s. 5; contrast Inheritance (Family Provision) Act, 1938, s. 5.

²⁶ See, e.g., *Re Goodman's Trusts* (1881) 17 Ch.D. 266; *Re Andros* (1888) 24 Ch.D. 637; *Re Grey's Trusts* [1892] 3 Ch. 88.

domiciled, and though known to English law, will not be allowed to affect X as regards his rights to property in England.

‘It is a general principle that the penal laws of one country cannot be taken notice of in another’.²⁷ ‘I would’, says Lord Loughborough, ‘even go farther, and say a right to recover any . . . specific property, such as plate or jewels, in this country, would not be taken away by the criminal laws of another. The penal laws of foreign countries are strictly local, and affect nothing more than they can reach, and can be seized by virtue of their authority. A fugitive who passes hither comes with all his transitory rights; he may recover money held for his use, stock, obligations, and the like, and cannot be affected in this country by proceedings against him in that which he has left, beyond the limits of which such proceedings do not extend’.²⁸

Illustrations

1. A, a French citizen domiciled in France, is a person of full age, but being of extravagant habits is, by a French court of competent jurisdiction, adjudged to be a ‘prodigal’, and is placed under the control of a *conseil judiciaire* (legal adviser). He is, as a prodigal, incapable of receiving or giving a receipt for his movable property, without the consent of such adviser. He becomes entitled to a fund in court in England. The status of a prodigal is unknown to English law and is a penal status. A has a right to receive the fund in court on his own receipt, in spite of the opposition of his legal adviser.²⁹

2. A Roman Catholic priest is a citizen of, and domiciled in, a foreign country, under the law of which he is, as a priest, incapable of marriage. He marries an Englishwoman in England. The marriage is valid, *i.e.*, English law does not recognise such a disability as an incident of the status of a priest.

3. An African negro is domiciled in a South African province, in which his marriage with a white woman is illegal and criminal. He marries an Englishwoman in London. His marriage is valid.

RULE 112.³⁰—Any status existing under the law of a person’s domicile is recognised by the court as regards all

²⁷ *Ogden v. Folliott* (1790) 3 T.R. 726, 733, *per* Buller, J.

²⁸ *Folliott v. Ogden* (1789) 1 H.Bl. 123, 135. See also *Wolff v. Oxholm* (1817) 6 M. & S. 92, 99. Compare *Lynch v. Provisional Government of Paraguay* (1871) L.R. 2 P. & D. 268; and *Huntington v. Attrill* [1893] A.C. 150. And see Rule 22, p. 152, *ante*. So, also, as regards penalties on the re-marriage of divorced persons: *Scott v. Att.-Gen.* (1886) 11 P.D. 128. A curious question is suggested, but not raised, in *Tourton v. Flower* (1735) 3 P.Will. 369: how far will an English court recognise the refusal of the law of a foreign domicile to permit inheritance by a Protestant? Or disabilities imposed on Roman Catholics in countries such as Mexico?

²⁹ *Re Selot's Trust* [1902] 1 Ch. 488; *Worms v. De Valdor* (1880) 49 L.J.Ch. 261.

³⁰ *Folliott v. Ogden* (1789) 1 H.Bl. 123, throws some doubt on the principle of this rule if carried out to its full extent. See, however, *Ogden v. Folliott* (1790) (in error), 3 T.R. 726, by which it seems that the real ground of decision was that the confiscation by the State of New York, being made during the Rebellion, was held by our courts inoperative, even as regards property in New York. See judgment of Kenyon, C.J., 3 T.R. 731; *Newton v. Manning* (1849) 1 M. & G. 362, 364.

transactions taking place wholly within the country where he is domiciled.

Comment

Our courts recognise every kind of status or personal condition held under the law of a country where a person is domiciled, in so far as such status affects acts done and rights exercised wholly in that country. Hence it has been laid down, with substantial accuracy, that 'the status of persons with respect to acts done and rights acquired in the place of their domicile, and contracts made concerning property situated therein, will be governed by the law of that domicile; and that England . . . will hold as valid or invalid such acts, rights, and contracts, according as they are holden valid or invalid by the law of the domicile'.³¹

This clearly is so as regards any person domiciled in England. The transactions of such a person in England are, in so far as they may be affected by status, governed by English law. If A, for example, is a Frenchman domiciled in England, his capacity to contract in England depends on English law, without reference to the law of France.³²

The same principle applies to persons domiciled in a foreign country. If an English court undertakes to determine the effect of acts done and rights exercised in a foreign country where a person is domiciled, the court will recognise the effect of his status under the law of his domicile without any reference to what would have been the status of such a person in England, or to what might or might not be the effect of his foreign status on transactions taking place in any other country than that of his domicile.

Suppose, for example, that infancy lasts in a foreign country till the age of twenty-four. If A, a person who is of age twenty-one, is domiciled in such foreign country, and makes a gift, or sells goods, or enters into a contract there, the effect of the transaction will be judged of by our courts with reference to whatever be the privileges or incapacities of an infant under the law of such foreign country; it may, of course, be that in that country capacity is regulated on the basis of nationality and the youth concerned may be deemed a major by the law of that country, in which case English law will follow its ruling. So, again, though civil death is not now known to our law,³³ its effects on the rights of a person affected by it in the country where he is domiciled will be noticed by our courts. If, for example, under the law of Spain, the property of a person who becomes a monk should devolve, say,

³¹ Phillimore, s. 381.

³² In many of the cases falling under this rule the *lex actus* (or law of the country where a transaction takes place) and the *lex domicilii* are the same. It is therefore difficult to say for certain whether the character of the transaction is determined by our courts with a view to the *lex actus* or the *lex domicilii*.

³³ See 1 Blackst. Comm. pp. 132, 133.

on his heir, English law would recognise the fact of the property in Spain of a person there domiciled having, through his taking monastic vows, devolved upon his heir. In other words, our courts would (it is conceived), to this extent at any rate, recognise the effect of the monastic status.³⁴

RULE 113.³⁵—In cases which do not fall within Rule 111, the existence of a status existing under the law of a person's domicile is recognised by the court, but such recognition does not necessarily involve the giving effect to the results of such status.

Comment

Three views as to status.—Three opinions, at least, may be held as to the relation between a person's status, or personal capacity, and the law of his domicile.

First view. A person's status depends (subject to certain exceptions coinciding in the main with cases falling under Rule 111) wholly on the law of his domicile.

This is the view formerly maintained by many foreign jurists, and notably by Savigny.³⁶

According to this opinion, a person who is legitimate, or an infant, by the law of his domicile, is to be considered as legitimate or an infant all the world over. Thus, if A, a person domiciled in Scotland, is legitimate by the law of Scotland, he ought, though born out of lawful wedlock,³⁷ to be considered legitimate in England. So B, a person domiciled in a foreign country where infancy lasts till twenty-four, who is of the age of twenty-two should, according to the view we are now considering, be treated as an infant in England till twenty-four, and on similar grounds a domiciled Englishman of twenty-two ought to be considered of full age in such foreign country.

From this view the consequence logically follows that not only the fact of a person having a particular status, *e.g.*, of legitimacy, but also all the legal effects of such status, ought to be everywhere

³⁴ Compare *Santos v. Illidge* (1860) 8 C.B.(N.S.) (Ex. Ch.) 861. The case is noticeable as showing the extent to which English courts will, in regard to transactions in a foreign country, recognise the existence of conditions, such as slavery, unknown to English law. Compare *Madrazo v. Willes* (1820) 3 B. & Ald. 353; *Buron v. Denman* (1848) 2 Ex. 167.

³⁵ In support of this Rule, see the authorities given in support of the Rules as to particular kinds of status. 'It is a settled rule of English law that civil status, with its attendant rights and disabilities, depends, not upon nationality, but upon domicile alone.' Judgment of P. C., *Abd-ul-Messih v. Farra* (1888) 13 App.Cas. 431, 437. Compare *Armstrong v. Armstrong* [1898] P. 178, 186, judgment of Sir J. Gorell Barnes; and as to the status of bastardy, see *R. v. Humphrys* [1914] 3 K.B. 1237.

³⁶ Savigny, s. 362.

³⁷ Compare Rule 120, p. 487, *post*.

determined by the law of his domicile. If, for example, A is legitimate under the law of his Californian domicile³⁸ by reason of his parents having been married though bigamously, he not only ought to be considered legitimate in England, but ought also (though he would be illegitimate according to English domestic law) to possess in England all the privileges of legitimacy, both as to the inheritance of real estate and otherwise.

A person's civil status, in short, ought, on this view, to be 'governed universally by one single principle, namely, that of domicile, which is the criterion established by law for the purpose of determining civil status'.³⁹

This principle has never been fully accepted by our courts, though some judges have paid lip-service to it⁴⁰; and the most recent pronouncement of the Court of Appeal rejects it.⁴¹

Second view. No status conferred only by the law of a person's domicile is to be recognised as regards transactions taking place in another country.

This view is, in its most extreme form, the exact opposite of the first theory. If it were completely carried out, it would make status a matter purely of local law. No civilised State has ever fully adopted it, and English courts have certainly never gone the length of applying it, at any rate in its full extent, to the status of persons domiciled in England; and certain cases⁴² exhibit on the whole a distinct tendency on the part of English courts to approximate in practice to the theory that a person's status is governed by his *lex domicilii*. Eminent writers have, however, held that the view now under consideration was at one time adopted by English law with regard to the status of persons domiciled in a foreign country.⁴³

Third view. The existence, at any rate, of a status imposed by the law of a person's domicile ought in general to be recognised in other countries, though the courts of such countries may exercise their discretion in giving operation to the results or effects of such status.

This is the principle (if so it can be called) which is meant to be stated in Rule 113,⁴⁴ and which, it is conceived, most nearly corresponds with the actual practice of our courts. It constitutes a kind

³⁸ *Moore v. Saxton* (1916) 90 Conn. 164, where legitimacy was accepted.

³⁹ *Udny v. Udny* (1869) L.R. 1 Sc.App. 441, 457, *per* Lord Westbury; *Sottomayor v. De Barros* (1877) 3 P.D. (C.A.) 1.

⁴⁰ *E.g.*, *Sottomayor v. De Barros* (No. 1) (1877) 3 P.D. 1; Scott, L.J. (dissenting) in *Re Luck* [1940] Ch. 864 at pp. 894, 907-8, criticised by Falconbridge, p. 599.

⁴¹ *Boindail v. Baidail* [1946] P. 122, 128, cited *ante*, p. 466.

⁴² *Re Goodman's Trusts* (1881) 17 Ch.D. (C.A.) 266; *Goodman v. Goodman* (1862) 3 Giff. 648; *Sottomayor v. De Barros* (1877) 3 P.D. (C.A.) 1. But contrast *Simonin v. Mallac* (1860) 2 Sw. & Tr. 67; *Ogden v. Ogden* [1908] P. (C.A.) 46; *Boyes v. Bedale* (1863) 1 H. & M. 798.

⁴³ See Westlake (1st ed.), s. 402, and compare Story, s. 98.

⁴⁴ See p. 471, *ante*.

of practical compromise between the first and the second views,⁴⁵ and enables the courts to recognise the existence of a status acquired under the law of a person's domicile, while avoiding the practical difficulties which arise from subjecting legal transactions to rules of law which may be unknown in the country where the transaction takes place.⁴⁶

The operation of Rule 118 may be thus illustrated :—

The son of a father domiciled in France is legitimate, according to the law of France, in consequence of the marriage of his parents after his birth. His legitimacy has always been for some purposes recognised by English courts.⁴⁷ On the other hand, under the common law, until altered by statute, he was not allowed by English tribunals the whole of the advantages which, had he been born after his parents' marriage, would have accrued to him under English law as his father's heir, for he was not allowed to succeed to English real estate,⁴⁸ and even now he cannot succeed to a title of honour.

So again, a person's appointment as guardian of an infant under the infant's *lex domicilii* is certainly recognised as a fact by English judges,⁴⁹ but it cannot be said that the powers of a foreign guardian have always, as such, been recognised in England.⁵⁰

When the bearing of our Rule is understood, two points with regard to it become apparent.

(1) The Rule, though it is all which can be extracted by way of principle from decided cases, is seen to be so vague as to be of

⁴⁵ This principle comes very near to the opinion of some jurists (defended by Allen, 46 L.Q.R. 277) that a distinction ought to be made between the existence of a status—for example, infancy—and the legal results or effects of it, and that, while the existence of the status ought to be determined wholly by the law of the person's domicile, the extent to which effect should be given in other countries to the results of such status, e.g., to the infant's incapacity to contract, depends upon other laws, as, for example, the *lex loci contractus*, or the proper law of the contract. As a speculative view, this opinion is obviously open to criticism, but its inconsistency represents in a theoretical form the difficulty which the courts of any country are certain to feel in practice of either, on the one hand, referring questions of status wholly to the *lex domicilii*, or, on the other hand, entirely refusing recognition to personal conditions imposed by the law of a person's domicile. The great practical inconvenience of holding that a man of twenty-four who enters into a contract in England is not bound by it here, because by the law of his foreign domicile he is an infant, may be taken as one illustration of the difficulty of carrying out to the full the principle that status depends upon the law of domicile. See Comment on Rule 139, *post*.

⁴⁶ In Continental jurisprudence the idea of *ordre public* results similarly in deviation from acceptance absolutely of the determination of rights by nationality; see Wolff, p. 168 ff.

⁴⁷ *Skottowe v. Young* (1871) L.R. 11 Eq. 474.

⁴⁸ Rule 121, *Proviso*, p. 497, *post*.

⁴⁹ See *Nugent v. Vetzera* (1886) L.R. 2 Eq. 704; *Di Savini v. Lousada* (1870) 18 W.R. 425.

⁵⁰ *Johnstone v. Beattie* (1843) 10 Cl. & F. 42; *Stuart v. Bute* (1861) 9 H.L.C. 440; *Re Chatard's Settlement* [1899] 1 Ch. 712. See Rule 119, p. 484, *post*. A grant of administration cannot be made to an infant even if emancipated by the law of his foreign domicile: *In Goods of Duchess d'Orléans* (1859) 1 Sw. & Tr. 253; *In Goods of Meatyard* [1903] P. 125, 129. But a legacy

comparatively little use for practical purposes. The fact that the existence of a particular status under a person's *lex domicilii* is generally recognised does not answer the important question how far the capacities or incapacities of an individual under the law, for example, of his French domicile, will be allowed, by English courts to affect transactions in England. The answer to this inquiry (as far as, in the dearth of authorities, it can be given at all) must be sought for in the rules deducible from English decisions with regard to the recognition to be given to particular kinds of personal condition or status.⁵¹

(2) The Rule applies to two different classes of cases, that is to say, to cases in which English courts have to consider the effect to be given to an English status as regards transactions taking place out of England, and to cases in which English courts have to consider the effect to be given to a foreign status as regards transactions taking place in England.

When, however, the decisions as to particular kinds of status are examined, it will be found that they throw, comparatively speaking, little light on the answer to the question what are the limits within which our courts will recognise the effect of an English status on transactions taking place abroad. We may probably, indeed, conclude that their inclination will be to give effect to an English status as regards transactions in a foreign country; thus, a British subject is, under English law, guilty of bigamy, if having obtained a divorce from his wife in a foreign country where he is not domiciled, he, during his wife's lifetime, marries another woman.⁵² A person domiciled in England was formerly incapable of marrying his deceased wife's sister,⁵³ and is incapable of marrying his own niece, and cannot rid himself of his incapacity by marrying in a country where such marriage is lawful⁵⁴; and a person whose father was domiciled in England, and who was born

bequeathed by a testator domiciled in England may be paid to a person who is an infant by English law if he has attained majority by the law of his domicile (*Re Hellmann* (1866) L.R. 2 Eq. 363; *Donohoe v. Donohoe* (1887) 19 L.R.Ir. 349), or is emancipated under that law (*Re Da Cunha* (1828) 1 Hagg. Ecc. 237). So money paid into court for the credit of a foreign national, who is an infant in English law, may be paid out to that person when full age is attained under the law of domicile: *Re Schnapper* [1928] Ch. 420. But it was also ruled, in *Re Hellmann*, that payment could be made to an infant at the English age of majority, though by his law of domicile he would not be a major until age twenty-two. Similarly a fund may be paid to a married woman if entitled to receive it independently of her husband by the law of her domicile: *Re Lett's Trusts* (1881) 7 L.R.Ir. 132. See *post*, pp. 483-484.

⁵¹ Rule 111, p. 465, *ante*, must always be borne in mind. It denies any effect as regards transactions in England to whole classes of personal conditions, e.g., slavery, as penal or contrary to public policy.

⁵² *Lolley's Case* (1812) 2 Cl. & F. 567 (n); *Shaw v. Gould* (1868) L.R. 3 H.L. 55; *R. v. Russell* (1901) 70 L.J.K.B. 998; [1901] A.C. 446. The divorce is in England a nullity. See Rule 72, p. 374, *ante*.

⁵³ *Brook v. Brook* (1861) 9 H.L.C. 198; *Re Paine* [1940] Ch. 46; and Chap. 27, Rules 168, 169, *post*.

⁵⁴ *Re De Wilton* [1900] 2 Ch. 481.

out of lawful wedlock, was prior to January 1, 1927, when the Legitimacy Act, 1926, came into operation, at common law incapable of legitimation under the law of a foreign country.⁵⁵ On the other hand, the tendency of our courts is to hold that, as regards at any rate, capacity to contract, the effect of an English status is, even in the case of a domiciled Englishman, usually overridden by the proper law of the contract.⁵⁶

The decisions throw more light on the answer to the inquiry, what are the limits within which our courts will recognise the effect of a foreign status on transactions taking place in England, and make it possible to lay down in several cases rules with regard to the effect of a given foreign status. These rules may be considered applications of Rule 118.

⁵⁵ *Re Wright's Trusts* (1856) 2 K. & J. 595.

⁵⁶ See *Baindail v. Baindail* [1946] P. 122, 128, and Rule 139, *post*.

STATUS OF CORPORATIONS¹

RULE 114.—The existence or dissolution of a foreign corporation duly created or dissolved under the law of a foreign country is recognised by the court.

Comment

The principle is now well established that a corporation duly created in a foreign country should be recognised as a corporation in England. Foreign corporations can sue and can be sued in their corporate capacity before English tribunals,² and English courts do not enquire into the constitution of a foreign company.³ Also English courts will normally refrain from intervention in domestic issues as between the members of foreign corporations, especially if a judgment would be ineffective.⁴ Whether a company or corporation has been extinguished must be determined by the law of its place of incorporation.⁵ If according to that law the corporation is in the

¹ As to foreign corporations, see Cheshire, pp. 252–254; Wolff, ss. 277–287; Westlake, Chap. 16, Story, s. 106, n.(a), s. 565, Beale II, pp. 723–902, Goodrich, s. 105; Wortley (1933) 14 B.Y.B.I.L., pp. 1–17; Farnsworth, *The Residence and Domicile of Corporations*; Niboyet, *Traité de Droit International Privé Français*, II, pp. 312–381; Raape in Staudinger, *Kommentar zum Bürgerlichen Gesetzbuch*, VI, 2, pp. 120–163, Rühlend, *Hague Recueil* 45 (1933, III), pp. 391–472; Johnson, I, pp. 159–170, III, p. 725; Lindley, *Company Law* (6th ed.), Appendix No. 1; Lloyd, *Law relating to Unincorporated Associations* (1938), pp. 179–205; *The Dutch West India Co. v. Henriques* (1730) 2 Ld. Raym. 1535; *Newby v. Von Oppen and Colt's Patent Firearms Co.*, (1872) 7 Q.B. 293; *Bonanza Creek Gold Mining Co. v. The King* [1916] 1 A.C. 566; *Russian and English Bank v. Baring Bros.* [1932] 1 Ch. 435; *Lazard Bros. v. Midland Bank* [1933] A.C. 289; *Burr v. Anglo-French Banking Corporation* (1933) 149 L.T. 282; *Deutsche Bank v. Banque des Marchands de Moscou* (1938) 158 L.T. 364; *Davren Kisen Kabushiki Kaisha v. Shiang Kee* [1941] A.C. 373. Whether a partnership is a corporation depends on the law of the country in which it is formed: *Hellfeld v. Rehnitzer* [1914] 1 Ch. (C.A.) 746. But the *lex fori* determines whether partners are to be sued alone, together or as a firm: *Bullock v. Caird* (1875) L.R. 10 Q.B. 276; *Re Doetsch* [1896] 2 Ch. 836; contrast *Muir v. Collett* (1862) 24 D. 1119.

² Service out of the jurisdiction is permissible in the case of a foreign corporation in the same circumstances as in that of a natural person. *Westman v. Aktiebolaget, etc.* (1876) 1 Ex.D. 237; *Scott v. Royal Wax Candle Co.* (1876) 1 Q.B.D. 404; *Hamlyn Co. v. Griendtsoeven Co.* (1890) 5 T.L.R. 225; (C.A.) 274; *Lazard Bros. v. Midland Bank* [1933] A.C. 289. For service within the jurisdiction see R.S.C. Order IX, rr. 8, 8A.

³ *Branley v. S. E. Ry.* (1862) 12 C.B. (n.s.) 63, 70, *per* Erle, C.J.

⁴ See *Sudlow v. Dutch Rhensh Ry.* (1855) 21 Beav. 43; *Re Schmitz* [1906] Ch. 710; contrast *Lewis v. Baldwin* (1848) 11 Beav. 153; *Pickering v. Stephenson* (1872) L.R. 14 Eq. 322; Westlake, s. 302.

⁵ *Lazard Bros. v. Midland Bank* [1933] A.C. 289; and see *ante*, n. 1.

process of being wound up, it can still sue and be sued in England,⁶ but if this process has come to an end and the corporation has been liquidated, the corporation is dead in the eyes of the English courts.⁷ If the foreign corporation has a branch in England, the latter cannot sue after the former has been extinguished.⁸ The branch must be wound up,⁹ and the liquidator can then sue in the name of the company, although it has been dissolved.¹⁰ Where a corporation is extinguished in its place of incorporation, but a branch of it, existing in another country, is still recognised there, and that branch claims to have a legal existence in England and seeks to bring an action there, it seems very dubious if recognition should be granted in such a case.¹¹

RULE 115.¹²—The capacity of a corporation to enter into any legal transaction is governed both by the constitution of the corporation and by the law of the country where the transaction occurs.

Comment

The power or capacity of a corporation is limited in a twofold manner.

(1) Its capacity is limited by its constitution. A corporation, for example, which is prohibited by its constitution from the purchase of land, has no power to effect a valid purchase of land in any

⁶ Compare *Russian Commercial and Industrial Bank v. Comptoir d'Escompte de Mulhouse* [1925] A.C. 112, *Employers' Liability Assurance Corporation v. Sedgwick, Collins & Co.* [1927] A.C. 95; *First Russian Insurance Co. v. London and Lancashire Insurance Co.* [1928] Ch. 922. If the country where the corporation was incorporated has come under the control of a *de facto* recognised government, the law of that government and not of the *de jure* recognised authority determines the constitution and extinction of the corporation: *Bank of Ethiopia v. National Bank of Egypt and Liguori* [1937] Ch. 513; *Banco de Bilbao v. Sancha and Rey* [1938] 2 K.B. 176 (C.A.).

⁷ *Lazard Bros. v. Midland Bank* [1933] A.C. 289; *Re Russian and English Bank* [1932] 1 Ch. 663; *Re Tea Trading Co and Popoff* [1933] Ch. 647; *Deutsche Bank v. Banque des Marchands de Moscou* (1938) 158 L.T. 364.

⁸ *Russian and English Bank v. Baring Bros.* [1932] 1 Ch. 435.

⁹ *Russian and English Bank v. Baring Bros.* [1932] 1 Ch. 435; *Re Russian and English Bank* [1932] 1 Ch. 663; *Re Tea Trading Co and Popoff* [1933] Ch. 647; *Re Russian Bank for Foreign Trade* [1933] Ch. 745.

¹⁰ *Russian and English Bank v. Baring Bros.* [1936] A.C. 405. Contrast *Re Russian and English Bank* [1932] 1 Ch. 663; *Russian and English Bank v. Baring Bros.* [1934] Ch. 276; *United Service Insurance Co., Ltd. v. Long* (1935) 35 S.R. (N.S.W.) 487.

¹¹ Compare *Banque Internationale de Commerce de Petrograd v. Goukassow* [1923] 2 K.B. 682, 688, 690, reversed, [1925] A.C. 150 on other grounds; *Sea Insurance Co. v. Russia Insurance Co.* (1924) 20 Ll.L.R. 306 (C.A.). It is clear that the foreign branch could have successfully sued in the country where it operated. But, see *Re Russian Bank for Foreign Trade* [1933] Ch. 745, 763.

¹² Lindley, *Company Law* (6th ed.), p. 1226. Compare *Banque Internationale de Commerce de Petrograd v. Goukassow* [1923] 2 K.B. 682, 690; *Risdon Iron and Locomotive Works v. Furness* [1906] 1 K.B. 49 (C.A.). See *Pickering v. Stephenson* (1872) L.R. 14 Eq. 322, 340.

country; for the corporation exists as such only by virtue of its constitution, and any acts done in contravention of its constitution by its directors or others are *ultra vires*, and in strictness not the acts of the corporation.

(2) Its capacity is limited by the law of the country where a given transaction takes place. It cannot do any act forbidden by the law of such country. Thus a foreign corporation authorised by its constitution to acquire and hold land cannot hold land in England in contravention of the Mortmain Acts.¹³

Similarly an English corporation empowered by its terms of association to purchase land, work mines, etc., in a foreign country, cannot obtain land in a colony or other foreign country if the holding of land by a corporation is prohibited by the laws of such foreign country.

‘If a company is incorporated abroad so that by the constitution of the company the members are rendered wholly irresponsible, or only to a limited extent responsible, for the debts and engagements of the company, the liability of the members, as such, will be the same in England as in the country which created the corporation.’¹⁴ But, with respect to unincorporated companies, the measure of liability in respect of any given transaction, seems to depend upon the law of the place where the transaction in question occurred (*lex loci contractus*). The law of agency, as administered in that place, would, it is conceived, have to be applied; and the law of the place where the company might be considered as domiciled would only be material for the purpose of determining the authority given by the members to the agents by whom the transactions in question were conducted.’¹⁵

Illustrations

1. X takes shares in an English company constituted under the Joint Stock Companies Acts as a limited company with general powers, which it uses for the carrying on of a mining business in California. The company works a mine there, and incurs a debt for which, under Californian law, X is, as a member of the company, personally liable. An action is brought in England against X for the recovery of the debt. X is not liable, i.e., X's liability is limited by the constitution of the company.¹⁶

2. A, a Russian company, shares with X its local business, and is given a share in X's business outside Russia. A Soviet decree of December 1, 1918, makes insurance a state monopoly and provides for the liquidation of insurance companies. A ceases Russian business, but by its English agent carries on other business up to December 31, 1919. A is placed under

¹³ Compare *Great West Saddlery Co. v. The King* [1921] 2 A.C. 91; *Bonanza Creek Gold Mining Co. v. R.* [1916] 1 A.C. 566; *Chaudière Gold Mining Co. v. Desbarats* (1874) L.R. 5 P.C. 277.

¹⁴ *General Steam Navigation Co. v. Guillou* (1843) 11 M. & W. 877; *Ridson Iron and Locomotive Works v. Furness* [1906] 1 K.B. 49 (C.A.). Compare *Bateman v. Service* (1881) 6 App.Cas. 386; p. 361, note 69, *ante*.

¹⁵ *Lindley, Company Law*, 6th ed., p. 1297. See *Maunder v. Lloyd* (1862) 2 J. & H. 718; *Story*, s. 320 a; *Wolff*, s. 263; *Beale*, II, pp. 1192-1199; III, pp. 1603-1604; *Johnson*, III, p. 787; and *Rule 159, post*.

¹⁶ *Ridson Iron and Locomotive Works v. Furness* [1906] 1 K.B. (C.A.) 49.

liquidation in England in 1926, and the liquidator claims sums due by X on the non-Russian business. X denies liability on the ground of the decree terminating A's power to do business. Since the decree does not prevent A carrying on business out of Russia by an agent, who can act until his power is revoked by the liquidator, A's claim is valid.¹⁷

3. The Y bank was incorporated in Russia in 1911 and established a branch in England in 1915. In 1918 the bank was dissolved by a decree of the Russian Soviet Government. In 1921 the managers of the English branch sued Z on a debt due to the bank. The action was stayed. The Y bank existed no longer. However, upon an order for winding-up the English branch, the liquidator appointed by the English court can bring the action, notwithstanding that the bank has been dissolved.¹⁸

4. X, resident in England, is a shareholder in a Missouri company. Under the law of the State the company is declared to be dissolved, and all its property is vested in a State official, A. (*Semble*) A can claim in England from X payment of contributions on winding-up.

¹⁷ *First Russian Insurance Co. v. London and Lancashire Insurance Co.* [1936] Ch. 922.

¹⁸ *Russian and English Bank v. Baring Bros.* [1932] 1 Ch. 435; [1936] A.C. 406. And see *ante*, p. 477, notes 9 & 10.

FAMILY RELATIONS

1. HUSBAND AND WIFE

RULE 116.¹—The authority of a husband as regards the person of his wife while in England is not affected by the nationality or the domicile of the parties, but is governed wholly by the law of England.

Comment

The question, what amount of control a husband may exercise over the freedom of his wife, and what amount of force (if any) he may use in controlling her, must be answered with reference to the law of the place where they are residing. In effect our courts in this regard substitute the incidents of marriage as a status in England for those of the status of the law of the domicile of the spouses in accordance with Rule 118.

Our courts certainly would not allow a foreigner, when in England, whatever might be his domicile, to exercise over his wife, or vice versa, any power which might not be lawfully exercised by an Englishman or Englishwoman. Nor would they (*semble*) interfere if the exercise of power was valid by English law, but excessive by the law of the domicile of the spouses.

The English courts have jurisdiction to entertain an action for restitution of conjugal rights if the respondent is resident in England, whether or not the petitioner is resident or domiciled in England.² It is not a good defence to such an action to show that the husband is incarcerated in a fortress or the wife in a convent, in accordance with the law of their foreign domicile.³

2. PARENT AND CHILD⁴

RULE 117.⁵—The authority of a parent as regards the person of his child while in England is not affected by the

¹ The English courts do not appear to have considered problems of the Conflict of Laws in relation to such matters as a husband's right to beat his wife or to read her correspondence, or a wife's right to use her husband's name; but for discussion of continental authorities, see Wolff, p. 359. As to effect of marriage on property of husband and wife, see in reference to immovables, Rule 127, p. 529, and pp. 535, 541-4, *post*, and to movables, Rules 170-172.

² *Thornton v. Thornton* (1886) 11 P.D. 176; and see *ante*, p. 237, Rule 34.

³ *Herbert v. Herbert* (1819) 2 Hagg.Cons. 263.

⁴, ⁵ See notes on opposite page.

nationality or the domicile of the parties, but is governed wholly by the law of England.

Comment

By the law of England, the parental authority of a foreign father over his child—whether of a monogamous or polygamous marriage⁶—is recognised, but ‘the authority so recognised is only that which exists by the law of England. If, by the law of the country to which the parties belonged, the authority of the father was much more extensive and arbitrary than in this country, is it supposed that the father would be permitted here to transgress the power which the law of this country allows? If not, then the law of this country regulates the authority of the parent of a foreign child living in England by the laws of England, and not by the laws of the country to which the child belongs’.⁷

A Frenchman, domiciled in France, is travelling in England with his son ten years old. He flogs the child for some fault. Whatever the laws of France, the father’s authority to administer such punishment cannot be questioned in an English court, since he has not exceeded the limits of authority recognised by English law. If, again, the French father, in punishing his son, exceeds the limits of what is deemed by English law reasonable chastisement when inflicted by an English parent, he cannot justify his conduct here by showing that the punishment is allowed by French law.

Dicey’s view that foreign law is inapplicable in cases of this sort is confirmed by the Guardianship of Infants Act, 1925, which provides in s. 1:—

‘Where in any proceeding before any Court . . . the custody or upbringing of an infant, or the administration of any property belonging to or held on trust for an infant, or the application of the income thereof, is in question, the Court, in deciding that question, shall regard the welfare of the infant as the first and paramount consideration, and shall not take into consideration whether from any other point of view the claim of the father, or any right at common law possessed by the father, in respect of such custody, upbringing, administration or application is superior to that of the mother, or the claim of the mother is superior to that of the father’.

This provision has been held to be imperative, even where the parents are foreign nationals domiciled abroad: the English court ‘is bound in every case, without exception, to treat the welfare

⁶ See Story, s. 463 a; Cheshire, p. 531; Restatement, ss. 149-151; Goodrich, ss. 192-194; Wolff, ss. 366-370; 387-392; Schmitthoff, p. 286 *et seq.*

⁷ See *Johnstone v. Beattie* (1843) 10 Cl. & F. 42, 114; *Nugent v. Vetzera* (1866) L.R. 2 Eq. 704. The matter is really one of public law, not of civil rights, and foreign law is, therefore, inapplicable.

⁸ See *Re Ullie* (1836) 54 L.T. 286.

⁹ *Johnstone v. Beattie* (1843) 10 Cl. & F. 42, 114.

of its ward as being the first and paramount consideration, whatever orders may have been made by the courts of any other country'.⁸

Illustrations

1. H and W were British subjects domiciled and ordinarily resident in England. W took the four infant children of the marriage to the U.S.A. and kept them there without the consent and against the will of H. H then made a settlement on the four children and took proceedings in the Chancery Division to enforce the trusts, the children thereupon becoming wards of court. The Court of Appeal held that H was entitled to an injunction restraining W from keeping the infants out of the jurisdiction, notice thereof being served on her under Order XI. 'I agree', said Romer, L.J., 'that the benefit of the children is the first consideration for the court. In my opinion the children of British parents who are wards of court should not, in the absence of special circumstances, be permanently resident abroad, and it is plainly right and for the benefit of the children in the present case that they should be brought to this country.'⁹

2. The marriage of two domiciled Danes was dissolved by decree under the law of Denmark, the custody of the son of the marriage being awarded to the father, and access to the child by the mother being refused. Thereafter, both parents being resident in Scotland, the mother petitioned the Scottish court for access to the child 'in respect of her natural rights as his mother'. It was held that, the question of access having been determined by the court of the parents' domicile, the petition must be dismissed.¹⁰ But 'it was not disputed that, if it were relevantly averred that the interests of the child demanded either a change of custody or an arrangement for access, the court would have power to interfere in order thus to safeguard and secure the child's interests'.¹¹

3. H, a British subject domiciled in Northern Ireland, was married in the U.S.A. to W, an American citizen domiciled in Florida. W thereafter obtained a decree of divorce and custody of the child of the marriage from a Florida court. H brought the child to Northern Ireland. W petitioned the Irish court for custody of the child. It was held that (1) as the Florida court had no jurisdiction to pronounce a decree of divorce, H not being domiciled in Florida, the decree for custody was not binding in Northern Ireland; and (2) the welfare of the infant being the principal consideration, custody of the infant should be decreed to W.¹²

4. W, a British subject, married H, a Belgian. W petitioned for divorce in the Belgian courts, and her petition being dismissed, H became, under Belgian law, guardian of the infant and entitled to custody. W took the infant to England and was ordered by the Belgian court to return him to H. H petitioned the Chancery Division for custody. Morton, J., held that (1) the first and paramount consideration under the Guardianship of Infants Act, 1925, s. 1, is the welfare of the infant; and (2) while the court ought to give due weight to any views formed by the courts of the country of which

⁸ *Re B's Settlement* [1940] Ch 54, distinguishing *Nugent v. Vetzera* (1866) L.R. 2 Eq. 704, and *Di Savini v. Lousada* (1870) 18 W.R. 425. See comment in 21 B.Y.B.I.L., pp. 204-205; 4 Mod.L.R. p. 64.

⁹ *Re Liddell's Settlement Trusts* [1936] Ch. 365.

¹⁰ *Westergaard v. Westergaard* [1914] S.C. 977.

¹¹ *Ibid.*, at p. 982, per Lord Guthrie. Compare *Radoyevitch v. Radoyevitch* [1930] S.C. 619, where the court granted custody of a child to a Yugoslav father in pursuance of a Yugoslav decree, after making inquiry as to the means of the petitioner and the arrangements for the child's journey to Belgrade and her upbringing there.

¹² *Re E.H.L.* [1938] N.Ir. 56. See also *Re Kindersley* [1944] Ir.R. 111.

the infant is a national, the court must exercise a judgment of its own. Custody was awarded to W.¹²

5. Two infants were made wards of court in England by their mother, W. H., who was domiciled in Scotland, brought an action in the Court of Session for divorce and custody. Being advised that the Court of Session might feel a difficulty in exercising its jurisdiction over the children because they were wards of court in England, he applied to the Chancery Division for leave to apply for custody in the action in the Court of Session and to carry out whatever order that court might make, or, alternatively, for leave to either parent to apply in that court, in that action or otherwise, notwithstanding that the infants were wards of court in England. Vaisey, J., held that neither form of relief was proper to be granted as the jurisdictions of the courts of England and Scotland for the care and protection of infants were exercised concurrently and could not conflict.¹⁴

6. H., an interned enemy subject, obtained a divorce from W. and custody of the children. After his repatriation to Germany he applied to the Chancery Division for an order permitting him to have the children sent to Germany. The children being British subjects, the Court of Appeal held that considerations of public policy must prevent the court from ordering them to be sent to Germany.¹⁵

RULE 118.¹⁶—The rights of a parent domiciled in a foreign country over the movables in England belonging to an infant are governed by the law of England.

Comment

There is little authority as to a foreign father's rights in respect of the movables of an infant. In the earlier cases there was a tendency to hold that the matter was governed by the law of the father's domicile. In *Gambier v. Gambier*,¹⁷ H. and W., being domiciled in Holland, were married there and later acquired an English domicile, and had children born to them in England. On the death of W., H. claimed the enjoyment of property settled on their infant children, by virtue of Dutch law and a judicial decree pronounced in Holland while the parties were domiciled there. It was held that the claim was governed by English law, as the *lex domicilii*. Conversely, the English courts have more than once allowed a father domiciled abroad to receive or administer property to which his infant children have become entitled.¹⁸ The earlier

¹² *Re B's Settlement* [1940] Ch. 54. Cf. *Re McKee* [1948] 4 D.L.R. 399.

¹³ *Re X's Settlement* [1945] Ch. 44. See 22 B.Y.B.I.L. p. 286.

¹⁴ *Uhlig v. Uhlig* (1916) 33 T.L.R. 63.

¹⁵ Dicey qualified the rule by the word 'probably', adding that the parent's rights were 'possibly governed by the law of the parent's domicile' (3rd ed., p. 516). For the reasons stated in the Comment, the qualification now appears to be unnecessary.

¹⁶ (1885) 7 Sim. 263.

¹⁷ Thus in *Re Brown's Trust* (1865) 12 L.T. 488, a fund devolving on an infant under a Prussian settlement was ordered to be paid to his father, who was entitled under Prussian law to receive the fund and administer it during the infant's minority. See also *Re Hellmann's Will* (1866) L.R. 2 Eq. 363; and compare *Re Crickton's Trust* (1856) 24 L.T.(o.s.) 267 (receipt of Scottish curator held a valid discharge of a debt owing to a Scottish infant); *Mackie*

authorities were considered by Kekewich, J., in *Re Chatard's Settlement*.¹⁹ In that case infants of French nationality and domicile had become absolutely entitled to a fund in court, and it was proved that by French law their father was entitled to receive and give a legal discharge for all moneys coming to them during infancy. The learned judge held that the court was not bound to pay out the money to the father as of right, but that evidence ought to be adduced showing that the fund would be applied for the benefit of the infants.²⁰

This decision appears to be confirmed by the Guardianship of Infants Act, 1925, s. 1,²¹ which provides that the court, in deciding questions relating to the administration of any property belonging to or held on trust for an infant, or the application of the income thereof, shall regard the welfare of the infant as the first and paramount consideration. The section is imperative, even where the infant and its father are foreigners; and while the court should not disregard the *lex domicilii* or the *lex patriae*, it is bound to exercise a judgment of its own.²²

3. GUARDIAN AND WARD²³

RULE 119.—A guardian appointed under the law of a foreign country for a child domiciled in that country can exercise, subject to the discretion of the court, control over the person of his ward in England, and over movables belonging to his ward situate in England.

v. Darling (1871) L.R. 12 Eq. 319 (Scottish curator held not bound to pay into court assets belonging to the infants receivable under an English will); *Coombe v. Coombe* [1909] T.H. 241 ('The court of the domicile of the father is the court to determine the guardianship of his minor child').

¹⁹ [1899] 1 Ch. 712.

²⁰ Followed in *Dhamaral v. Holmpatrick* [1935] Ir.R. 760, where an Indian girl aged seven, domiciled in Indore, won a prize in the Irish sweep. By Indore law her father could give a good discharge for the money. The court held that he was not entitled as of right to the fund, and ordered payment of the interest to the father for seven years, keeping the corpus intact. But the decision was distinguished in *Orlando v. Finigall* [1940] Ir.R. 281, where the court ordered payment of the 'far-flung treasure of the Irish sweep' to the father of an infant prize-winner who was domiciled in New York, by the law of which State the father was as guardian entitled to sue for all property due to the infant. Compare *Re Burnett* [1936] 4 D.L.R. 355, where the mother of an infant son (both domiciled in England) claimed life insurance moneys in Ontario on the ground that she was his guardian under the Guardianship of Infants Act, 1925. The Supreme Court of Ontario held that she was not entitled unless she proved that by English law, or under an order of the English court, she was entitled to receive the money (not merely that she was a proper person to receive it).

²¹ See p. 481, *ante*.

²² Cf. *Re B's Settlement* [1940] Ch. 54, *ante*, pp. 481-2.

²³ Story, ss. 499, 499 a; Cheshire, p. 531; Restatement, ss. 149-151; Goodrich, ss. 192-194; Wolff, ss. 366-370.

Comment

There has been a clear development in the English law as to this topic. The earlier view treated guardianship as substantially local, and a part of the administrative law of each country, without extra-territorial validity. Hence, in 1843, it was held²⁴ that a guardian appointed in Scotland held no authority in England, and other guardians were appointed, and in this case it was said that :—

‘Foreign tutors and curators . . . cannot be English guardians without being able to derive their authority from some one of those sources from which the English law considers that the right of guardianship must proceed; and it has before been shown that the rights and duties of a foreign tutor and curator cannot be recognised by the Courts of this country with reference to a child residing in this country. The result is, that such foreign tutor and curator can have no right, as such, in this country; and this so necessarily follows from reason, and from the rules which regulate in this respect the practice of the Court of Chancery, that it could not be expected that any authority upon the subject would be found’.²⁵

But in a subsequent case the House of Lords indicated that the decision in *Johnstone v. Beattie* rested upon a narrow ground. ‘All that was decided there was, that the status of guardian not being a status recognised by the law of this country unless constituted in this country, it was not a matter of course to appoint a foreign guardian to be English guardian; but that that was only a matter to be taken into consideration’.²⁶ And the more recent, and reasonable, doctrine recognises the existence of the foreign guardianship as conferring rights which the court should normally confirm if they are called into question. In Lord Campbell’s words, ‘the benefit of the infant, which is the foundation of the jurisdiction, must be the test of its right exercise’.²⁷ This principle was not accepted in *Nugent v. Vetzera*,²⁸ where Page Wood, V.-C., held that the court would not from any supposed benefit to infant subjects of a foreign country, who had been sent to England for the purposes of education, interfere with the discretion of the duly appointed foreign guardian, when he wished to remove them from England in order to complete their education in their own country. And in the more recent case of *Monaco v. Monaco*,²⁹ where the question arose whether an infant should be removed from

²⁴ *Johnstone v. Beattie* (1843) 10 Cl. & F. 42.

²⁵ *Ibid.*, p. 114, per Lord Cottenham.

²⁶ *Stuart v. Buis* (1861) 9 H.L.C. 440, 470, per Lord Cranworth. For recognition of an English guardian at the Cape, see *Leyland v. Chetwynd* (1901) 18 S.C. 239.

²⁷ *Ibid.*, at p. 463. Cf. *Re Chatard's Settlement* [1909] 1 Ch. 712.

²⁸ (1866) L.R. 2 Eq. 704. Cf. *Di Savini v. Louzada* (1870) 18 W.R. 426.

²⁹ (1907) 157 L.T. 231.

England against the wishes of his grandfather, the reigning Prince of Monaco, the court seems to have concerned itself solely with ascertaining who was the infant's guardian according to Monégasque law.

The effect of the most recent decision,³⁰ however, is to reaffirm the test laid down by Lord Campbell. The welfare of the infant is the prime and paramount consideration, in terms of the Guardianship of Infants Act, 1925, s. 1, even though the infant and its guardian are domiciled in a foreign country; and if there are any observations in earlier cases which state or imply a contrary view, those observations ought not to be followed at the present day.³¹

As in the case of parental and marital rights of control, the power of a foreign guardian over his ward is limited to the power possessed by a guardian under English law, *mutatis mutandis*.³² Thus normally, a guardian appointed in Italy for an Italian ward may remove the latter from England without exposing himself to any legal proceedings,³³ provided such removal is in the interests of the ward.

As regards the movable property of a ward situate in England it appears in principle³⁴ that the guardian's power of disposal should be regulated by the law of the country to which he owes his appointment as guardian, and it has been held³⁵ that a

³⁰ *Re B's Settlement* [1940] Ch 54

³¹ *Ibid.*, at pp. 63-64, *per* Morton, J Compare *Re Luck* [1940] Ch 864, 908. *per* Scott, L.J.

³² See *Johnstone v. Beattie* (1843) 10 Cl. & F. 42, 113, 114, *per* Lord Cottenham; the language of Wood, V.-C., in *Nugent v. Vetzera* (1866) L.R. 2 Eq. 714, is wider in terms, but it does not appear that it was meant to admit the right of the exercise by a guardian of methods of control disapproved by English law.

³³ *Nugent v. Vetzera* (1866) L.R. 2 Eq. 712. Contrast *Dawson v. Jay* (1854) 3 De G.M. & G. 764, which is explained by Lord Campbell in *Stuart v. Bute* (1861) 9 H.L.C. 440, 467, as depending on the special circumstances of that case. But see also *Uhlir v. Uhlir* (1916) 33 T.L.R. 63, p. 483, *ante*, which turns on the position of children in war time when an alien enemy father seeks to remove them from the United Kingdom.

³⁴ It is expressly stated in the judgment of Kekewich, J., in *Re Chatard's Settlement* [1899] 1 Ch. 712, 716, that a trustee would have had a legal discharge if he had paid trust funds to the guardian of the infants; what, however, that case established is that, where there is a fund in court, the court need not order payment out to a foreign guardian as a matter of right, but may if it thinks fit require proof that the funds will be duly applied by the guardian. Compare the decision of an analogous point in regard to the curator of a lunatic, *Pélégryn v. Coutts & Co.* [1915] 1 Ch. 696, where it was held that a bank ought to have paid over funds of a lunatic to a foreign curator without requiring the latter to obtain an order from the court, and that it must pay the costs of the needless action. See also *Re White* [1918] 1 I.R. 19.

³⁵ *Mackie v. Darling* (1871) L.R. 12 Eq. 319; *Re Crichton's Trust* (1855) 22 L.T.(o.s.) 267. As regards Scotland, by s. 13 of the Judicial Factors (Scotland) Act, 1889, all the funds of any minor's *curator bonis* anywhere in British territory shall be paid to the *curator* on the production of the official extract of appointment, thus removing all possibility of doubt. Compare *Re Brown's Trust* (1865) 12 L.T. 488, in which payment was ordered to the father of an infant as guardian under the law of Prussia. Contrast *Re Hellmann* (1866) L.R. 2 Eq. 363, in which payment was refused in analogous

Scottish *factor loco tutoris* and *curator bonis* is the proper person to retain the English assets of Scottish minors. But the actions of the guardian are subject to the control of the court, which may conceivably but not normally, in a suitable case treat a foreign infant as a ward of court.³⁶

The authority of a foreign guardian who is not appointed by the court of the foreign infant's domicile (e.g., of a guardian appointed by a French court for an Italian infant), will, it is conceived, not be recognised in England, unless indeed recognition would be accorded to it by the courts of the domicile.³⁷

4. LEGITIMACY, LEGITIMATION, AND ADOPTION

(1) LEGITIMACY³⁸

RULE 120.—(1) A child born³⁹ anywhere in lawful wedlock is legitimate.

(2) A child not born in lawful wedlock is (semble) legitimate in England if, and only if, he is legitimate by

circumstances, showing that the court has a discretion. That case, however, is very briefly reported and the matter seems to have been hardly argued at all: see *Re Chatard's Settlement* [1899] 1 Ch. 712.

³⁶ *Brown v. Collins* (1888) 25 Ch.D. 56. *Re Montagu* (1884) 28 Ch.D. 82 (directions as to religious education of infant ward resident in Jersey with mother). Compare *De Pereda v. Mancha* (1881) 19 Ch.D. 451. Where an infant residing abroad is a necessary party and the foreign guardian does not appear, both having been served with notice of the writ, the court can appoint a guardian *ad litem*; *White v. Ducernay* [1891] P. 290. The court may, on being satisfied that orders will be obeyed, allow an infant ward of court to be removed from England: *Re Callaghan* (1885) 28 Ch.D. 186; *Re Medley* (1871) 6 Ir.R.Eq. 339; *Re Plomley* (1882) 47 L.T. 283.

³⁷ It has never been decided in England which foreign court has jurisdiction to appoint a guardian to a foreign infant. On principle, the *forum domicilii* has such jurisdiction: see the South African case of *Leyland v. Chetwynd* (1901) 18 S.C. 239. Schmitthoff (p. 288, note 5) argues that the English courts would also recognise the guardian appointed by the court of the child's nationality, citing *Re Bourgoise* (1889) 41 Ch.D. 310. Will the English courts give effect to a decision of a foreign court displacing a guardian? The point might have arisen in *Besant v. Narayaniath* (1914) 30 T.L.R. 560, had the Judicial Committee decided in favour of the parent in Madras, who had entrusted his son to a guardian to be educated in England, and who desired authority from the local court to revoke his delegation to the guardian.

³⁸ See Story, ss. 87a, 93-93w, 105, 106; Westlake, pp. 101-103; Cheshire, p. 497 *et seq.*; Restatement, ss. 187-141; Wolff, ss. 359-365; Taintor, 'Legitimation, Legitimacy and Recognition in the Conflict of Laws', 18 Can.Bar Rev. (1940), 589, 691; Welsh, 'Legitimacy in the Conflict of Laws', 63 L.Q.R. (1947) 65.

³⁹ A child conceived before but born after the marriage of its parents is presumed to be legitimate. A child conceived before but born after its parents have been validly divorced is also presumed to be legitimate: *Re Leman's Settlement Trusts* (1946) 115 L.J.Ch. 89. In both cases, however, the presumption may be rebutted, subject to such rules of evidence of the *lex fori* as the rule in *Russell v. Russell* [1924] A.C. 687. Presumably a child conceived while a foreign decree of judicial separation is in force would be presumed to be illegitimate, as is the case with a child conceived while an English decree of judicial separation is in force: *Ettenfield v. Ettenfield* [1940] P. 96.

the law of the domicile of each of his parents at the date of his birth.

Provided that a child who is legitimate under clause (2) of this Rule cannot (seem) succeed as heir to English real estate, or to a dignity or title of honour, or to an entailed interest in personalty, nor can anyone except his issue inherit such a dignity or title or estate from him as heir.

Comment

(1) *Birth in lawful wedlock.* Dicey's comment⁴⁰ on clause (1) of this Rule was that 'if any dispute arises as to the legitimacy of a child ostensibly born in lawful wedlock, it will be found that the matter in dispute is not the soundness of Rule [120], but either the validity of the marriage⁴¹ or the fact of the child being born in wedlock. The principle itself, expressed in the Rule, is beyond dispute.'

This is all that Dicey had to say about legitimacy; but his brief treatment hardly exhausts the difficulties of the subject. It is probably true that problems of the conflict of laws have most frequently arisen in this field because the English conception of lawful wedlock differs or has differed from that of other systems of law.⁴² In this connection it used to be thought that polygamous marriages were wholly unrecognised by English law and that the issue of such unions could not be legitimate.⁴³ But it is now clear that such unions are recognised for many purposes⁴⁴ and possible that they are recognised for all purposes except where there is some compelling reason to the contrary; for example, the inapplicability of the matrimonial machinery of the English courts, the law of bigamy, or such rules of English law as are traceable to the old doctrine that husband and wife are one.⁴⁵ It is also clear from recent dicta⁴⁶ that the issue of such unions may be legitimate and as such entitled

⁴⁰ 3rd ed., pp. 520-1.

⁴¹ See as to validity of marriage, Chap 27, Rules 168, 169, *post*.

⁴² See e.g. *Brook v. Brook* (1857) 8 Sm. & G. 481; (1861) 9 H.L.C. 193 (marriage to deceased wife's sister in Holstein); *Re De Wilton* [1900] 2 Ch. 481 (marriage to niece in Germany); *Re Paine* [1940] Ch. 46 (marriage to deceased sister's husband in Germany).

⁴³ *Re Bethell* (1887) 38 Ch.D. 220, a case which, as pointed out *ante*, p. 227, is reconcilable with the most recent authorities only on the assumption that the man's English domicile at the date of his Baralong marriage was a material fact. Contrast *Re Ulles* (1885) 53 L.T. 71; 54 L.T. 286.

⁴⁴ *Srini Vasan v. Srini Vasan* [1946] P. 67; *Beindail v. Beindail* [1946] P. 122 (C.A.); *ante*, pp 224-228.

⁴⁵ *Ante*, p. 227.

⁴⁶ *The Sinka Peerage Claim* [1946] 1 All E.R. 348, 349, *per Lord Maugham*, cited *ante*, p. 226; *Beindail v. Beindail* [1946] P. 122, 127-8, cited *ante*, p. 226.

to succeed to property as children, at any rate in cases where the man has married only one woman.^{41a}

But Dicey did not consider the problems which arise out of the fact that by the domestic law of some foreign countries (unlike the domestic law of England) a child may in certain circumstances be legitimate even though his parents were not validly married.⁴¹ It is not altogether clear whether he shared Westlake's view that 'every question of legitimacy must involve that of the validity of some marriage'.⁴³ In any event, that view seems too narrow⁴³ and was not adopted in the most recent English decision.⁴² For these reasons a second clause has been added to Rule 120.

(2) *Legitimacy by the lex domicilii of each parent.* This more difficult phase of the problem of legitimacy may, as a matter of principle, be approached from any one of three points of view: first, from the point of view that legitimacy is or may be a question of status, and therefore should be governed by the law of the child's domicile of origin^{50a}; secondly, from the point of view that the meaning of the term 'children' in a will or settlement is or may be a question of construction, and therefore should be governed by the law of the testator's domicile or the proper law of the settlement^{50b}; or thirdly, from the point of view of the rule of English domestic law that children not born in lawful wedlock are illegitimate, and therefore children born of a marriage which is invalid by the English conflict of laws rules are illegitimate.^{50c} Objections, however, can be and have been raised to each of these views. The objection to the first view is, as Westlake pointed out,^{50d} that since the child's domicile of origin is that of its father if legitimate and

^{41a} It is true that in *The Sinha Peerage Claim* [1946] 1 All E.R. 348, 349, Lord Maugham added the qualification 'except, it may be, the inheritance of real estate before the Law of Property Act, 1925, or the devolution of entailed interests as equitable interests before or since that date, and some other exceptional cases'. But this observation must have been *obiter*, because the marriage in question was held to be monogamous. It is difficult to see why the rule in *Birtwhistle v. Vardill* (1839) 7 Cl. & F. 895 (that is, the proviso to Rule 120, *ante*) to which Lord Maugham was referring should apply at all if the marriage is valid. It has never been held that the rule applies so as to prevent the issue of a marriage within the prohibited degrees of English domestic law from succeeding as heirs to real estate in England, if the marriage was valid by the law of each party's ante-nuptial domicile.

⁴¹ See Wolff, p. 392; and with regard to the issue of a 'putative marriage', *Khoo Hooi Leong v. Khoo Hean Tzee* [1926] A.C. 529, 543; *Berthiaume v. Dastous* [1930] A.C. 79, 87-88. In *Shaw v. Gould* (1868) L.R. 3 H.L. 55, and *Re Stirling* [1908] 2 Ch. 344, the Scots doctrine of putative marriage was held on the facts to be inapplicable.

⁴² Westlake, pp. 106, 231.

⁴³ Welsh, 63 L.Q.R. (1947) pp. 65-69.

³⁹ *Re Bischoffsheim* [1948] Ch. 79.

^{30a} Cheshire, pp. 498-511; Wolff, pp. 388-389; Schmitthoff, p. 275. The dicta relied on by Cheshire in support of this view (at pp. 499-501) are all taken from cases on legitimization by subsequent marriage, not legitimacy.

^{50b} Welsh, 63 L.Q.R. 65 (1947).

^{50c} Westlake, pp. 106, 131; cf. Morris, *Cases*, p. 188.

^{50d} At p. 106. See post, note 69, p. 493.

that of its mother if illegitimate, how can the legitimacy of the child depend upon its domicile of origin if its domicile of origin depends upon its legitimacy? The difficulty does not, of course, arise if the child's parents are domiciled in the same country when the child is born; but in at least two of the decided cases^{50c} the father and mother were domiciled in different countries. The objection to the second view is that it has now been decided that the question whether a legitimated child can take under the will or intestacy of a testator or intestate dying domiciled in England raises a question of status, and not a question of construction,^{50f} so that it would appear to be inelegant that the question whether a child is legitimate, and can succeed as such, should be treated simply as one of construction. The objection to the third view is that, by projecting a rule of English domestic law into the conflict of laws, it fails to take account of the possibility that under some foreign systems of law a child may be legitimate though its parents were not validly married. This difficulty, however, does not yet appear to have arisen in an English case.

Prior to 1947 there appears to have been no case in which an English court held that a child not born in lawful wedlock (that is, not born of a marriage valid under the English conflict of laws rules⁵¹) was legitimate. The leading case is *Shaw v. Gould*,^{51a} in which a testator domiciled in England devised land in England in trust for the sons lawfully begotten of his great-niece Elizabeth Hickson, and bequeathed funds in trust for her children. Elizabeth Hickson, who was domiciled in England, was induced by the fraud of one Buxton, who was also domiciled in England, to marry him in England. This marriage was dissolved by the Court of Session in Scotland, and Elizabeth Hickson subsequently married a domiciled Scotsman and had children by him. It was held by the House of Lords that these children were illegitimate, and so could not take under the will. The ground for this decision was that as the Scottish divorce was invalid in England, Buxton not being domiciled in Scotland, the subsequent marriage of Elizabeth Hickson was also invalid.^{51b} In the subsequent cases of *Re Bethell*^{51c} and *Re Paine*^{51d} the sole question discussed was whether the respective marriages were valid, and the possibility that the children might

^{50c} *Shaw v. Gould* (1868) L.R. 3 H.L. 55; *Re Paine* [1940] Ch. 46.

^{50f} *Re Goodman's Trusts* (1881) 17 Ch.D. 266; *Re Andros* (1883) 24 Ch.D. 637; contrast *Levy v. Solomon* (1877) 37 L.T. 263; *Boyes v. Bedale* (1863) 1 H. & M. 798, which was expressly followed in *Re Wilson's Trusts* (1865) L.R. 1 Eq. 247, affirmed *sub nom. Shaw v. Gould* (1868) L.R. 3 H.L. 55; *post*, p. 501.

⁵¹ See Rules 168, 169, *post*.

^{51a} (1868) L.R. 3 H.L. 55.

^{51b} See especially pp. 72-73, *per* Lord Chelmsford.

^{51c} (1887) 38 Ch.D. 220.

^{51d} [1940] Ch. 46. Compare *Brook v. Brook* (1861) 9 H.L.C. 198, *stated post*, Illustration 1, where the question was as to the legitimacy of a child (3 Sm. & G. 481), but the only question discussed by the House of Lords was the validity of his parents' marriage. See also *Re De Wilton* [1900] 2 Ch. 481.

be legitimate by the law of their domicile of origin or of their mother's or father's domicile at the date of their births, notwithstanding the invalidity of the marriages, was not even considered.

In the recent case of *Re Bischoffsheim*,⁵¹ however, the following proposition was laid down by Romer, J. :—

'Where succession to personal property depends on the legitimacy of the claimant, the status of legitimacy conferred on him by his domicile of origin (i.e., the domicile of his parents at his birth) will be recognised by our Courts, and . . . if that legitimacy be established, the validity of his parents' marriage should not be entertained as a relevant subject for investigation'.

The facts were that a testator, presumably domiciled in England (the report is silent on this point) gave a share of residue to his granddaughter Nesta for her life with remainder to her children. In 1917 Nesta was married in New York to George, the brother of her deceased husband, and in 1920 she gave birth to a son Richard. The question was whether Richard could take under the will. In 1917 the marriage of a widow to her deceased husband's brother was invalid by the domestic law of England but valid by the domestic law of New York. Romer, J., refused to decide whether Nesta and George were in 1917 domiciled in England and whether their marriage was void, since by the time Richard was born in 1920 they had each acquired a domicile of choice in New York. By the law of New York Richard received at birth the status of legitimacy; and Romer, J., accordingly held that he was entitled to share as a child of Nesta in the residuary estate of the testator.

While this decision must be regarded as authoritative until the matter is reconsidered by a higher tribunal, it seems open to criticism upon a number of grounds⁵² :

(i) It may be questioned whether the court should have concerned itself exclusively (as it did) with the status of Richard. 'The real problem was one of construction or definition, and its solution did not require discussion of the claimant's status. Status, and its recognition in England, is one matter. Whether a person who has acquired a certain status falls within the ambit of a clearly defined conception of English municipal law is an entirely different matter. The question before the court was whether the claimant was Nesta's child within the meaning of an English will.'⁵³ In classifying the problem before him as one of status which is governed by the law of the child's domicile of origin, Romer, J., relied upon *Re Goodman's Trusts*⁵⁴ and *Re Andros*.⁵⁵ But these were cases on

⁵¹ [1948] Ch. 79, 92.

⁵² See Morris, 12 *Conveyancer* 223 (1948); Mann, 64 L.Q.R. 199 (1948).

⁵³ Mann, 64 L.Q.R. pp. 201-2. Cf. *Shaw v. Gould* (1868) L.R. 3 H.L. 55, 80 per Lord Chelmsford. See also Falconbridge, pp. 599-600; and Welsh, 63 L.Q.R., p. 74 et seq., where this view is more fully elaborated. Compare the case where an adopted child claims to take under an English will, *Rule 128 (3) post*, p. 512; and see Rule 128 and Exception thereto, *post*, pp. 531, 533.

⁵⁴ (1881) 17 Ch.D. 266.

⁵⁵ (1863) 24 Ch.D. 637.

legitimation by subsequent marriage, not legitimacy. The learned judge expressed the view that 'there is no real distinction between the two classes of case. If, in fact, the status of legitimacy is conferred by the law of the domicile of origin, the time of, as also the reason for, its conferment are surely immaterial'.⁵⁶ It is not, however, true that questions of legitimation are governed by the law of the child's domicile of origin. At common law the question depends upon the law of the father's domicile at the date of the child's birth and at the date of the subsequent marriage⁵⁷; and under the Legitimacy Act, 1926, s. 8, the question depends upon the law of the father's domicile at the date of the marriage.⁵⁸ In both cases the law of the child's domicile of origin might well be different.⁵⁹

(ii) The decision is not easy to reconcile with the earlier authorities, in particular the decision of the House of Lords in *Shaw v. Gould*.⁶⁰ The court distinguished that 'much debated' decision on three grounds, none of which would appear to be entirely satisfactory. In the first place, the learned judge said⁶¹ that if the divorce was invalid, as the House of Lords held it to be, the domicile of origin of the children was English, since the mother's domicile remained that of her first and lawful husband. It is true that this distinguished *Shaw v. Gould* from *Re Bischoffsheim*, since Nesta's first husband was dead and she was therefore able to acquire a domicile in New York before Richard was born. But the argument appears to proceed in a circle, since the House of Lords in *Shaw v. Gould* could not have held that the domicile of origin of the children was English before deciding that they were illegitimate, which was the very point in issue. The reason why the House of Lords held that the children were illegitimate was not that they were illegitimate by the law of their domicile of origin, but that their parents were not validly married, since the mother's divorce was, in the view of English law, invalid.⁶² In the second place, Romer, J., expressed the view^{62a} that the validity of the divorce obtained in Scotland by the claimants' mother and, consequently, the validity of her second marriage to the claimants' father, was not really relevant, but was 'a matter rather of assumption by the House of Lords than one of direct decision'. This argument, as Mann observes,⁶³ certainly does not lack boldness, for it treats as obiter a substantial portion of the opinions delivered in *Shaw*

⁵⁶ [1948] Ch. 79, 92.

⁵⁷ Rule 121, *post*.

⁵⁸ Rule 122, *post*.

⁵⁹ Morris, 12 *Conveyancer*, 224.

⁶⁰ (1868) L.R. 3 H.L. 55. See 63 L.Q.R., p. 82 *et seq.* for fuller discussion of the case.

⁶¹ [1948] Ch. 79, 91.

⁶² See *ante*, p. 490, note 51b.

^{62a} [1948] Ch. 79, 91.

⁶³ 64 L.Q.R., p. 200.

v. Gould.⁶⁴ Romer, J.'s, third reason for distinguishing *Shaw v. Gould* was that 'the claims under consideration were not confined to personal estate in England, for there was a claim to English real estate as well, and this may have had some effect on the line which was adopted both in the argument and in their Lordships' opinions'.⁶⁵ But the devise in *Shaw v. Gould* was to the sons (not heirs) of the body of Elizabeth Hickson; and there is authority for the proposition that the rule in *Birtchistle v. Vardill*⁶⁶ relates only to the case of descent of land upon an intestacy, and does not affect the case of a devise in a will to children.⁶⁷

Nor is it any easier to reconcile the decision in *Re Bischoffsheim* with that of Stirling, J., in *Re Bethell*⁶⁸ or with that of Bennett, J., in *Re Paine*,⁶⁷ neither of which was cited by counsel or referred to by the court in *Re Bischoffsheim*.

(iii) Romer, J., regarded the domicile of origin of a child as synonymous with the domicile of his parents at the date of his birth; and on the facts before him this assumption was correct. But it would not have been correct if Nesta had never lived with George in New York, for in that case (assuming the marriage to have been void) she would have retained her English domicile of origin. Romer, J.'s, statement of the law therefore affords no solution in cases where the parents are at the time of the child's birth domiciled in different countries. In particular, where an English woman contracts a marriage with a foreigner which is invalid in the view of English law and they never live together in the country of the man's domicile, it is 'thinking in a circle', in Westlake's phrase,⁶⁸ to refer the child's legitimacy to the law of his domicile of origin, since that domicile cannot be determined before it is decided whether or not the child is legitimate.⁶⁹ This

⁶⁴ Contrast the interpretation placed upon *Shaw v. Gould* by the Judicial Committee in *Le Mesurier v. Le Mesurier* [1895] A.C. 517, 539-540.

⁶⁵ [1948] Ch. 79, 91. The reference is to the rule in *Birtchistle v. Vardill* (1839) 7 Cl. & F. 895; cf. Rule 122, proviso, *post*.

^{65a} (1839) 7 Cl. & F. 895

^{65b} *Re Grey's Trusts* [1892] 3 Ch. 88, 93, *per* Stirling, J.

⁶⁶ (1887) 38 Ch.D. 220. Morris (*ubi supra*) points out that in that case the child was illegitimate because her father's marriage to a Baralong woman in South Africa was polygamous, and by the law of his domicile (English law) he had no capacity to contract such a marriage. Yet by the Baralong law of the child's mother at the date of her birth she was undoubtedly legitimate.

⁶⁷ [1940] Ch. 46. There the child was held illegitimate because her mother's marriage was invalid, although she was legitimate by the law of her father's domicile at the date of her birth. See Illustration 5, *post*, p. 496.

⁶⁸ At p. 231.

⁶⁹ *Udny v. Udny* (1869) L.R. 1 Sc. & Div. 441, 457. It is submitted that Wolf's ingenious attempt to break the vicious circle (pp. 106, 889) is also unsatisfactory, for the reasons given by Welsh, 63 L.Q.R., pp. 71-73. No vicious circle would arise if the courts had held that the domicile of origin of a child is that of its mother in all cases, whether it is legitimate or illegitimate. Cf. Rule 6, *ante*, p. 88, with Rule 9, Sub-Rule 2, *ante*, p. 207. It is clear that Rule 6, which is based on Lord Westbury's formulation in *Udny v. Udny*, was settled law long before Rule 9, Sub-Rule 2.

very situation arose both in *Shaw v. Gould*⁷⁰ and in *Re Paine*.⁷¹ and it is significant that in neither case did the court apply the test which has now been formulated by *Romer, J.*⁷²

It has been suggested⁷³ that it is not inconsistent with any of the English decisions to say that a child not born in lawful wedlock is legitimate in England if, and only if, he is legitimate by the law of the domicile of each of his parents at the time of his birth. This formula has accordingly been adopted in clause (2) of Rule 121,⁷⁴ notwithstanding the difficulties that have been mentioned and the fact that the Rule thus framed is scarcely reconcilable with the actual reasoning of the courts in such cases as *Shaw v. Gould* and *Re Paine*.⁷⁵ But though the Rule has been formulated thus in an attempt to reconcile the actual results of the cases, it is to be hoped that the Court of Appeal will choose one or other of the conflicting views when the opportunity occurs, and thus determine the vexed question whether legitimacy is a question of status, or a question of construction, or simply a question of the validity of a marriage.

Capacity of legitimate children to succeed to property. It was decided by the House of Lords in *Birtwhistle v. Vardill*⁷⁶ that a person legitimated by the subsequent marriage of his parents in accordance with the law of Scotland could not succeed as heir to English real estate, since 'the English heirship, the descent of English land, required not only that the man should be legitimate, but as it were *porphyro-genitus*, born legitimate within the narrowest pale of English legitimacy'.^{76a} This principle, which is fully discussed in connection with the proviso to Rule 121,^{76b} is wide enough to cover and (it is submitted) does cover the case of a child who is legitimate under clause (2) of Rule 120, that is, a child not born in lawful wedlock. Such a child therefore cannot (*semble*) succeed as heir to English real estate, or to a dignity or title of honour, or

⁷⁰ (1868) L.R. 3 H.L. 55; *ante*, p. 490.

⁷¹ [1940] Ch. 46; *ante*, p. 490.

⁷² Indeed, Lord Chelmsford said (at p. 89): 'But if a constructive legitimacy of this kind, viz. arising from putative marriage would, under the circumstances, have arisen in Scotland, I cannot think that we would be bound to recognise it so far as to qualify the offspring of a void marriage to take under the description of "children" in an English will'.

⁷³ See Morris, 12 *Conveyancer*, 225

⁷⁴ *Ante*, p. 487.

⁷⁵ Morris (*ubi supra*) points out that it involves the conclusion that *Shaw v. Gould* ought to have been differently decided if Buxton (the first husband) had acquired a domicile in Scotland after the divorce but before the birth of the children, since in that event the domicile of the children's mother and father at the date of their birth would have been Scottish. It is of course a matter of conjecture what the decision of the House of Lords would have been in that event, but it may be observed that no member of the House referred to the domicile of Buxton as being relevant at any time other than that of the proceedings for divorce in Scotland.

⁷⁶ (1839) 7 Cl. & F. 895.

^{76a} *Re Goodman's Trusts* (1881) 17 Ch.D. 266, 299, *per James, L.J.*

^{76b} *Post*, pp. 497, 501-505.

to an entailed interest in personality,^{76c} nor can anyone except his issue inherit such a dignity or title or estate from him as heir.^{76d}

Legitimacy in cases other than succession. All the English cases on legitimacy have arisen in connection with succession to property, and the question discussed has been whether a child can claim as such under a will or settlement or on an intestacy. In other branches of law the rights of illegitimate children have been progressively enlarged by the Legislature,⁷⁷ so that the question whether a person is legitimate is of little practical importance except in determining his rights of succession.

Illustrations

1. T, a testator domiciled in England, gives a share of his residuary estate to 'my reputed son X'. X dies intestate soon after T and his share of residue is claimed by X's sisters and half-brother and half-sister on the ground that X was legitimate, and by the Crown on the ground that X was illegitimate. X was the child of a second marriage of T celebrated in Holstein with his deceased wife's sister, also domiciled in England. Such a marriage was valid by the law of Holstein but void at that time (1850) by English domestic law. The marriage is void, X is illegitimate, and the Crown is entitled to his share of residue.⁷⁸

2. T, a testator domiciled in England, devises land in England in trust for the sons lawfully begotten of E, and bequeaths funds in trust for the children of E. E, being domiciled in England, is induced by the fraud of B to marry him in England. B is domiciled in England at all material times. The Court of Session in Scotland purports to dissolve the marriage of B and E, and E marries in Scotland S, who was domiciled in Scotland, and has children by him. The Scottish divorce is invalid in England, because B was not domiciled in Scotland; E's second marriage is invalid; and E's children are illegitimate and cannot take under the will.⁷⁹

3. T, a testatrix domiciled in England, gives securities upon trust for the children of E. E, being domiciled in England, married her uncle, also domiciled in England, in Germany, and has children by him. The marriage is valid by German law but invalid by English domestic law. The marriage is invalid, the children are illegitimate and cannot take under the will.⁸⁰

4. T, a testatrix domiciled in Scotland, gives land in Scotland and securities in England upon trust for S and the heirs male of his body. S's eldest surviving son is W, whose domicile is probably Scottish. W marries X and has a child, Y by her. Before her marriage to W, X was married to Z, who was domiciled in British Columbia; and that marriage was dissolved by a decree of a court in North Dakota, where Z was never domiciled. The North Dakota divorce is invalid in British Columbia. The marriage between W and X is therefore invalid, and Y, the child of that marriage, is illegitimate and cannot take under the will. The Scottish doctrine of putative marriage,

^{76c} *Fenton v. Livingstone* (1859) 3 Macq. 497; cf. *The Sinks Peerage Claim* [1946] 1 All E.R. 348, 349; *Re Bischoffsheim* [1948] Ch. 79, 87.

^{76d} *Re Don's Estate* (1857) 4 Drew. 194.

⁷⁷ E.g., Workmen's Compensation Act, 1925, s. 4 (1); Law Reform (Miscellaneous Provisions) Act, 1934, s. 2 (1). See also British Nationality Act, 1948, s. 23.

⁷⁸ *Brook v. Brook* (1857) 3 Sm. & G. 481; (1861) 9 H.L.C. 193.

⁷⁹ *Shaw v. Gould* (1868) L.R. 3 H.L. 55.

⁸⁰ *Re De Wilton* [1900] 2 Ch. 481.

even if it is part of the law of Scotland, is not applicable, because the error of the parties was one of law, not fact.⁸¹

5 T, a testatrix domiciled in England, gives securities in England on trust for W absolutely if W should have any child or children living at the time of her decease, with a gift over if she should not. W, being domiciled in England, marries in Germany H, who never lost his German domicile of origin, and has children by him. H was the husband of W's deceased sister. The marriage is valid by German law, but void at that time (1875) by English domestic law. The marriage is invalid, the children are illegitimate, and the gift over takes effect.⁸²

6 T, a testator presumably domiciled in England, gives securities on trust for the children of W. In 1917 W marries in New York H, the brother of her deceased husband. The domicile of origin of H and W is English; it is uncertain whether they have acquired a domicile of choice in New York by 1917, but it is certain that they have done so by 1920, when S their son is born. The marriage is valid by New York law but void at that time by English domestic law. S is legitimate and can take under the will, whatever be the domicile of H and W in 1917.^{82a}

(2) LEGITIMATION

(a) *Legitimation at Common Law.*⁸³

RULE 121.⁸⁴—At common law the law of the father's domicile at the time of the birth or conception⁸⁵ of a child born out of lawful wedlock, and the law of the father's domicile at the time of the subsequent marriage of the child's parents, determine whether the child becomes, or may become, legitimate in consequence of the subsequent marriage of the parents (*legitimatio per subsequens matrimonium*).

Case 1.—If both the law of the father's domicile at the time of the birth of the child and the law of the father's domicile at the time of the subsequent marriage allow of *legitimatio per subsequens matrimonium*, the child becomes,

⁸¹ *Re Stirling* [1908] 2 Ch. 344. See Robertson, *Characterisation in the Conflict of Laws*, 149-150; cf. Welsh, 63 L.Q.R. 86, n. 5, 87, n. 7.

⁸² *Re Payne* [1940] Ch. 46, discussed, *post*, p. 782, in relation to the validity of the marriage.

^{82a} *Re Bischoffsheim* [1948] Ch. 79.

⁸³ See Story, ss. 87-94, 105, 105a; Cheshire, pp. 514 *et seq.*; Restatement, ss. 137-141, 246; Goodrich, ss. 136-140; Wolff, ss. 153, 371-375; Mann, 'Legitimation and Adoption in Private International Law', 57 L.Q.R. (1941) 112; Taintor, 'Legitimation, Legitimacy and Recognition in the Conflict of Laws', 18 Can. Bar Rev. (1940) 589, 691.

⁸⁴ This Rule should be read and compared with Rule 122, *post*, p. 507.

⁸⁵ *Uday v. Uday* (1869) L.R. 1 Sc.App. 441; *Re Wright's Trusts* (1856) 3 K. & J. 595. As to whether the time of birth or of conception is material, see p. 498, note 92, *post*.

⁸⁶ *Re Grove* (1888) 40 Ch.D. (C.A.) 216; Westlake, ss. 54, 55.

or may become, "legitimate on the marriage of the parents."⁸⁵

Case 2.—If the law of the father's domicile at the time of the birth of the child does not allow of *legitimatio per subsequens matrimonium*, the child does not at common law become legitimate on the marriage of the parents.

Case 3.—If the law of the father's domicile at the time of the subsequent marriage of the child's parents does not allow of *legitimatio per subsequens matrimonium*, the child does not become legitimate on the marriage of the parents.⁸⁶

Provided that a person born out of lawful wedlock cannot succeed as heir to English real estate, or to a dignity or title of honour, or to an entailed interest in personalty, nor can anyone except his issue inherit such a dignity or title or estate from him as heir.⁸⁷

Comment and Illustrations

According to the common law of England, and originally of the Northern States of America, and of all countries governed by the English common law, a child born before the marriage of his parents could not be legitimated by their subsequent marriage. According to the law of Scotland, of France, and of most countries which have

⁸⁵ It is not certain that he will become legitimate on the marriage of his parents, since the law of the country where the father is then domiciled may for the purpose of legitimation require something more than the marriage; it may, for example, require that the father should go through some additional ceremony or formality, e.g., registration of the child, or that he should not, between the child's birth or conception and the subsequent marriage with the child's mother, have been married to any other woman. The Legitimacy Act, 1926, s. 8 (1) requires that the father should be domiciled, at the time of his marriage, in a foreign country 'by the law of which the illegitimate person became legitimate by virtue of such subsequent marriage'. But the common law authorities are in favour of the Rule as stated by Dicey in the text: see *Udny v. Udny* (1869) L.R. 1 H.L.Sc.App. 441, 448, per Lord Hatherley; *Re Grove* (1888) 40 Ch.D. 216, 232, per Cotton, L.J.; and Mann, 57 L.Q.R. (1941) p. 115.

⁸⁶ *Udny v. Udny* (1869) L.R. 1 Sc.App. 441; *Re Grove* (1888) 40 Ch.D. (C.A.) 216; *Moffett v. Moffett* [1920] 1 Ir.R. (C.A.) 57; *Dalkousie v. McDonald* (1840) 7 Cl. & F. 817; *Munro v. Munro* (1840) 7 Cl. & F. 842.

⁸⁷ *Re Wright's Trusts* (1856) 3 K. & J. 595; *Shedden v. Patrick* (1854) 1 Macq. 535; *Munro v. Saunders* (1832) 6 Bl. 468.

⁸⁸ *Re Grove* (1888) 40 Ch.D. (C.A.) 216. As to meaning of 'marriage' see Chap. 27, Rule 168, post.

⁸⁹ *Birtwhistle v. Vardill* (1855) 2 Cl. & F. 571; (1859) 7 Cl. & F. 895; *Re Don's Estate* (1857) 4 Drew. 194.

adopted, or have been influenced by, the law of Rome, such a child is or may be legitimated by the subsequent marriage of the parents. These countries, in short, allow what is technically known as *legitimatio per subsequens matrimonium*.

After some fluctuation in the decisions, the principle stated in Rule 121 became well established. The test at common law whether the subsequent marriage of a child's parents can legitimate him is the law of the father's domicile at the time of the child's birth,⁹² taken in combination with the law of the father's domicile at the time of the subsequent marriage.

The effect of the Legitimacy Act, 1926, was twofold. In the first place, it introduced *legitimatio per subsequens matrimonium* into English domestic law⁹³; and in the second place, it modified the English conflict rule by providing⁹⁴ for the recognition of a foreign *legitimatio per subsequens matrimonium* if the child's father was or is domiciled, at the time of the marriage, in a foreign country by the law of which the child became legitimated by virtue of the marriage, notwithstanding that at the time of the child's birth the father was not domiciled in a country in which legitimation by subsequent marriage was permitted by law. But it may still be necessary to apply the old rule of common law, for one of three reasons:—

(1) A child becomes legitimate under section 1 (1), or is recognised as having been legitimated under section 8 (1), only from January 1, 1927, or from the date of his parents' marriage, whichever last happens.

(2) The Act applies only to legitimation by subsequent marriage, not to legitimation by recognition, acknowledgment, adoption or otherwise.

(3) The Act is not, or may not be, available if the child's father or mother was married to a third person when the child was born: section 1 (2). It may therefore still be necessary to have recourse to the old law in such a case.⁹⁵

The common law rules may be illustrated by their application to three different cases:—

Case 1.—If the law of the country (for example, Scotland) where the father is domiciled (not necessarily where he is resident) at the time of a child's birth or conception, and also of the country (for example, France) where the father is domiciled at the time of the

⁹² Or conception, in cases where the law of the father's domicile makes this period and not birth the decisive factor in deciding whether the parents could legally have intermarried, as is probably the rule in Scotland under the Scottish Act (c. 29) of 1600 (*Fraser, Parent and Child*, p. 41) and perhaps under the Roman-Dutch law: see Lee, *Introduction to Roman-Dutch Law*, 4th ed., p. 34, n. 5. See further, *Re Luck* [1940] Ch. 864, 895, per Scott, L.J.

⁹³ Section 1 (1). For a full account of the acceptance of the rule, see 36 L.Q.R. 255.

⁹⁴ Section 8 (1).

⁹⁵ See *Re Askew* [1930] 2 Ch. 259, and contrast *Collins v. Att.-Gen.* (1931) 47 T.L.R. 484. See *post*, pp. 508, 509.

marriage with the child's mother, recognises *legitimitas per subsequens matrimonium*, the child, though born before the marriage of his parents, may become legitimate on their subsequent marriage. Thus, where the child's father was domiciled, though not residing, in Scotland at the time of the child's conception and birth in England, it was held that the subsequent marriage of his parents whilst the father retained his Scottish domicile made the child legitimate.⁵

Case 2.—If the law of the country (for example, England before 1927) where the father is domiciled at the time of the child's birth does not allow of *legitimitas per subsequens matrimonium*, no subsequent marriage will avail to make the child legitimate at common law.

Thus, where an Englishman, domiciled in England, had, while residing in France, a child by a Frenchwoman, herself domiciled in France, it was held before 1927 that the subsequent marriage of the parents did not legitimate the child.⁶⁷ This was a particularly strong case, because the father had, after the birth of the child but before the marriage, acquired a French domicile.

Case 3.—If, lastly, the law of the country (for example, England before 1927) where the father is domiciled at the time of the subsequent marriage with the child's mother does not allow of *legitimitas per subsequens matrimonium*, the marriage will not avail to make the child legitimate.

Thus, where a Genevese citizen was at the time of the birth of his child domiciled at Geneva, the law whereof allowed of *legitimitas per subsequens matrimonium*, and, having afterwards obtained an English domicile, then married the child's mother, it was held that the subsequent marriage did not legitimate the child.⁶⁸ 'In my opinion', says Cotton, L.J., 'the domicile at birth must give a capacity to the child of being made legitimate; but then the domicile at the time of the marriage, which gives the status, must be domicile in a country which attributes to marriage that effect'.⁶⁹

The domicile of the mother is immaterial.

⁶⁶ *Munro v. Munro* (1840) 7 Cl. & F. 840. In *Re Luck* [1940] Ch. 864, 888 Scott, L.J., thought that 'the decisions about legitimation *per subsequens matrimonium* . . . postulate the possession by the natural father of the same domicile at the date of birth as at the date of the marriage'.

⁶⁷ *Re Wright's Trusts* (1856) 2 K. & J. 595. The effect of the Legitimacy Act, 1926, on such a case is considered, *post*, Rule 122, pp. 507, 509.

⁶⁸ *Re Grove* (1888) 40 Ch.D. (C.A.) 216. This case is not, it is true, absolutely decisive, for some of the judges took the view that the father was domiciled in England, both at the time of the child's birth and at the time of his marriage with the child's mother. But the very decided expressions of opinion both by Cotton, L.J. (pp. 231-233), and by Fry, L.J. (p. 241), are nearly equivalent to a decision on the point in question. The same doctrine is laid down in *Uday v. Uday* (1869) 1 Sc.App. 441, 447, *per* Lord Hatherley; *Goodman v. Goodman* (1862) 3 Giff. 643; *Munro v. Munro* (1840) 7 Cl. & F. 842, 875, *per* Lord Cottenham.

⁶⁹ *Ibid.*, p. 233, judgment of Cotton, L.J. Stress is laid in this judgment on the fact that *Re Goodman's Trusts* (1881) 17 Q.B.D. (C.A.) 260, did not decide that legitimation depended on domicile at birth. See *Munro v.*

Thus, where a child's mother was at the time of his birth a domiciled Frenchwoman, it was laid down that 'a domiciled Englishman having a child before marriage in any part of the world by a woman of any other nation, the legitimacy or illegitimacy of that child must be determined by the law of his domicile'.¹⁰⁰ So, if the father is a domiciled Scotsman, the child's capacity for being legitimated is not affected by the mother being a domiciled Englishwoman.¹

The place of the child's birth is immaterial.

It was, indeed, at one time thought that the law of the country where the child was born determined the effect of the subsequent marriage on the legitimacy of the child.² It is, however, now settled that the place of the birth is immaterial.³

The place where the marriage is celebrated is immaterial.⁴

In the following illustrations, F is the father, M the mother, and C the child.

1 F is domiciled in Scotland, but has resided for a long time, and is residing in England at the time both of C's birth and of the marriage. M is an Englishwoman domiciled in England. The marriage takes place in London.

C is legitimate.⁵

2. F is domiciled in England, but is residing in Scotland at the time of C's birth. M is a Scotswoman domiciled in Scotland. C is born in Scotland. After C's birth, but before the marriage with M, F acquires a Scottish domicile. F marries M whilst domiciled in Scotland.

C is illegitimate at common law.⁶

3. F is domiciled in Scotland at the time of C's birth, but has long resided in England. M is an Englishwoman domiciled in England. C is born in England. After C's birth, but before the marriage with M, F acquires an English domicile. F marries M whilst domiciled in England.

C is illegitimate.⁷

Munro (1840) 7 Cl. & F. 842; *Udny v Udny* (1869) L.R. 1 Sc.App. 441, 448, per Lord Hatherley. Domicile at birth alone is referred to in *Re Andros* (1883) 24 Ch.D. 637, 638.

¹⁰⁰ *Re Wright's Trusts* (1856) 2 K. & J. 595, 610, per Page Wood, V.-C.

¹ *Munro v. Munro* (1840) 7 Cl. & F. 842. That the domicile of the mother should have no effect is rather remarkable, but the principle is maintained under the Legitimacy Act, 1926, s. 8. From the fact that an illegitimate child derives his domicile of origin from his mother (see Rule 6, clause 2, p. 88, ante), it might be inferred that his capacity for legitimation would depend on the law of her domicile. The American rule is apparently that 'the status of legitimacy is created by the law of the domicile of the parent whose relation to the child is in question': see Restatement, s. 187; Beale, Vol. 2, s. 137. But there is no authority for this in England: see 63 L.Q.R. pp. 72-73.

² Compare Story, ss. 93 w, 93 s.

³ *Re Wright's Trusts* (1856) 2 K. & J. 595, 614, judgment of Page Wood, V.-C.; *Munro v. Munro* (1840) 7 Cl. & F. 842; *Udny v. Udny* (1869) L.R. 1 Sc.App. 441.

⁴ *Munro v. Munro* (1840) 7 Cl. & F. 842.

⁵ *Udny v. Udny* (1869) L.R. 1 Sc.App. 441; *Munro v. Munro* (1840) 7 Cl. & F. 842; *Dalhousie v. McDouall* (1840) 7 Cl. & F. 817. Compare *Shedden v. Patrick* (1854) 1 Macq. 535, 611.

⁶ This is (substituting Scotland for France) the state of facts decided upon in *Re Wright's Trusts* (1856) 2 K. & J. 595. Cf. Rule 122, post, pp. 507, 511.

⁷ *Re Grove* (1888) 40 Ch.D. (C.A.) 215.

4 C is the child of F and M both domiciled in Scotland. Before M's death F marries another woman, W. W dies. F then marries M, the mother of C. C is thereupon legitimated, but if, during the first marriage with W, X is born, who is clearly the legitimate son of F and W, X's rights cannot be damaged by the subsequent marriage of F and M, and X will be treated as the eldest legitimate child of F.⁸

It will have been noticed that Dicey treats legitimation as though it raised a pure question of status. In most of the reported cases, however, it arose incidentally to a claim to take under a will or marriage settlement or on an intestacy as a 'child' or 'issue'. In the earlier cases⁹ it was held that this raised a question of construction, and was governed by the *lex successionis*, not the *lex domicilii* of the claimant; but in 1881 the majority of the Court of Appeal held that the rule of construction goes no further than to lay down that the word 'child' or 'issue' means legitimate child or issue.¹⁰ 'The question remains who are his legitimate children. That certainly is not a question of construction of the will. It is a question of status.'¹¹

Proviso. The proviso, that at common law no one born out of lawful wedlock can succeed as heir to English real estate, or to a title or dignity of honour, or to an entailed interest in personalty, is an example of the very strict meaning attributed to heirship by the English feudal law of real property. 'The English heirship, the descent of English land, required not only that the man should

⁸ Compare *Kerr (or Ker) v. Martin* (1840) 2 D. 752, where a majority (seven to six) of the full court, while holding that C is legitimated, expressed *obiter* the view adopted above. Compare *Fraser, Parent and Child*, pp. 41, 42, 45. This principle has been adopted for legitimation in England: Rule 122, *post*.

⁹ *Birtwhistle v. Vardill* (1840) 7 Cl. & Fin. 895; *Fenton v. Livingstone* (1859) 3 Macq. 497, esp. at p. 542, *per* Lord Cranworth; *Boyes v. Bedale* (1863) 1 H. & M. 798; *Re Goodman's Trusts* (1880) 14 Ch.D. 619 (Jessel, M.R.). In *Lety v. Solomon* (1877) 37 L.T. 263, Malins, V.-C., said that 'there is a concurrence of all the authorities on the subject'.

¹⁰ *Re Goodman's Trusts* (1881) 17 Ch.D. 266, Lush, L.J., dissenting, overruling Jessel, M.R.

¹¹ *Re Andros* (1883) 24 Ch.D. 637, 639, *per* Kay, J. Dicey (3rd ed. p. 850, note (p)) thought that *Re Goodman's Trusts* might be 'treated as overruling *Boyes v. Bedale*'; but the latter case was expressly followed by the court *a quo* in *Shaw v. Gould* (1865) L.R. 1 Eq. 247, 266, and was not dissented from by the House of Lords in that case: see Welsh, 63 L.Q.R. (1947) pp. 65-66, 75-77, 82-84; Cheshire, pp. 510-513. *Re Goodman's Trusts* has been applied, e.g., in *Re Grey's Trusts* [1892] 3 Ch. 88, and *Re Hagerbaum* [1933] Ir.R. 198, and cf. *Re Bischoffsheim* [1948] Ch. 79, *ante*, p. 491 ff. But there are other cases which are difficult to reconcile with the status theory. Thus in *Re Fergusson's Will* [1902] 1 Ch. 483, a claim to be a testator's 'next of kin' was classified as raising a question of construction; and in *Re Wicks' Marriage Settlement* [1940] Ch. 475, a child legitimated under the 1926 Act was held not to be a 'child of the marriage' of his parents within the meaning of an English marriage settlement: cf. *Re Hoff* [1942] Ch. 298; 63 L.Q.R. pp. 78-79. But a contrary decision was reached in *Colquitt v. Colquitt* [1948] P. 19, in construing the expression 'child of the marriage' in the Summary Jurisdiction Acts, 1895 to 1925. For Dicey's own view on the problem of construction, see *post*, p. 504, note 31.

be legitimate, but as it were *porphyro-genitus*, born legitimate within the narrowest pale of English legitimacy.' ¹³

The rule of English law was, before 1926, that real estate descended to the heir on the death of the owner intestate, and has been since 1925 that entailed interests, whether in realty or personality, descend to the heir unless disposed of by will; and that a man must, in order to be an heir, according to English law, fulfil two conditions. First, he must be the eldest living, legitimate son of his father. This condition is fulfilled by a Scotsman, who, born of a father domiciled in Scotland, is legitimated by the subsequent marriage of his parents. Secondly, he must be born in lawful wedlock. This condition could not at common law be fulfilled by a person who was legitimated after his birth. Such a person, therefore, though legitimate, could not, at common law, be an English heir ¹⁴ and therefore could not inherit English realty and cannot now inherit an entailed interest whether in realty or personality, or a dignity or title of honour. ¹⁵

On similar grounds he could not transmit the right to realty to his father, ¹⁶ or to collateral relations, since, in order to do this, he must in substance establish the very connection between him and his father which would make him, under different circumstances, heir to his father.

The rule in *Birtwhistle v. Vardill* is now of little importance. The Administration of Estates Act, 1925, s. 45 (1) abolishes descent to the heir in the case of the fee simple estate, which now falls to be sold and distributed like personality under ss. 46 and 47. The result is that the operation of the proviso is confined to the following cases :—

1. Entailed interests, whether in realty or personality, and (unless the legitimation is effected under the Legitimacy Act, 1926 ¹⁷) whether created before or after the date of legitimation.

2. Where there is an express limitation to the 'heir' of a person. ¹⁸

3. Where a lunatic was alive and of full age before 1926 and dies thereafter without having recovered his testamentary capacity, and therefore has been unable since 1925 to make a will; his real estate descends to the heir as before 1926. ¹⁹

Limitations to proviso.—(1) A person legitimate under Rule 121 in one country is, according to the law of England, legitimate

¹³ *Re Goodman's Trusts* (1881) 17 Ch.D. 266, 299, per James, L.J.

¹⁴ *Birtwhistle v. Vardill* (1826) 5 B. & C. 438; (1835) 2 Cl. & F. 571; (1839) 7 Cl. & F. 895.

¹⁵ *The Sinha Peerage Claim* [1946] 1 All E.R. 348 n; *The Strathmore Peerage Claim* (1821) 6 Bl. (n.s.) 487; *Shedden v. Patrick* (1854) 1 Macq. (H.L.) 535.

¹⁶ *Re Don's Estate* (1857) 4 Drew. 194.

¹⁷ See Rule 122, post, pp. 507, 510.

¹⁸ Law of Property Act, 1925, ss. 131, 132.

¹⁹ Administration of Estates Act, 1925, s. 51 (2).

everywhere.²⁰ What the proviso lays down is in effect that a person, in order to be an English 'heir', must be something more than legitimate. It does not (as it is often supposed to do) lay down that a man may be legitimate, e.g., in Scotland, but illegitimate in England.²¹

(2) The proviso was, it will be observed, primarily confined to 'real estate', which descends to the heir. It had clearly no application to movables²² until entailed estates in them were provided for in the Act of 1925; and the principle of the proviso has almost certainly no application to 'chattels real',²³ e.g., leases for years (unless entailed), which pass not to the 'heir', but the next of kin of the deceased.

F, a Scotsman domiciled in Scotland, has, whilst unmarried, a child, C, by M. F afterwards, whilst still domiciled in Scotland, marries M, and after M's death dies in 1948 intestate, possessed of—

- (a) an entailed freehold estate in England;
- (b) money and furniture situate in England;
- (c) a house in London held on a lease of ninety-nine years (personal estate)

C, the child, *does not* inherit the entailed freehold estate, since he is not F's 'heir' according to the law of England.²⁴

C succeeds to the money, furniture, etc., or the share thereof to which he may be entitled by the law of Scotland.²⁵

C probably succeeds to the house in London as F's next of kin.²⁶

(3) The proviso applies in strictness only to the *inheritance* of real estate in the case of *intestacy* or under a devise to *heirs* or a settlement in favour of *heirs*; it does not apply to the devolution of English real estate under a will in favour of *children*. 'The law, as I understand it, is that a bequest of personalty in an English will to the children of a foreigner means to his legitimate children, and that by international law, as recognised in this country,²⁷ those children are legitimate whose legitimacy is established by the law of the father's domicile.'²⁸ This principle, which is really

²⁰ *Re Don's Estate* (1857) 4 Drew. 194; *Re Goodman's Trusts* (1881) 17 Ch.D. (C.A.) 266, *Re Grey's Trusts* [1892] 3 Ch. 88; *Re Andros* (1889) 24 Ch.D. 637.

²¹ See *Re Goodman's Trusts* (1881) 17 Ch.D. 266, 298-9, *per* James, L.J., approved by Lord Maugham in *The Sinha Peerage Claim* [1946] 1 All E.R. 348 n.

²² As to succession to movables, see Chap. 31, *post*.

²³ See *Freke v. Lord Carbery* (1873) L.R. 16 Eq. 461; *In Goods of Gentili* (1875) Ir.R. 9 Eq. 541; *De Fogassieras v. Duport* (1881) 11 L.R.Ir. 128; *Duncan v. Lawson* (1889) 41 Ch.D. 394.

²⁴ Rule 121, p. 496, *ante*.

²⁵ See Chap. 31, Rule 178, *post*.

²⁶ See *Freke v. Carbery* (1873) L.R. 16 Eq. 461; *In Goods of Gentili* (1875) Ir.R. 9 Eq. 541; *Duncan v. Lawson* (1889) 41 Ch.D. 394; *De Fogassieras v. Duport* (1881) 11 L.R.Ir. 128, compared with *Re Goodman's Trusts* (1881) 17 Ch.D. (C.A.) 266; *Re Grey's Trusts* [1892] 3 Ch. 88. And see further discussion of the question, *post*, p. 505. One point may be regarded as clear: the domicile of F. at his death does not affect one way or another C's right to succeed to F's English leaseholds (*Duncan v. Lawson, supra*.)

²⁷ *I.e.*, in effect by the principle contained in Rule 121, p. 496, *ante*.

²⁸ *Re Andros* (1888) 24 Ch.D. 637, 642, judgment of Kay, J.

one with regard to the interpretation of a will, is in itself clearly applicable to a devise to children of English realty and has been so applied. It appears, 'upon examination of *Doe v. Vardill*'²⁹ that the rule there laid down relates only to the case of descent of land upon an intestacy, and does not affect the case of a devise in a will to children'.³⁰ Nor does there appear to be any clear reason for applying, in this instance, to a settlement in favour of children a rule of interpretation different from that applied to a will.³¹

(4) On the other hand, the proviso is no doubt applicable to the descent of entailed interests in personalty now allowed by the Law of Property Act, 1925.

T, domiciled in England, by will gives freeholds, leaseholds and stocks and shares in England to F and the heirs of his body. T dies in 1945. In 1940 F, domiciled in Germany, has an illegitimate child, C. In 1942 F, still domiciled in Germany, marries M, the mother of C. At the date of C's birth F was married to X,³² but the marriage was dissolved before F's marriage to M. By German law C is legitimated by the marriage of F and M, notwithstanding the fact that F was married to X when C was born. C cannot (it is submitted) succeed as heir of the body to the entailed freeholds, leaseholds and stocks and shares.³³ The result would be the same if T had died before the date of C's legitimation.³⁴

Questions suggested by Rule.—The whole Rule, including the proviso, leaves open two questions which cannot be answered with absolute certainty :—

Question 1.—*Can a person legitimated under Rule 121 succeed to the English chattels real of an intestate as next of kin under the Administration of Estates Act, 1925?*

²⁹ (1835) 2 Cl. & F. 571; (1839) 7 Cl. & F. 895.

³⁰ *Re Grey's Trusts* [1892] 3 Ch. 88, 93, judgment of Stirling, J. The dictum in the first sentence is, strictly speaking, correct, but it has sometimes been too widely interpreted.

³¹ Though the word 'child', or the like, may, when used in an English will or settlement, be held to include any person whom English courts hold to be legitimate under the rules of the conflict of laws recognised by them (i.e., under Rule 121, p. 496, *ante*), yet it must always be remembered that this principle is merely a rule of interpretation, and that the question whether a testator or settlor does or does not mean by the word 'child' to designate not only a child born in lawful wedlock, but also a child born out of lawful wedlock whether or not legitimated, either in the view of English or foreign law, by the subsequent marriage of his parents, must in every case depend upon the whole tenor of the document. Compare *Hill v. Crook* (1873) L.R. 6 H.L. 265, 282, *per* Lord Cairns; *Ebbens v. Fowler* [1909] 1 Ch. (C.A.) 578; *Re Bleckly* [1920] 1 Ch. (C.A.) 450; *Re Taylor* [1925] Ch. 739; *Re Dicker* [1947] Ch. 248. As to settlements, see *Re Askew* [1930] 2 Ch. 259; *Re Wicks' Marriage Settlement* [1940] Ch. 475, and comment in 63 L.Q.R. p. 78; contrast *M. v. M.* [1946] P. 31; *Colquitt v. Colquitt* [1948] P. 19. See further, p. 501, *ante*.

³² Hence the Legitimacy Act, 1926, is not available, s. 1 (2), and the legitimation is effected at common law under Rule 121, and not by statute under Rule 122, *post*, p. 507.

³³ Contrast Illustration 2, *post*, p. 511.

³⁴ Compare Illustration 3, *post*, p. 511.

The answer to this question depends on drawing the right inference from the following propositions:—

(1) A person born out of lawful wedlock cannot at common law inherit English realty as heir.³⁵

(2) Chattels real are not 'movables',³⁶ nor are they 'realty'; they are personal estate, and devolve therefore, in case of intestacy, in accordance with the provisions of the Administration of Estates Act, 1925, and not in accordance with the rules governing the devolution of movables under the law of the intestate's domicile; thus, if an intestate dies domiciled in Scotland, leaving leaseholds in England, the leaseholds devolve in accordance with the English Administration of Estates Act, 1925 (ss. 46, 47).³⁷

(3) A person who, though born out of lawful wedlock, is legitimated according to the law of his father's domicile, both at the time of such person's birth and at the time of the subsequent marriage³⁸ of his parents, is in England the legitimate child of his father.³⁹

(4) Such a legitimated person is his father's legitimate child under the Administration of Estates Act, 1925, and as such entitled to succeed as next of kin to his father's goods, though his father dies domiciled in England.⁴⁰

The right inference from these premises is (it is submitted) that a legitimated person is entitled to succeed to the English chattels real of an intestate as next of kin under the Administration of Estates Act, 1925, and this whether the domicile of the deceased be foreign or English.⁴¹

Question 2.—What is the effect, according to English law, of a person being made legitimate without intermarriage of parents by the authority of a foreign country?

Suppose that a person born illegitimate is legitimated by a decree of the Government of Italy, or under an Act of an American State, will such a person be held legitimate here?

Until 1940 there was no English authority on the subject.

³⁵ *Birtwhistle v. Vardill* (1839) 7 Cl. & F. 895; *Re Don's Estate* (1857) 4 Drew. 194. Compare *Re Grey's Trusts* [1892] 3 Ch. 88.

³⁶ *Freke v. Carbery* (1878) L.R. 16 Eq. 461; *In Goods of Gentili* (1875) Ir.R. 9 Eq. 541.

³⁷ *Duncan v. Lawson* (1889) 41 Ch.D. 394.

³⁸ See Rule 121, p. 496, *ante*.

³⁹ *Re Goodman's Trusts* (1881) 17 Ch.D. (C.A.) 266, 294, 295, judgment of Cotton, L.J.; pp. 298-300, judgment of James, L.J. But compare *Re Fergusson's Will* [1902] 1 Ch. 483. In this case it was held that the meaning of 'next of kin' in an English will was simply a matter of interpretation, and that, though the legatees were Germans domiciled in Germany, this was no ground for interpreting the term 'next of kin' in accordance with German rather than English law. It was admitted that the status of such legatees depended on German law.

⁴⁰ *Ibid.*

⁴¹ In an elaborate note on this question (pp. 271-276) Foote arrived, on the whole, at the conclusion here put forward as probable, that a legitimated person can succeed as next of kin to English chattels real.

Dicey's view⁴² was that 'the most probable answer is (it is conceived) that the effect of such a decree would, like the effect of a subsequent marriage of the parents, depend on the domicile of such person's father at the time of his birth and at the time when the decree was issued. Suppose, that is to say, that the child's father were domiciled in Italy at the time of the child's birth and at the date of the decree, then the decree would have the effect of making the child legitimate in England. If, on the other hand, the father were domiciled in England, either at the time of the birth or at the date of the decree, the child would apparently not be legitimated in England thereby'.

This view was approved by the majority of the Court of Appeal in *Re Luck*.⁴³ The question in that case was whether David Luck could share in the funds settled by an English settlement and will as a 'child' of his father Frederick Luck. David had been born in California in 1906 of the adulterous union of Frederick (whose domicile of origin was English) with M. Frederick subsequently became domiciled in California, and in 1922 his marriage with his English wife was dissolved in California. A week later he married a Californian woman H. In 1925, with H's consent, Frederick signed a declaration that he publicly acknowledged the child as his and adopted him as a legitimate child. By section 230 of the Californian Civil Law Code the effect was to legitimate the child as from the date of his birth. Frederick died in 1938. The majority of the Court of Appeal held that David was illegitimate and therefore disentitled to a share in the funds of the marriage settlement and the testator's residuary estate. Following the views expressed in *Re Wright's Trust*,⁴⁴ the court declined to 'recognise the jurisdiction of a foreign legislature to impose upon a domiciled Englishman the status of paternity which he did not acquire at the date of the child's birth, and the potentiality of acquiring which he did not at the time possess . . . The English authorities have been based upon the principle that, before subsequent legitimation can take place, the status of illegitimacy as acquired at birth under the law of the domicile of the putative father must have, as an integral part of itself, the potentiality of legitimation'.⁴⁵

Scott, L.J., in the course of a lengthy dissenting judgment, confessed⁴⁶ that 'the very idea of attributing to a newly born child, to a *filius nullius*, a sort of latent capacity for legitimation at the hands of a natural father to whom he is denied any legal relation seems to me an even more absurd legal fiction, and even

⁴² 3rd ed., p. 532.

⁴³ [1940] Ch. 864 (Greene, M.R., and Luxmoore, L.J., Scott, L.J. dissenting), reversing Farwell, J. [1940] Ch. 323.

⁴⁴ (1856) 2 K. & J. 595, *ante*, p. 499.

⁴⁵ [1940] Ch. 864 at pp. 882-3.

⁴⁶ *Ibid.*, at pp. 912-3.

less convincing, than the mythical contract of marriage supposed by the canonists to have been entered into at the moment of procreation. I can see no warrant for applying a rule, originating in the special reasons of the doctrine of legitimation by subsequent marriage, and justified by various legal fictions invented to support it, to the simple and straightforward case of a direct command of legitimation by the statute law of the father's domicile'.

The result is that the rule in *Re Wright's Trust*,⁴⁷ though it has been abrogated by the Legitimacy Act, 1926, so far as legitimation by subsequent marriage is concerned, still applies to other modes of legitimation. The majority decision has been most generally criticised on the ground that, as Cheshire⁴⁸ puts it, 'though it is obviously convenient that one principle should govern all types of legitimation, it is a little eccentric to choose one that has been abrogated by statute'. The rule in America is apparently that 'the father's domicile at the time of the legitimating act must control'.⁴⁹

(b) *Legitimation under the Legitimacy Act, 1926.*

RULE 122.—(1) Where the parents of an illegitimate person marry or have married one another, whether before or after January 1, 1927, and the father of the illegitimate person was or is, at the time of the marriage, domiciled in a country other than England,⁵⁰ by the law of which the illegitimate person became legitimate by virtue of such subsequent marriage, that person, if living, is recognised in England⁵⁰ as having been so legitimated from January 1, 1927, or from the date of the marriage, whichever last happens, notwithstanding that his father was not at the time of the birth of such person domiciled in a country in which legitimation by subsequent marriage was permitted by law.⁵¹

(2) A person so recognised as having been legitimated or who would, had he survived the marriage of his parents,

⁴⁷ (1856) 2 K. & J. 595.

⁴⁸ *Op. cit.* p. 521. See Mann's trenchant criticism in 57 L.Q.R. (1941) p. 112; Beckett, 21 B.Y.B.I.L., pp. 206-210; *Annual Surety* (1940) p. 256; Allen, *Legal Duties*, p. 61; Wolff, pp. 403-404; Falconbridge, Chap. 39.

⁴⁹ *Blythe v. Ayres* (1892) 96 Cal. 532. Cf. *Hall v. Gabbert* (1904) 213 Ill. 208, where the Rule in *Re Wright's Trust* was described as a 'refinement of reasoning'. See Restatement, ss. 139-140; Goodrich, s. 137.

⁵⁰ The Act says 'England or Wales'. But in this Digest 'England' includes Wales: *ante*, pp. 39, 43.

⁵¹ Legitimacy Act, 1926, s. 8 (1).

have been so recognised, and his spouse, children or more remote issue are entitled to take any interest—

- (a) in the estate of an intestate dying after the date of legitimation ;
- (b) under any disposition coming into operation after the date of legitimation ;
- (c) by descent under an entailed interest created after the date of legitimation ;

in like manner as if the legitimated person had been born legitimate.⁵² This paragraph applies only if and so far as a contrary intention is not expressed in the disposition, and has effect subject to the terms of the disposition and to the provisions therein contained.⁵³

(3) Nothing in this Rule affects the succession to any dignity or title of honour, or renders any person capable of succeeding to or transmitting a right to succeed to any such dignity or title,⁵⁴ or operates to sever from any such dignity any property real or personal or any interest therein which is limited in such a way as to devolve along with any such dignity or title.⁵⁵

(4) Nothing in this Rule operates to legitimate a person whose father or mother was married to a third person when the illegitimate person was born.⁵⁶

Comment

The Legitimacy Act, 1926, effected two important changes in English law. In the first place, it introduced the doctrine of legitimation *per subsequens matrimonium* into English domestic law by providing⁵⁷ that where the parents of an illegitimate person marry or have married one another, whether before or after January 1, 1927, the marriage shall, if the father of the illegitimate person was or is at the date of the marriage domiciled in England, render that person, if living, legitimate from January 1, 1927, or from the date of the marriage, whichever last happens.

The second major change brought about by the Act is the

⁵² *Ibid.*, ss. 8 (2), 3 (1).

⁵³ *Ibid.*, s. 8 (4).

⁵⁴ *Ibid.*, s. 10 (1).

⁵⁵ *Ibid.*, s. 3 (3).

⁵⁶ *Ibid.*, s. 1 (2).

⁵⁷ S. 1 (1).

alteration, by section 8 (1), of the old rule of the English Conflict of Laws set forth in Rule 121.^{57a} The effect of the section is to render inapplicable, in cases falling within the Act, the rule laid down in *Re Wright's Trust*,⁵⁸ viz., that the father must be domiciled at the time of the birth of the child in a country in which legitimation by subsequent marriage is permitted by law.⁵⁹ It is now sufficient, in the case of legitimation by subsequent marriage, if the father was or is domiciled at the time of such marriage, in a country, other than England, by the law of which the child became legitimated by virtue of the subsequent marriage of his parents. Section 8 (2) goes on to provide that the Act shall have effect as if references therein to a legitimated person included a person recognised under s. 8 (1) as having been legitimated.

Section 1 (2) provides that 'nothing in this Act shall operate to legitimate a person whose father or mother was married to a third person when the illegitimate person was born'.⁶⁰ It has been suggested,⁶¹ and indeed held,⁶² that the section merely enacts a rule of English domestic law, and does not apply to cases which, because of the foreign domicile of the father, fall within s. 8 (1). But the better view would appear to be that the Act does 'operate to legitimate' a child whose father was domiciled abroad, and that s. 1 (2) applies to cases falling under s. 8 (1) as well as to purely domestic cases.⁶³

The Act came into operation on January 1, 1927, and no person can be regarded as having been legitimated, either under s. 1 (1) or under s. 8 (1), prior to that date, even though his parents may have been married at an earlier date. The question has arisen abroad whether the Act applies at all if the child's parents were not alive on January 1, 1927. It has been held in Eire that it does⁶⁴; but the Australian courts have expressed the contrary view.⁶⁵ The Australian decisions appear to rest on a strict application of the foreign *lex successionis*: it can hardly be doubted that

^{57a} *Ante*, p. 496.

⁵⁸ (1856) 2 K. & J. 595.

⁵⁹ *Ante*, p. 499.

⁶⁰ The section does not strike effectively at adulterous connections, since it refers to the birth, not the conception, of the child: see *Re Heath* [1945] Ch. 417.

⁶¹ Beckett, 12 B.Y.B.I.L. (1931), p. 186; 13 B.Y.B.I.L. (1932), pp. 173, 182-3; Cheshire, p. 517.

⁶² By Bateson, J., in *Collins v. Att.-Gen.* (1931) 47 T.L.R. 484. But the question did not really arise, because the father was domiciled in Germany at both dates.

⁶³ Morris, *Cases*, pp. 207-8, citing *Re Askew* [1930] 2 Ch. 259. Compare s. 8 (2) *in fin.*

⁶⁴ *Re Hagerbaum* [1933] Ir.R. 198, where it was held that C could take as next-of-kin on the intestacy of her father's sister, C's parents (who were domiciled in England) having married two years after C's birth, and C's father having died in 1910.

⁶⁵ In *Re Williams* [1936] V.L.R. 223, C was born a month before the marriage of her parents (domiciled in England) in 1860. C's son was held disentitled to take on the intestacy of C's younger brother, domiciled in Victoria, even

both s. 1 (1) and s. 8 (1) apply, even though the child's parents or either of them may have died before 1927.

The effects of legitimation under the Act are summarised in the Rule and set out in detail in the Act.⁶⁶ The most important point is that the rule in *Birtwhistle v. Vardill*⁶⁷ is modified to this extent, namely that a person legitimated by the Act may now succeed as heir to an entailed interest created after the date of legitimation.⁶⁸ The result would appear to be that a person legitimated by the Act is in the same position as a legitimate person except in the following respects:

- (a) He cannot take by descent an entailed interest created before the date of legitimation.⁶⁹
- (b) He cannot succeed to any dignity or title of honour.⁶⁹
- (c) He cannot take property real or personal limited to devolve with any such dignity or title of honour.⁷⁰
- (d) He ranks in relative seniority as if he had been born on the day on which he became legitimated by virtue of the Act.⁷¹

All the provisions of section 3 of the Act relating to the taking of interests in property by legitimated persons apply only if and so far as a contrary intention is not expressed in the disposition, and have effect subject to the terms of the disposition and to the provisions therein contained.⁷² In *Re Wicks' Marriage Settlement*⁷³ the question was whether C was a 'child of the marriage' of F and M within the meaning of an English marriage settlement. C had been born out of lawful wedlock, but by virtue of the Legitimacy Act had been legitimated by the subsequent marriage of his parents. Farwell, J., held that C was not a 'child of the marriage'; 'he is a legitimate child of the spouses, but he is not a child of the marriage because, in fact, he was born before his

though the son had obtained a declaration from a Welsh county court that C (who died in 1932) was legitimated as from January 1, 1927. The Victoria court held that a claim to succeed as a 'child' under the Victorian statutes could not be upheld unless the status of legitimacy was established during the lifetime of the parent. The decision is criticised by Falconbridge, Chap. 37, but was followed in *Re James* [1942] V.L.R. 12. Similarly, in *Re Davey* [1937] N.Z.L.R. 56, C was held disentitled to share in a legacy to 'grandchildren' bequeathed by a testatrix domiciled in New Zealand. C was born in 1910, and his parents were married in 1911, his father being domiciled in England at both times. By 1927 his father was domiciled in New Zealand, and this was held to be fatal to C's claim to have been legitimated under the English Act of 1926. Followed in *Re Pritchard* (1940) 40 S.R. (New South Wales) 443.

⁶⁶ Sections 1 (3), 3, 4, 5, 6, 7, 10. For the right to petition for a declaration of legitimacy, see s. 2, as amended by the Administration of Justice Act, 1928, s. 19 (3), and *ante*, p. 273.

⁶⁷ (1835) 2 Cl. & F. 571; (1839) 7 Cl. & F. 895; *ante*, pp. 501 ff.

⁶⁸ Section 3 (1) (c).

⁶⁹ Section 10 (1).

⁷⁰ Section 3 (3).

⁷¹ Section 3 (2).

⁷² Section 3 (4).

⁷³ [1940] Ch. 475.

parents were married'.⁷⁴ More recently, however, it has been held that a child legitimated by the subsequent marriage of his or her parents is a 'child of the marriage' within the meaning of the Summary Jurisdiction Acts, 1895 to 1925.⁷⁵ The problems of construction which arise out of these and other⁷⁶ decisions sorely need clarification by the House of Lords.

Section 23 of the British Nationality Act, 1948, provides that, for purposes relating to the acquisition of British nationality and of citizenship of the United Kingdom and Colonies, a child born out of wedlock and legitimated by the subsequent marriage of his parents is to be treated as if he had been born legitimate, as from the date of the marriage or January 1, 1949, whichever is the later.⁷⁷ Whether a child has been so legitimated is to be tested by the law of the domicile of his father at the time of the marriage. That any child concerned may have been born of adulterous intercourse would appear to be immaterial.

Illustrations

1. F is domiciled in England. M is a Scotswoman domiciled in Scotland. In 1910 C is born to F and M in Scotland. In 1915 F acquires a domicile in Scotland. In 1920 F marries M. C is legitimated in England from January 1, 1927.⁷⁸

2. T, domiciled in England, by will gives land and stocks and shares in England to F and the heirs of his body. T dies in 1945. In 1920 F, being domiciled in England, has an illegitimate child, C. F acquires a domicile in Germany and marries M, the mother of C in 1942. By German law the subsequent marriage legitimates C from the date of the marriage. C can succeed as heir of the body of F under the entail.⁷⁹

3. The facts are the same as in Illustration 2, except that T dies in 1941, i.e., before the date of C's legitimation. C cannot succeed as heir of the body of F under the entail.

(3) ADOPTION

RULE 123.—(1) If a person adopts a stranger in blood, the law of the domicile of the adopter and of the person adopted at the date of the adoption, determines (*semble*) whether the adopted person has the status of an adopted child.

⁷⁴ This would have provided a simple solution to the problem in *Re Askeu* [1930] 2 Ch. 259: see *ante*, p. 52, n. 72. But see *Colquitt v. Colquitt* [1948] P. 19, 26, where Lord Merriman, P., said 'it may be that the decision in *Re Wicks* can be supported on the construction of the particular instrument, but, in our opinion, it does not oblige us to hold that a legitimated child is not a child of the marriage within the meaning of the Summary Jurisdiction (Separation and Maintenance) Acts'.

⁷⁵ *Colquitt v. Colquitt* [1948] P. 19.

⁷⁶ See *ante*, p. 501.

⁷⁷ This renders *Abraham v. Att.-Gen.* [1934] P. 17 obsolete.

⁷⁸ Legitimacy Act, 1926, s. 8 (1). Contrast Illustration 2 on p. 500, *ante*.

⁷⁹ Legitimacy Act, 1926, ss. 3 (1) (a), 8 (2). Contrast Illustration on p. 504, *ante*.

(2) The question whether an adopted child can succeed as a child to movables or immovables under an intestacy or a will is (*semble*) determined by the law governing the succession, that is, the law of the domicile of the testator or intestate at the date of his death in the case of movables⁸⁰ and the *lex situs* in the case of immovables.⁸¹

Comment

Adoption has been defined as 'the creation of the relation of parent and child between persons who are strangers in blood'.⁸² It was unknown to the common law,⁸³ and no provision was made for it in England until the Adoption of Children Act, 1926.⁸⁴ Dicey's view was that a status unknown to English law would not be recognised in England, and that rights flowing from a foreign adoption would therefore not be enforced in England.⁸⁵ But although there are no English cases directly in point,⁸⁶ the matter cannot be so summarily disposed of. In the first place, it has been shown⁸⁷ that Dicey's view that a foreign status will not be recognised in England if it is unknown to English law is quite untenable. And, in the second place, even if that principle were sound, it would not be applicable, since the Adoption of Children Act, 1926, has introduced the institution of adoption into English domestic law. It will therefore be convenient to consider the matter briefly in the light of principle and of practice in other countries.

The Adoption of Children Act, 1926, makes no provision in regard to the conflict of laws. It merely provides⁸⁸ that the English courts have no jurisdiction to make an adoption order if (a) the adopter is not resident in England or Wales, *and* is not domiciled in England, Wales or Scotland; *and* (b) the child is not a British subject *and* is not resident in England or Wales. The effect of an adoption order is (a) to extinguish all rights, duties, obligations and liabilities of the parents or guardians of the child in relation to its future custody, maintenance and education; and (b) to vest all such rights, duties, obligations and liabilities in the adopter as though the child were the legitimate child of the

⁸⁰ *Post*, Chap. 31, p. 817.

⁸¹ *Post*, Chap. 22, p. 529.

⁸² Goodrich, p. 381; cf. Restatement, s. 142.

⁸³ Halsbury, Vol. 17, s. 1406.

⁸⁴ As amended by the Adoption of Children (Regulation) Act, 1939.

⁸⁵ 3rd ed., pp. 502-3; *ante*, pp. 467-468.

⁸⁶ *Re Luck* [1940] Ch. 864, was a case of legitimation by recognition, not of adoption as defined above.

⁸⁷ *Ante*, pp. 467-468.

⁸⁸ Section 2 (5), as amended by the Adoption of Children (Regulation) Act, 1939, s. 8 (2).

adopter.⁸⁹ An adoption order does not deprive the adopted child of any right to or interest in property to which the child would have been entitled under any intestacy or disposition; nor does it confer on the child any right to or interest in property as a child of the adopter, and the expressions 'child', 'children' and 'issue' where used in any disposition do not, unless the contrary intention appears, include an adopted child or children or the issue of an adopted child.⁹⁰

The question remains whether the English courts would give any effect to an adoption effected in a foreign country. The first matter to be considered is what law has a paramount claim to govern the creation of the status of adoption.⁹¹ The principles formulated by the common law with regard to legitimization *per subsequens matrimonium* are clearly inapplicable⁹²: on principle, if both parties are domiciled in the same State at the time of the adoption, their *lex domicilii* should govern, and the *lex domicilii* of the child at the time of his birth is irrelevant. But what if the parties are domiciled in different States? In some countries the *lex domicilii* of the adopter governs,⁹³ in others the *lex domicilii* of the child⁹⁴; in the United States, it seems that adoption can be successfully accomplished by compliance with the *lex domicilii* of either party.⁹⁵ The prevailing opinion abroad, however, seems to be that the *lex domicilii* of both parties must be considered,⁹⁶ and this appears to be the most convenient solution. 'The adoption alters the status of both parties, and therefore to attract extra-territorial validity it must be valid according to each *lex domicilii*.'⁹⁷

The next question is what effect will be given in England to the status thus created. The matter is most likely to arise in connection with questions of succession; and the prevailing view appears to be that whether a foreign adoption creates a right of succession in favour of the child or the parent or both must be decided by the *lex successionis*, i.e., the *lex domicilii* of the deceased at the time of his death or (in the case of immovables)

⁸⁹ Section 5 (1).

⁹⁰ Section 5 (2). Contrast the Inheritance (Family Provision) Act, 1938, s. 5.

⁹¹ Cheshire, pp. 522-3, where it is pointed out that the question is not necessarily one of the jurisdiction of a foreign court: in some countries the status of adoption may be created by agreement between the parties.

⁹² Mann, 57 L.Q.R. pp. 122-3; Cheshire, p. 523.

⁹³ Switzerland, Scandinavia, Belgium, Poland: see Mann, 57 L.Q.R., p. 123; Wolff, p. 406.

⁹⁴ See Mann and Wolff, *ubi supra*.

⁹⁵ See Goodrich, s. 142; Restatement, s. 142.

⁹⁶ Mann and Wolff, *ubi supra*. Compare the Canadian cases of *Burnfel v. Burnfel* [1926] 2 D.L.R. 129; *Culver v. Culver* [1933] 2 D.L.R. 535; and the Australian case of *Re an Infant* (1934) 34 S.R. (N.S.W.) 349.

⁹⁷ Cheshire, p. 524.

the *lex situs*.⁹⁸ If, therefore, X dies domiciled in England bequeathing movables to 'the children of Y', Y's adoptive child will have no claim thereto, even though the child is recognised by his own *lex domicilii* as being legitimate in all respects.⁹⁹ So, too, an adoptive child is not ordinarily regarded as being a 'child' within the meaning of an English statute.¹ If, on the other hand, the testator or intestate dies domiciled abroad, or the immovables are situate abroad, the foreign *lex successionis* will govern, and the fact that an adoptive child enjoys no rights of succession as such in English domestic law is irrelevant.² If, however, the analogy of the legitimisation cases and of the latest decision on legitimacy be followed,³ the whole matter will be regarded as a question of status and therefore governed by the *lex domicilii* of the claimant, and not the *lex successionis*.⁴ In the absence of any English decision on the point, it is of course necessary to speak with great hesitation.

Illustrations

1 F, domiciled in Germany, adopts C, a stranger in blood domiciled in Germany. By German law C possesses the status of a legitimate child of F. That status will be recognised in England, but all the consequences which flow from it in Germany will not necessarily be recognised.⁵

2 T, domiciled in England, gives movables in England to the children of F. F, domiciled in Germany, adopted C, domiciled in Germany. C's right to take under the bequest will (*semble*) be determined by English domestic law, *i.e.*, C will not take unless there is an intention shown in the will that he should do so.⁶

3. T, domiciled in Germany, gives movables in England to the children of F. F, domiciled in England, adopted C, domiciled in England. C's right to take under the bequest will (*semble*) be determined by German law.

⁹⁸ Mann, 57 L.Q.R. (1941), p. 127 *et seq.*; in Canada, *Burnfiel v. Burnfiel* [1926] 2 D.L.R. 129 (intestacy); *Re Donald* [1928] 4 D.L.R. 181; [1929] 2 D.L.R. 244 (bequest to 'children'); in the U.S.A., the Restatement, ss. 143, 247, 305. But see Falconbridge, Chap. 38, for criticism of the Canadian cases.

⁹⁹ Cf. Adoption of Children Act, 1926, s. 5 (2); *ante*, p. 513.

¹ Halsbury, Vol. 17, s. 1424; Mann, *op. cit.*, p. 135. Hence such special provisions as the Adoption of Children (Workmen's Compensation) Act, 1934, s. 1 (1); Unemployment Insurance Act, 1939, s. 4 (2).

² Mann, *op. cit.*, pp. 139-40. For an attempt to justify this method of approach, see Welsh, 63 L.Q.R. (1947), pp. 65-6.

³ *E.g.*, as to legitimisation, *Re Goodman's Trusts* (1881) 17 Ch.D. 266; *Re Andros* (1883) 24 Ch.D. 637; *Re Grey's Trusts* [1892] 3 Ch. 88; *ante*, p. 501; and as to legitimacy, *Re Bischoffsheim* [1948] Ch. 79, *ante*, p. 491.

⁴ See *e.g.*, *Re Morris' Estate* (1943) 133 Pac. 452 (California), where on a question of legacy duties the court gave effect to an adoption valid by the *lex domicilii* of the child; *Re Pearson* [1946] V.L.R. 356, where a testator domiciled in Victoria gave movables to the issue of X, and X adopted a child domiciled in Tasmania: held Tasmanian law determines whether the adopted child can take under the bequest. This view of the matter is preferred in *Theobald on Wills* (10th ed.), pp. 225-226. But it leads to the conclusion, as Mann observes (64 L.Q.R. 202), that a person adopted abroad under a legal system which confers legitimacy upon the adopted person is a 'child' in the English sense, though the adopter may not be married at all.

⁵ Cf. *Re an Infant* (1934) 34 S.R. (N.S.W.) 349.

⁶ Cf. *Re Donald* [1929] 2 D.L.R. 244; but contrast *Re Pearson* [1946] V.L.R. 356.

5. LUNATIC AND CURATOR, OR COMMITTEE⁷

RULE 124.⁸—(1) The powers and authorities conferred by the Lunacy Act, 1890, the Mental Deficiency Act, 1913, or the Mental Treatment Act, 1930, upon the judge in lunacy⁹ in respect of the management and administration of the property of a lunatic or a defective extend to the lunatic's or defective's property of whatever kind situate in any British territory.

(2) The powers of management and administration of the estate of a lunatic so found by inquisition in England, vested in the judge in lunacy and the committee of the lunatic's estate, extend to the personal property in Northern Ireland or Eire of the lunatic provided it does not exceed £2,000 in value or the income thereof does not exceed £100 a year, and similar provisions apply to the personal property in England of lunatics so found on inquisition in Northern Ireland, or Eire, under the Lunacy Regulation (Ireland) Act, 1871.

(3) The powers of management and administration conferred in England with regard to cases in which the property of a person of unsound mind does not exceed £2,000 in value or the income £100 a year, and the like powers conferred in Northern Ireland or Eire under section 68 of the Lunacy Regulation (Ireland) Act, 1871,

⁷ See Cheshire, p. 539; Restatement, ss. 149-151; Wolff, ss. 270-1, 390-2.

⁸ See the Lunacy Act, 1890, ss. 110, 131. For the powers referred to, see especially s. 116 and also the Lunacy Act, 1908. See also Ord. XI, r. 8a (b). The position as regards mental defectives is assimilated to that of lunatics by s. 64 of the Mental Deficiency Act, 1913, and like provision is made for temporary patients by the Mental Treatment Act, 1930, s. 5 (16). Compare *Re Talbot* (1892) 20 Ch.D. 269 (as to Ireland). S. 116 (1) (c) does not give power to the judge in lunacy as regards the property of a person declared lunatic abroad, i.e., 'lawfully detained' refers to detention under an English order: see *Re Watkins* [1896] 2 Ch. (C.A.) 336; but action is possible under s. 116 (1) (d), on the score that the judge may hold that a person found lunatic abroad is mentally unfit to manage his affairs.

⁹ For the definition of this expression, see the Lunacy Act, 1890, s. 108; Lunacy Act, 1891, s. 27 (1); Lunacy Act, 1911, s. 1; Lunacy Act, 1922, s. 1; and Administration of Justice (Miscellaneous Provisions) Act, 1933, s. 8, under which a Master in Lunacy performs, subject to appeal, the functions of the judge as regards administration and management of the estates of lunatics. As regards mental defectives, see s. 64 of the Mental Deficiency Act, 1913. In the case of small estates the Acts place a receiver in a position analogous to that of the committee of a lunatic, so that in the Rule committee includes receiver.

extend to the property in Northern Ireland, Eire, or England, as the case may be, of the person of unsound mind if the total of his property in both countries does not exceed £2,000 or the income does not exceed £100.

(4) The committee of the estate of a person found lunatic by inquisition in England has the same powers with regard to the lunatic's personal property in Scotland as a tutor at law after cognition or a *curator bonis* to a person of unsound mind in Scotland,¹⁰ and a tutor at law or *curator bonis* duly appointed in Scotland has the same powers with respect to the lunatic's personal property in England as a committee of the estate of a lunatic so found by inquisition.

Comment

This Rule represents the statutory provisions enacted by the Lunacy Act, 1890, to simplify the administration in the United Kingdom of the property of a lunatic and made applicable in 1918 to mental defectives. The same Act and the Mental Deficiency Act, 1913,¹¹ make provision to secure the restoration to authorised custody in the United Kingdom of any lunatic or mental defective who escapes.

It will be noted that the judge in lunacy is given an extremely wide power with regard to the property of a lunatic or mental defective situate in any British territory outside the United Kingdom. The term property as usual includes both real and personal property and it will be noted that the wider term is used in parts (1) and (3) of the Rule, giving powers of unusual character as to immovables out of England to the court or committee. No such powers are given as between England or Ireland and Scotland.

RULE 125.—(1) A person appointed by a foreign decree or commission the curator or committee of a lunatic resident in a foreign country (hereinafter called a foreign curator) does not acquire the right as such curator to control the person of the lunatic in England,¹² though,

¹⁰ *Grant v. Rose* (1835) 13 S. 878; *Gordon v. Stair* (1835) 13 S. 1073; *Sawyer v. Sloan* (1875) 3 R. 271. As regards mental defectives, see s. 62 of the Mental Deficiency and Lunacy (Scotland) Act, 1913.

¹¹ Sections 86-89 of the Lunacy Act, 1890; s. 42 of the Mental Deficiency Act, 1913.

¹² *Re Houston* (1826) 1 Russ. 312, per Eldon J. *Re Burbidge* [1902] 1 Ch. (C.A.) 426, shows that if an alien of foreign domicile is temporarily in England, an inquisition can be ordered, even if he has no property in England save such cash, etc., as he has on his person.

in a proper case, on application to the judge in lunacy arrangements may be made for the handing over of the lunatic to the foreign curator.¹³

(2) The foreign curator of a lunatic may, at the discretion of the court, enforce by action claims in respect of movable property of the lunatic in England.

(3) The foreign curator of a lunatic resident out of England may, at the discretion of the judge in lunacy, secure the transfer to himself of stock standing in the name of or vested in the lunatic.

Comment

Clause 1.—The control of lunatics is essentially bound up with the question of the liberty of the subject, and it is obviously impossible that a foreign curator should be permitted on the strength of a foreign decree to exercise restraint over a lunatic in England. On the other hand, in a suitable case the judge in lunacy may permit the handing over of a lunatic resident in England to a foreign curator appointed under the law of the lunatic's domicile. Thus, where a person was domiciled and had most of his property in Portugal, but was resident in England, being confined there as a lunatic so found by inquisition, and his wife had taken proceedings in lunacy in Portugal, under the law of which country she was the guardian and the administratrix of his estate, permission was given for the removal of the lunatic by the committee for delivery to his wife's custody, his moneys in England being also paid over to her.¹⁴

Clause 2.—The older rule¹⁵ appears to have been to treat the position of a foreign curator with regard to the property in England of a lunatic as on the same footing as his control of the person of the lunatic, but this tendency obviously rests on no sound basis, and as early as 1855 it was decided that a Scottish *curator bonis* of a person of unsound mind in Scotland could sue in England for money due to the lunatic and give a good discharge for it.¹⁶ This

¹³ *Re Sottomajor* (1874) L.R. 9 Ch. 677, 679; *Johnstone v. Beattie* (1848) 10 Cl. & F. 42, 97, per Lord Brougham. A simple means of procedure is provided by the Lunacy Act, 1890, s. 71. The Mental Deficiency Act, 1913, curiously enough contains no parallel clause. As regards the effect in this country of proceedings in India, see the Lunatics Removal (India) Act, 1851.

¹⁴ *Re Sottomajor* (supra).

¹⁵ *Re Houston* (1826) 1 Russ. 312.

¹⁶ *Scott v. Bentley* (1855) 1 K. & J. 281, 284, per Page Wood, V. C. Compare *Hessing v. Sutherland* (1856) 25 L.J.Ch. 687; *Newton v. Manning* (1849) 1 Mac. & G. 362. See also Judicial Factors Act, 1869, s. 13, for the wide authority throughout British territory of a *curator bonis*.

case has often been followed since,¹⁷ but the right of the foreign curator appears to be subject to the discretion of the court in every case in which the property is in the custody of the court or can be reached only in virtue of the court's jurisdiction as to trust property,¹⁸ or the lunatic is domiciled in England.¹⁹

Further, it must be noted that, if the lunatic is in England even temporarily, he is entitled to the protection of the Crown, through the jurisdiction in lunacy, for his person and property; an English committee may always be appointed for his estate, and that, if this is done, all power to deal with the estate is vested in that committee alone. Thus even a Scottish *curator bonis*, despite the authority given to him generally by section 13 of the Judicial Factors Act, 1889, and the specific power to represent a lunatic in bankruptcy proceedings under section 149 of the Bankruptcy Act, 1914, has no locus standi, when a committee has been appointed, to interfere in any way in English bankruptcy proceedings against the lunatic, and *a fortiori* this rule applies to foreign curators who have no such legal powers.²⁰ Even if the lunatic is not in England, a committee may in a suitable case be appointed,²¹ with the result of ousting the foreign curator from any right to deal with the property of the lunatic in England.

¹⁷ *Re Baker* (1871) L.R. 13 Eq. 168; *Re De Linden* [1897] 1 Ch. 453; *Thery v. Chalmers, Guthrie & Co.* [1900] 1 Ch. 80; *Didisheim v. London and Westminster Bank* [1900] 2 Ch. 15; *Pélegrin v. Coutts & Co.* [1915] 1 Ch. 696. Contrast *Re Barlow's Will* (1887) 36 Ch.D. (C.A.) 287, where payment of a fund in the hands of trustees was not ordered by the court, apparently on the ground that the patient had not been found a lunatic, and that her property was not vested by the foreign law (that of New South Wales) in the curator. The latter point is now of no great weight: see *Re Brown* [1895] 2 Ch. (C.A.) 666. The form of action by a curator should perhaps be both as curator and by the lunatic through the curator as next friend; compare *Didisheim v. London and Westminster Bank* [1900] 2 Ch. 15, 44; Ord. XVI, r. 17. For older cases, see *Re Gartner* (1872) L.R. 13 Eq. 532; *Re Stark* (1850) 2 Mac. & G. 174; *Re Elias* (1851) 3 Mac. & G. 234; *Re Morgan* (1849) 1 H. & T. 212; *Re Sargazurieta* (1853) 20 L.T.(o.s.) 299.

¹⁸ *Re Garnier* (1872) L.R. 13 Eq. 532 (lunatic domiciled in England). See also Court of Chancery Funds Act, 1872; *Re Carr's Trusts* [1904] 1 Ch. (C.A.) 792.

¹⁹ *New York Security Co. v. Keyser* [1901] 1 Ch. 666, where it was held that the foreign committee of a man domiciled in England, though resident in a foreign country where he is found lunatic, cannot as of right recover the lunatic's movable property in England. Where, however, the lunatic is domiciled and resident abroad the court has only to satisfy itself of the title of the lunatic and the authority of the curator. See *Didisheim v. London and Westminster Bank* [1900] 2 Ch. (C.A.) 15, 50-52. In a case falling within the principle thus laid down, a bank is not entitled to demand that an order be obtained from the court, and may be condemned in expenses if it does so: *Pélegrin v. Coutts & Co.* [1915] 1 Ch. 696.

²⁰ *Re Sottomaior* (1874) L.R. 9 Ch. 677; *Re Bariatinski* (1843) 13 L.J.Ch. 69; *Re R. S. A.* [1901] 2 K.B. 32; *Re Aytoun* (1904) 20 T.L.R. 252; *Re Burbidge* [1902] 1 Ch. 426; *Re Sollykoff* [1898] W.N. 77. Compare *Re Knight* [1898] 1 Ch. (C.A.) 257, 260, 261.

²¹ Lunacy Act, 1890, s. 96; Heywood & Massey, *Lunacy Practice*, pp. 8, 235; *Ex p. Southcote* (1751) 2 Ves.Sen. 401; *Re Scott* (1874) 22 W.R. 748; compare *Re Lanuarne* (1882) 46 L.T. 668, as to service where lunatic's presence is dispensed with.

Moreover, no foreign curator as such has any authority with regard to English immovables belonging to the lunatic.²²

Clause 3.—The jurisdiction in this part of the Rule is purely statutory, and is exercised under the Lunacy Act, 1890, s. 134, which is made also applicable to defectives as defined in the Mental Deficiency Act, 1913. The section runs (except as to the words in brackets) in the following terms:—

‘Where any stock is standing in the name of or vested in a person residing out of [England²³], the judge in lunacy, upon proof to his satisfaction that the person has been declared lunatic, and that his personal estate has been vested in a person appointed for the management thereof [*i.e.*, a foreign curator], according to the law of the place where he is residing, may [in his discretion²⁴] order some fit person to make such transfer of the stock or any part thereof to or into the name of the person so appointed [*i.e.*, the foreign curator] or otherwise, and also to receive and pay over the dividends thereof, as the judge thinks fit.’

As to this enactment, the following points are noticeable:—

The power of the court²⁵ is, as to cases within this section, in the strictest sense discretionary; whilst the court cannot act under the enactment in any case in which its requirements are not complied with, a foreign curator cannot, because its requirements are complied with, claim as of right that the court should act under it. To which may be added that, provided the lunatic is resident out of England, the court’s power under this section in no sense depends upon his domicile.

The term ‘stock’ is used in a very wide sense.²⁶

The word ‘vested’, in regard to the curator, is also used in a wide sense, and includes the right to obtain and deal with, without being actual owner of, the lunatic’s personal estate.

The following are illustrations of the operation of the enactment:—

1. A Spaniard, born in Spain, has acquired a domicile and is domiciled in New York. He resides, and has for many years resided, in France. He is declared lunatic by a French court. A French curator is appointed. An application is made by the

²² *Grimwood v. Bartels* (1877) 46 L.J.Ch. 788.

²³ ‘England’ substituted for ‘the jurisdiction of the High Court’.

²⁴ These words give the effect of *Re Knight* [1898] 1 Ch. (C.A.) 257, 260, 261.

²⁵ See *Heywood & Massey*, pp. 264–268. Security will not normally be required where it would not be necessary in the country of his appointment: *Re Mitchell* (1881) 17 Ch.D. 515. A transfer of capital will normally only be ordered if required for maintenance: *Re Knight* [1898] 1 Ch. 257; compare *New York Security Co. v. Keyser* [1901] 1 Ch. 666.

²⁶ “‘Stock’” includes any fund, annuity, or security transferable in books kept by any company or society, or by instrument of transfer alone, or by instrument of transfer accompanied by other formalities, and any share or interest therein, and also shares in ships registered under the Merchant Shipping Act, 1854 [now the Merchant Shipping Act, 1894]: Lunacy Act, 1890, s. 341.

curator for an order transferring securities of the lunatic to the French curator. The order is, as a matter of discretion, granted.²⁷

2. A lady residing in Victoria is declared lunatic by the Supreme Court sitting in Lunacy, and the Master in Lunacy is appointed to manage her property, which consists of English stock standing in her name. The English court is petitioned on behalf of the Master to transfer such stock into his name. The word 'vested' in s. 134 includes the right to obtain and deal with a lunatic's personal estate without being actual owner thereof. The court in its discretion orders the transfer of the stock into the name of the Victorian Master in Lunacy.²⁸

²⁷ *Re De Lariagoiti* [1907] 2 Ch. (C.A.) 14.

²⁸ *Re Brown* [1895] 2 Ch. (C.A.) 666. Compare *Re Knight* [1898] 1 Ch. (C.A.) 257. See also *Re Tarratt* (1884) 51 L.T. (C.A.) 310, decided under the Lunacy Act, 1858, s. 141.

NATURE OF PROPERTY

RULE 126.¹—The law of a country where a thing is situate (*lex situs*) determines whether

- (1) the thing itself is to be considered an immovable or a movable; or
- (2) any right, obligation, or document connected with the thing is to be considered an interest in an immovable or in a movable.

Comment

Introductory.—Whether a given thing is in its nature a movable or an immovable, *i.e.*, whether it can in fact be moved or not, is manifestly a matter quite independent of any legal rule. A law, however, may determine that a thing in its nature movable shall, for some or for all legal purposes, be subject to the rules generally applicable to immovables, or that a thing in its nature immovable shall, for some or all legal purposes, be subject to the rules applicable to movables. In this sense, and in this sense alone, law can determine whether a given thing shall be treated as a movable or as an immovable. Thus, the law of England can determine, as in fact it does, that title deeds shall be considered as part of the real estate, or, in other words, that title deeds shall in some respects be considered as immovables. The only law which can effectively determine whether things shall be treated as movables or immovables is the law of the country where they are in fact situate. Law, as already pointed out, deals in reality with rights; and the law of the country where a given tangible thing is in fact located can determine whether the rights over such thing, *e.g.*, land, or obligations connected with it, or the documents which embody such rights or obligations, shall be treated as interests in movables or immovables.

¹ Story, s. 447; Cheshire, Chap. 15; Wolff, ss. 482-486; Falconbridge, Chap. 21; Cook, Chap. 12; Robertson, pp. 190-212; *Chatfield v. Berchtoldt* (1872) L.R. 7 Ch. 192; *Freke v. Carbery* (1873) L.R. 16 Eq. 461; *Ex p. Rucker* (1834) 3 Dea. & Ch. 704; *De Fogassieras v. Duport* (1881) 11 L.R.Ir. 123; *Duncan v. Lawson* (1889) 41 Ch.D. 394; *Re Berchtold* [1923] 1 Ch. 192; *Re Anziani* [1930] 1 Ch. 407; *Re Hoyles* [1911] 1 Ch. (C.A.) 179; *Macdonald v. Macdonald* [1932] S.C. (H.L.) 79; *Re Cutcliffe's Will Trusts* [1940] Ch. 565. The wording of the Rule has been amended partly in deference to a suggestion by Falconbridge, p. 441.

Similarly, English courts admit the right of other countries to determine whether things within their limits come within the class of movables or immovables. When slavery existed in Jamaica, the slaves on the estate were reckoned appurtenant to the land by Jamaican law, and have been held by our courts to pass under a devise of realty in Jamaica.² Heritable bonds,³ again, in so far as they are treated by the law of Scotland as interests in immovables, are recognised as interests in immovables by English courts.⁴ The last example is specially noticeable in relation to our Rule; it shows that it is the *lex situs* which determines not only the nature of a thing, but also of rights, obligations, or documents connected with a thing. A heritable bond may itself be deposited in a bank in England, but it is Scottish law—the *lex situs* of the land on which the bond imposes a charge—that determines the character of the bond. A more sophisticated mode of stating this result is to say that though the bond is physically movable, it is so closely connected with the land that it ought to be governed by the law governing interests in the land and not by the law governing movables.⁵

Distinction between Movables and Immovables. In domestic English law the leading distinction between proprietary interests in things is the historical and technical distinction between realty and personalty. In the English conflict of laws, however, the leading distinction between things is the more universal and natural distinction between movables and immovables.⁶ This distinction is capable of application to the different systems of law between which a choice must be made, which the distinction between realty and personalty is not. 'In order to arrive at a common basis on which to determine questions between the inhabitants of two countries living under different systems of jurisprudence, our courts recognise and act on a division otherwise unknown to our law into movable and immovable.'⁷

The importance of the distinction between movables and immovables is most apparent in the field of succession, because

² *Ex p. Rucker* (1834) 3 Dea. & Ch. 704.

³ 'A "heritable bond" is a bond for a sum of money, to which is joined, for the creditor's further security, a conveyance of land or of heritage, to be held by the creditor in security of the debt.' See 'Heritable Bond', *Bell's Dictionary of the Law of Scotland*, ed. of 1882. See, however, the Titles to Land Consolidation (Scotland) Act, 1868, s. 117, whereby heritable bonds are now made, for certain purposes, part of the creditor's movable estate; *Train v. Train* [1899] 2 S.C. 146.

⁴ *Re Fitzgerald* [1904] 1 Ch. (C.A.) 573; *Johnstone v. Baker* (1817) 4 Madd. 474, n.; *Jerningham v. Herbert* (1829) 4 Russ. 388, 395; *Allen v. Anderson* (1846) 5 Hare 163. If, on the other hand, a separate personal bond was taken beside the heritable bond, it could be disposed of by a will of movables: *Buccleugh v. Hoare* (1819) 4 Madd. 467; *Cust v. Goring* (1854) 18 Beav. 388.

⁵ *Falconbridge*, p. 442.

⁶ *Re Hoyles* [1911] 1 Ch. 179; *Re Berchtold* [1928] 1 Ch. 192; *Macdonald v. Macdonald* [1932] S.C. (H.L.) 79.

⁷ *Re Hoyles* [1911] 1 Ch. 179, 185.

succession to movables is (in general) governed by the *lex domicilii* of the deceased,⁸ whereas succession to immovables is (in general) governed by the *lex situs*.⁹ But the distinction may also be important in transactions *inter vivos*, because such transactions are (in general) governed by the *lex situs* so far as immovables are concerned,⁹ whereas they are not necessarily governed by the *lex situs* so far as movables are concerned.¹⁰

The distinction between movables and immovables is not co-extensive with the distinction between realty and personalty. In the first place, as will appear below,¹¹ personalty includes some important interests in immovables; and in the second place, the distinction between movables and immovables would appear to be a distinction between different kinds of things, whereas the distinction between realty and personalty would appear to be a distinction between different kinds of interests in things.¹² The two distinctions are therefore 'distinctions in different planes'.¹³

In the English conflict of laws, the selection of the proper law is thus based on the distinction between movables and immovables and not on the distinction between realty and personalty. But once the proper law has been so selected, then if its domestic rules are based on the distinction between realty and personalty that distinction will be applied.¹⁴ This is because the case has now reached a stage when it has passed out of the domain of the conflict of laws into the domestic domain.

In *Re Hoyles*¹⁵ Farwell, L.J., suggested that our courts only adopt the distinction between movables and immovables when the conflict is between English law and the law of some country (e.g., France or Scotland) which does not recognise the distinction between realty and personalty, and not when the conflict is between English law and the law of some country (e.g., Ontario or New York) which does recognise that distinction. The suggestion looks plausible, but is (it is submitted) unsound. 'Is England to have one system of conflict of laws for the rest of the world, and a different system for the common law countries of the Empire and the United States? It is believed undesirable that this should be the case.'¹⁶ In *Re Hoyles* the conflict was between English law and the law of Ontario, a common law province. In the subsequent case of *Re Cutcliffe's Will Trusts*¹⁷ the conflict was again between

⁸ Chap. 31, p. 817, *post*.

⁹ Chap. 22, p. 529, *post*.

¹⁰ Chap. 23, p. 557, *post*.

¹¹ See pp. 525-526, *post*.

¹² This is insisted on by Cook, Chap. 10, called by Falconbridge (p. 436, n. (k)) 'a valuable contribution in aid of the adoption of accurate terminology in the conflict of laws'.

¹³ Falconbridge, p. 434.

¹⁴ *Re Berchtold* [1923] 1 Ch. 192.

¹⁵ [1911] 1 Ch. 179, 185.

¹⁶ Robertson, p. 201.

¹⁷ [1940] Ch. 565.

English law and the law of Ontario, and Morton, J. (correctly, it is submitted), applied the distinction between movables and immovables without reference to Farwell, L.J.'s, suggestion, which is, moreover, inconsistent with the decision of the House of Lords in *Macdonald v. Macdonald*.¹⁸

There is, however, one real exception to the general rule that the selection of the proper law is based on the distinction between movables and immovables and not on the distinction between realty and personalty. When the court is considering the formal validity of the will of a British subject, it is material to consider whether the property dealt with is realty or personalty. The reason for this exception is that Parliament, when it passed the Wills Act, 1861, validating certain wills made by British subjects, used the words 'personal estate' when it ought to have said 'movables'.¹⁹ The incongruities introduced into the English conflict of laws by this badly drafted statute have often been pointed out,²⁰ and it is apparent that this is only an exception to the general rule.

If there is a conflict between the *lex situs* and the *lex fori* as to whether a particular thing is movable or immovable, it is well settled that the *lex situs* at the decisive moment must control.²¹ The reason for this rule no doubt is the paramount importance of reaching a decision consistent with what the *lex situs* has decided or would decide, since in the last resort only the *lex situs* has effective control over the thing.²² The qualification indicated by the words 'at the decisive moment' is relevant only in the case of things which are in fact movable but which are treated as though they were immovable for some purposes by some systems of law—for example, the keys of a house or horses of the plough. What is meant by 'the decisive moment' will perhaps become clear from an example.²³ Suppose that T, domiciled in England, owns a farm in State X, and that by the law of X (but not by English law) horses of the plough are regarded as immovables for the purposes of succession. T dies intestate leaving A as his next of kin according to English domestic law and B as his next of kin according to the law of X. It would seem that as between A and B, B is entitled to the horses, because by the *lex situs* they are regarded as immovable; and that it should make no difference if A chanced to remove the horses to England without B's consent after the death of T. But if T had removed the horses to England

¹⁸ [1932] S.C. (H.L.) 79. See especially, *per* Lord Tomlin at p. 84.

¹⁹ See *post*, pp. 822-827, 839-843, for a discussion of the Wills Act, 1861, and for what constitutes 'personal estate' within the meaning of that Act.

²⁰ See Morris, 'The Choice of Law Clause in Statutes', 62 L.Q.R. 173-176; Falconbridge, Chaps. 23, 24, 25.

²¹ *Re Hoyles* [1911] 1 Ch. 179; *Re Berchtold* [1928] 1 Ch. 192, 199; *Macdonald v. Macdonald* [1932] S.C. (H.L.) 79, 84; *Re Cutcliffe's Will Trusts* [1940] Ch. 565, 571.

²² Robertson, p. 191.

²³ Cook, p. 309. Cf. Illustration 2, *ante*, p. 457.

before his death, then A would be entitled to them; in other words, in a case of succession the decisive moment is the death of the testator or intestate.

The following examples show how English courts have classified proprietary interests in things situated in England as interests in movables or immovables for the purposes of the conflict of laws.

Leaseholds. For the general purposes of the conflict of laws, leaseholds in England are regarded as interests in immovables,²⁴ and it is quite immaterial that English domestic law regards them as personal estate.

Rentcharges. A rentcharge on land in England is an interest in an immovable,²⁵ though for some domestic purposes it is regarded as personal estate.

Mortgages. A mortgage on land in England is for the purposes of the conflict of laws an interest in an immovable,²⁶ though it is regarded by English domestic law as personalty.

Land held on trust for sale. Interests in land in England held on trust for sale but not yet sold are interests in an immovable,²⁷ though under the equitable doctrine of conversion they are treated as personal estate by English domestic law.

In *Re Berchtold*,²⁸ a domiciled Hungarian died intestate having been entitled to an interest in English freehold land subject to a trust for sale but not yet sold. It was argued that his next of kin by Hungarian law were entitled to his interest on the ground that it was, under the doctrine of conversion, regarded as personalty. But it was decided that his interest was an interest in an immovable, that domestic English law applied (including its doctrine of conversion), and that therefore his next of kin by English law were entitled. Russell, J., said: 'But this equitable

²⁴ *Freke v. Carbery* (1873) L.R. 16 Eq. 461; *Duncan v. Lawson* (1889) 41 Ch.D. 394; *Pepin v. Bruyere* [1900] 2 Ch. 504; *In bonis Gentili* (1875) L.R. 9 Eq. 541; *De Fogassieras v. Duport* (1881) 11 L.R.Ir. 123; contrast *Re Watson* (1887) 35 W.R. 711 and *Re Grassi* [1905] 1 Ch. 584: leaseholds are personal estate for the purposes of the Wills Act, 1861 (*post*, p. 824).

²⁵ *Chatfield v. Berchtoldt* (1872) L.R. 7 Ch. 192.

²⁶ *Re Hoyles* [1911] 1 Ch. 179, followed in *Re Donnelly* (1927) 28 S.R.N.S.W. 34, *Re Burke* [1928] 1 D.L.R. 818; *Re Dalrymple Estate* [1941] 3 W.W.R. 605; *Hogg v. Provincial Tax Commissioner* [1941] 4 D.L.R. 501; *Re Ritchie* [1942] 3 D.L.R. 330; and *Re Landry and Steinhoff* [1941] 1 D.L.R. 699; but not followed in *Re O'Neill* [1922] N.Z.L.R. 468; *McClelland v. Trustees Executors and Agency Ltd.* (1936) 55 C.L.R. 483, 493; *Re Young* [1942] V.L.R. 4; *Re Williams* [1945] V.L.R. 213. The New Zealand and Australian cases where *Re Hoyles* was not followed purport to follow *Harding v. Commissioners of Stamps* [1898] A.C. 769, but that was a taxation case and of no value as an authority in the conflict of laws: see Falconbridge, Chaps. 24, 25 and 26. The matter would appear to be finally settled so far as England and Canada are concerned. As to whether a mortgage is personal estate for the purposes of the Wills Act, 1861, see *Re Gauthier* [1944] 3 D.L.R. 401 and *post*, p. 824.

²⁷ *Murray v. Champernowne* [1901] 2 Ir.R. 232; *Re Berchtold* [1923] 1 Ch. 192. Contrast *Re Lyne's Settlement Trusts* [1919] 1 Ch. 80, decided under the Wills Act, 1861, *post*, p. 824.

²⁸ [1923] 1 Ch. 192.

doctrine only arises and comes into play where the question for consideration arises as between real estate and personal estate. It has no relation to the question whether property is movable or immovable. The doctrine of conversion is that real estate is treated as personal estate, or personal estate is treated as real estate; not that immovables are turned into movables, or movables into immovables'.²⁹

Capital moneys arising under the Settled Land Act. Section 75 (5) of the English Settled Land Act, 1925, re-enacting section 22 (5) of the Settled Land Act, 1882, provides that capital money arising under the Act while remaining uninvested or unapplied, and securities on which an investment of any such capital money is made, shall for all purposes of disposition, transmission and devolution be treated as land. This section has had to be considered in a number of cases where the situation was to some extent the converse of that in *Re Berchtold*.

In *Re Cutcliffe*,³⁰ C died intestate in 1897 domiciled in Ontario. At the time of his death he was entitled to a reversionary interest in certain stock which represented the reinvestment of the proceeds of sale of English settled land. As the stock was that of a British company and held by the English trustees of an English settlement, it was common ground that it must be regarded as situated in England. The question was whether C's interest in the stock passed to his next of kin under the law of Ontario (*lex domicilii*), or whether it passed to his heir at law under the law of England (*lex situs*). It was held that as the English statute provided that the stock must be treated as land for all purposes of devolution, C's interest in the stock was an interest in an immovable, and therefore its devolution was governed by English domestic law. The decision has not escaped criticism, but would appear to be perfectly correct. The gist of the criticism is that 'the doctrine of conversion is a characteristic doctrine of domestic English law arising from the distinction between realty and personalty, and whether it is a judge-made rule, as in the *Berchtold Case*, or has been expressed in statutory form, as in the *Cutcliffe Case*, in either event the doctrine can have no application to a particular situation unless it has first been decided in accordance with the conflict rules of the forum that the proper law is domestic English law or some other law that distinguishes between realty and personalty and includes the doctrine of conversion'.³¹ The answer would appear to be that in the *Berchtold Case* the doctrine of conversion said that realty was to be treated as personalty, while in the *Cutcliffe Case* the statute said that capital money was to be treated as land. In other words, in the *Berchtold Case* the doctrine of conversion that

²⁹ At p. 206.

³⁰ [1940] Ch. 565; contrast *Re Cartwright* [1939] Ch. 90, decided under the Wills Act, 1861, *post*, p. 824.

³¹ Falconbridge, Chap. 29, p. 515.

had to be considered was formulated in terms appropriate only to domestic English law, while in the *Cutcliffe Case* the statute that had to be considered was expressed in terms appropriate also to the conflict of laws. The stock was in England; English law (*lex situs*) therefore had to decide whether it was movable or immovable; and English law said it was immovable. 'How could the decision have been otherwise?'³²

The correctness of the decision becomes even more apparent if we consider a case in which the *lex fori* and the *lex situs* are different. This was the situation in *Re Crook*.³³ C died intestate domiciled in New South Wales. At the time of his death he was entitled to investments in England representing the proceeds of sale of English settled land. The New South Wales Court held that these investments must, by English law, be treated as immovables and so passed to his English next of kin in accordance with English law (*lex situs*), and not to his New South Wales next of kin in accordance with New South Wales law (*lex domicilii*).

In *Re Middleton's Settlement*³⁴ the proceeds of sale of Irish settled land were re-invested in English securities. Notwithstanding the Settled Land Act, 1882, s. 22 (5), which was still in force in Ireland and so was treated as an Irish statute, it was held that for purposes of taxation the securities were situated in England. It seems to follow from this decision that, had it been necessary to determine for the purposes of the conflict of laws whether the securities were movable or immovable, they would have been held to be movable. Such a conclusion would appear to be entirely correct. Apart from statute, stocks and shares are treated as movables; the English Settled Land Act, 1925, could not apply as the capital moneys did not arise 'under this Act'; nor could the Irish Settled Land Act apply, because English law (*lex situs*) determined the character of the securities.

Illustrations³⁵

1. D, domiciled in Ontario, dies intestate leaving leaseholds in England. The leaseholds will devolve in accordance with English domestic law.³⁶

2. D, domiciled in England, dies intestate leaving leaseholds in Ontario. By the law of Ontario, leasehold interests in land are interests in immovables, although they are personal estate. The leaseholds will devolve in accordance with the law of Ontario.³⁷

3. D, domiciled in Ontario, dies intestate. He was entitled to a mortgage

³² *Cheshire*, p. 554; cf. 54 H.L.R. 184. I withdraw the criticism of the decision which I submitted in *Theobald on Wills* (10th ed.), p. 2 (J.H.C.M.).

³³ (1936) 36 S.R.N.S.W. 186.

³⁴ [1947] Ch. 583 (C.A.), not following *Re Stoughton* [1941] Ir.R. 166.

³⁵ In all these illustrations, it should be remembered that intestate succession to immovables is governed by the *lex situs* and to movables by the *lex domicilii*: *post*, pp. 535 ff., 817 f.

³⁶ *Freke v. Garbery* (1873) L.R. 16 Eq. 461; *Duncan v. Lawson* (1889) 41 Ch.D. 394.

³⁷ *Macdonald v. Macdonald* [1932] S.C.(H.L.) 79.

on land in England. D's interest devolves in accordance with English domestic law.³⁸

4. D, domiciled in England, dies intestate. He was entitled to a mortgage on land in Ontario. By the law of Ontario a mortgage on land is an interest in an immovable. D's interest devolves in accordance with the law of Ontario.³⁹

5. D, domiciled in Hungary, dies intestate. He was entitled to an interest in land in England subject to a trust for sale but not yet sold. D's interest devolves in accordance with English domestic law.⁴⁰

6. D, domiciled in Ontario, dies intestate. He was entitled to an interest in English stock representing capital moneys arising from the sale of English settled land. By the English Settled Land Act, 1925, such capital moneys shall for all purposes of disposition, transmission and devolution be treated as land. D's interest in the stock devolves in accordance with English domestic law.⁴¹

7. D, domiciled in England, dies intestate. He was entitled to an interest in Irish stock representing capital moneys arising from the sale of Irish settled land. By the (Irish) Settled Land Act, 1882, such capital moneys shall for all purposes of disposition, transmission and devolution be treated as land. D's interest in the stock devolves in accordance with Irish law.⁴²

8. The circumstances are the same as in Illustration 7, except that the capital moneys arising from the sale of the Irish settled land are re-invested in English stock. D's interest in the stock will (*semble*) devolve in accordance with English domestic law. The Irish Act cannot prevail against the physical location of the stock in England.⁴³

³⁸ *Re Hoyles* [1911] 1 Ch. 179; *Re Ritchie* [1942] 3 D.L.R. 330; *Re Landry & Steinhoff* [1941] 1 D.L.R. 699.

³⁹ *Re Hoyles* [1911] 1 Ch. 179; *Re Dalrymple Estate* [1941] 3 W.W.R. 605; *Hogg v. Provincial Tax Commissioner* [1941] 4 D.L.R. 501. *Re Hoyles* is the leading authority both for the proposition that the *lex situs* determines whether a thing is movable or immovable, and for the proposition that a mortgage on land in England is an interest in an immovable.

⁴⁰ *Re Berchtold* [1928] 1 Ch. 192.

⁴¹ *Re Cutcliffe's Will Trusts* [1940] Ch. 565.

⁴² Inference from *Re Crook* (1936) 36 S.R. N.S.W. 186.

⁴³ Inference from *Re Middleton's Settlement* [1947] Ch. 588 (C.A.), not following *Re Stoughton* [1941] Ir.R. 166.

IMMOVABLES

RULE 127.¹—All rights over, or in relation to, an immovable (land) are (subject to the Exceptions hereinafter mentioned) governed by the law of the country where the immovable is situate (*lex situs*).

Comment

‘The general principle of the common law is, that the laws of the place, where such [immovable] property is situate, exclusively govern, in respect to the rights of the parties, the modes of transfer, and the solemnities which should accompany them’.² ‘The common law has avoided all . . . difficulties by a simple and uniform test. It declares that the law of the *situs* shall exclusively govern in regard to all rights, interests, and titles, in and to immovable property. Of course it cuts down all attempts to introduce all foreign laws, whether they respect persons or things, or give or withhold the capacity to acquire or to dispose of immovable property’.³ ‘All questions concerning the property in immovables, including the forms of conveying them, are decided by the *lex situs*’.⁴ The general principle thus enunciated by Story and by Westlake is beyond dispute, and applies to rights of every description. It is based upon obvious considerations of convenience and expediency. Any other rule would be ineffective, because in the last resort land can only be dealt with in a manner which the *lex situs* allows.

¹ Story, Chap. 10, ss. 424-463 a; Westlake, Chap. 8; Foote, Chap. 6; Cheshire, Chap. 17; Falconbridge, Chaps. 22, 31, 36; Restatement, ss. 214-254; Cook, Chap. 10; Goodrich, ss. 119, 144-148, 160, 162-163; Wolff, ss. 487, 497-510; Johnson, Vol. 3, Chap. 6; *Coppin v. Coppin* (1725) 2 P.Wms. 291; *Nelson v. Bridport* (1846) 8 Beav. 547; *Freke v. Carbery* (1873) L.R. 16 Eq. 461; *Duncan v. Lawson* (1889) 41 Ch.D. 394; *Pepin v. Bruyère* [1902] 1 Ch. 24; *Bank of Africa, Ltd. v. Cohen* [1909] 2 Ch. (C.A.) 129; *Re Estate of Von Brentano* [1911] P. 172; *Re Miller* [1914] 1 Ch. 511; *Re Hayles* [1911] 1 Ch. (C.A.) 179; *Re Charteris* [1917] 2 Ch. 257; *Re Berchtold* [1923] 1 Ch. 192; *Re Anziani* [1930] 1 Ch. 407; *Re Ross* [1930] 1 Ch. 377; *Re Duke of Wellington* [1948] Ch. 118 (C.A.). See also *Scott v. Nesbitt* (1808) 14 Ves. 438 (creditor's lien); *Hanson v. Walker* (1829) 7 L.J.(o.s.) Ch. 135 (priority of creditors); *Harrison v. Harrison* (1873) L.R. 8 Ch. 342 (liability for debts); *Batthyany v. Walford* (1887) 36 Ch.D. (C.A.) (liability for waste).

As to jurisdiction in respect of immovables, see Rule 20, p. 141, *ante*; Rule 66, p. 348, *ante*; and Rule 70, *ante*.

² Story, s. 424.

³ Story, s. 463.

⁴ Westlake, s. 156.

Rule 127 applies in principle not only to English, but also to foreign, immovables (land), in so far as it may happen (which is not often the case⁵) that English courts are called upon to determine rights over foreign land, or (which is more likely) of money in England which represents foreign land. Their decision must be governed by the *lex situs*—i.e., the law of the country (e.g., France) where the land is situate. But it must be remembered that the *lex situs*, or law of France, means not necessarily the domestic law of France, but any law which the French courts would apply to the decision of the particular case, which might under certain circumstances be the domestic law of some other country, e.g., of England. Writers on the conflict of laws are accordingly almost unanimous that, so far as foreign land is concerned, the *lex situs* means not the domestic law of the *situs* but the conflict of laws rule of the *situs*, which may refer to some other system of domestic law.⁶ Thus Falconbridge⁷ says 'As regards interests in immovables it is logical, and indeed inevitable, that a court sitting in a country other than that of the *situs* should acquiesce in whatever the *forum rei sitae* has decided or would decide'. In truth an English court in the rare cases when it determines rights in respect of foreign land follows the *lex situs* almost of necessity. The sovereign of the country where land is situate has absolute control over the land within his dominions: he alone can bestow effective rights over it; his courts alone are, as a rule, entitled to exercise jurisdiction over such land.

Indirectly, of course, a foreign immovable may be affected by a judgment of an English court *in personam* ordering some person subject to the control of the court to execute a conveyance or mortgage, and similarly English immovables may thus be affected by a decree of a foreign court.⁸ It has been held in Canada that no effect will be given to a decree of a Californian court ordering reconveyance of land in British Columbia on the ground of fraud.⁹

Now, if the *lex situs* means, for an English court dealing with foreign land, that system of domestic law which the *lex situs* would apply, it follows that Rule 127 furnishes no guide whatever for an English court dealing with land in England, unless it is first assumed that the word 'law' in the Rule means—contrary to its

⁵ As English courts have in general no jurisdiction to adjudicate upon the title to or the right to the possession of foreign land (see Rule 20, p. 141, *ante*), the cases with regard to land which come before them must in general have reference to land in England. But this is not invariably the case. See Exceptions to Rule 20, p. 141, *ante*.

⁶ Cheshire, pp. 127-128; Beale, p. 97; Restatement, § 8 (1); Falconbridge, p. 180; Cook, pp. 264, 279-280; Griswold, 51 H.L.R. 1165, 1202; see *ante*, pp. 59-60; *Re Ross* [1930] 1 Ch. 377; *Re Duke of Wellington* [1947] Ch. 506; [1948] Ch. 118 (C.A.).

⁷ Page 180.

⁸ Rule 20, Exception 1, *ante*, p. 145.

⁹ *Duke v. Andler* [1932] 4 D.L.R. 529; cf. *Haspel v. Haspel* [1934] 2 W.W.R. 412; *ante*, pp. 348-349, Rule 66.

meaning when foreign land is in question—English domestic law and not English conflict of laws rules.¹⁰ For to tell an English court to apply whatever system of domestic law English conflict of laws rules would apply is, of course, to tell it precisely nothing. Accordingly, Cook¹¹ has argued strenuously that this assumption ought not to be made. In his opinion, when the English court is dealing with the effect on land in England of deeds and wills executed abroad or by persons domiciled abroad, there is room for applying some system of law other than English law (e.g., the *lex actus* or the *lex domicilii*), so far as concerns capacity, formalities and the effect of marriage (but not material or essential validity). There is much force in Cook's reasoning. But the English habit of applying English domestic law to all transactions affecting land in England is so inveterate that it seems unlikely that English courts would be prepared to apply any other law.

(1) *Capacity*. A person's capacity to alienate an immovable by sale or mortgage *inter vivos*, or to devise an immovable, is governed by the *lex situs*.¹² The *lex situs* means, for an English court dealing with land in England, English domestic law, and means, for an English court dealing with land abroad, whatever system of domestic law the *lex situs* would apply.

Cook¹³ argues that when a court sitting at the *situs* of the land is confronted with a statute expressed in general terms which imposes restrictions on capacity to alienate land, it should ask itself whether the statute was intended to lay down a policy for conveyances of land within the State, or whether it was intended to lay down a policy for persons domiciled within the State. In the first case, the statute must apply no matter where the transferor is domiciled; but in the second case, the statute should not be applied if the transferor is domiciled abroad. It is submitted that Cook's approach to the problem of capacity is a sound one. It was substantially adopted in the New Hampshire case of *Proctor v. Frost*.¹⁴ A married woman, domiciled in Massachusetts, in that State became surety for her husband and gave a mortgage on her New Hampshire land as security. The mortgagee brought a bill in equity in New Hampshire to foreclose the mortgage. The defence was that by a New Hampshire statute a married woman cannot become surety for her husband. The Supreme Court of New Hampshire rejected this defence on the ground that 'the primary purpose of the statute was not to regulate the transfer of New Hampshire real estate, but to protect married women in New Hampshire from the

¹⁰ Cook, p. 264.

¹¹ Cook, pp. 264-281.

¹² *Bank of Africa v. Cohen* [1909] 2 Ch. 129; *Bondholders Securities Corporation v. Manville* [1933] 4 D.L.R. 699; *Landreau v. Lackapelle* [1937] 2 D.L.R. 504; Restatement, s. 216; Illustrations 1-3, *post*.

¹³ At pp. 270-276.

¹⁴ (1938) 89 N.H. 304.

consequences of their efforts, presumably ill-advised, to reinforce the credit of embarrassed husbands'.

It is instructive to contrast this case with the Ontario court's decision in *Landreau v. Lachapelle*.¹⁵ H and W, domiciled in Quebec, married there and by antenuptial contract negated community of property and provided that they should be separate as to property present and future. W purchased land in Ontario and later conveyed it to H and W as joint tenants. On the death of W, her executor claimed the land on the ground that by the Quebec Civil Code there can be no gifts between husband and wife. His claim was dismissed on the ground that the *lex situs* (Ontario law) applied, and by an Ontario statute a wife has the same capacity to transfer land as a single woman. The decision was perhaps right in the result, but it is submitted that the court should have examined the policy and possible territorial limitations of the Quebec and Ontario statutes.¹⁶ If it had done so, it might have discovered that the Quebec statute laid down a rule of policy for Quebec spouses and that the Ontario statute laid down a rule of policy for Ontario spouses. If so, it is submitted that the Quebec statute should have been applied although the land was in Ontario. Or the court might have found that the Quebec statute laid down a rule of policy for Quebec spouses and that the Ontario statute laid down a rule of policy for Ontario land. If so, it is submitted that the court was correct in applying the Ontario statute.

It is submitted that an English court which is considering capacity to transfer land in England should adopt the approach advocated by Cook and consider whether the rule of English domestic law is intended to lay down a policy for conveyances of land in England, or for persons domiciled in England. In the first case, the court should apply English domestic law, but in the second case, the court should apply the law of the domicile.

Capacity to transfer land situated abroad is governed by whatever system of law the *lex situs* would apply. There is one English authority for this proposition, but the reasoning was not very satisfactory, and it may even be that the decision was wrong on the facts. In *Bank of Africa v. Cohen*¹⁷ W, a married woman resident and domiciled with her husband in England, executed a deed in England by which she agreed to mortgage land in Johannesburg to the plaintiff bank as security for past and future advances made and to be made by the bank to her husband. The bank sued for specific performance of the deed. W's defence was that by the Roman-Dutch law in force in the Transvaal, a married woman was incapable of becoming surety for her husband unless

¹⁵ [1937] 2 D.L.R. 504.

¹⁶ Cf. Falconbridge, pp. 550-552.

¹⁷ [1909] 2 Ch. 129, criticised Cheshire, 722-723; Falconbridge, p. 550. Cf. *Bondholders Securities Corporation v. Manville* [1933] 4 D.L.R. 699 and contrast *Ex p. Pollard* (1840) Mont. & Ch. 239.

(a) she obtained a pecuniary benefit from the contract, or (b) she was engaged in trade, or (c) she clearly and specifically renounced the benefits of certain provisions of Roman-Dutch law. None of these exceptions applied, but the trial judge found that W knew quite well what she was doing. It was held by Eve, J., and the Court of Appeal that W's capacity to make the contract was governed by the law of the Transvaal and the contract was invalid. The following observations are submitted :—

(i) It is doubtful whether the facts raised a question of capacity at all. The law of the Transvaal did not say that a married woman was incapable of binding herself as surety for her husband; it merely said that she was incapable of doing so except in a certain form. However, all four judges treated the case as one of capacity.

(ii) The court was not dealing with a mortgage, but with a contract to make a mortgage. It is well settled that contracts dealing with land are governed by their proper law, which is usually (but not necessarily) the *lex situs*.¹⁸ The court made no attempt to ascertain the proper law of the contract.

(iii) The court made no attempt to ascertain the policy of the Transvaal law, or how the Transvaal courts would deal with this very case. Had it done so, it might have discovered that the Transvaal law laid down a policy for Transvaal married women and not for Transvaal land, and that the Transvaal law did not apply to a contract made in England by a domiciled English woman. In that case, it is submitted that the English court should have applied domestic English law, as being the law which the *lex situs* would have applied.

(iv) The decision lost sight of the economic and social considerations involved. The bank was left without security for advances made to H in reliance on W's promise; and W was allowed to break her promise with impunity, although she made it in solemn form and knew quite well what she was doing.

Capacity to take land is no doubt governed by the *lex situs*, which means, for an English court dealing with land in England, English domestic law, and means, for an English court dealing with foreign land, whatever system of law the *lex situs* would apply.¹⁹

(2) *Formalities*. The question whether a conveyance of land is formally valid must be determined in accordance with the *lex situs*.²⁰ The *lex situs* means, for an English court dealing with land in England, English domestic law, and means, for an English court dealing with land abroad, whatever system of domestic law the *lex situs* would apply.

¹⁸ Exception 1, *post*, p. 541.

¹⁹ *Duncan v. Lawson* (1889) 41 Ch.D. 394.

²⁰ *Adams v. Clutterbuck* (1888) 10 Q.B.D. 403; *Coppin v. Coppin* (1725) 2 P.Wms. 291; *Pepin v. Bruyère* [1902] 1 Ch. 24; *De Fogassieras v. Duport* (1881) 11 L.R.Ir. 123; *Murray v. Champemoune* [1901] 2 I.R. 232; *Re Howard* [1924] 1 D.L.R. 1062; *Re Colville* [1932] 1 D.L.R. 47; Illustrations 4-7, *post*.

Cook²¹ argues that there is nothing illogical or inconsistent in holding that a conveyance of land in England need not necessarily comply with the formalities prescribed by English domestic law. Why, he asks, should it be assumed without discussion that an English statute (*e.g.*, the Wills Act, 1837) which provides in general terms that no will shall be valid unless made with certain formalities, applies to wills executed abroad devising land in England, but does not apply to the wills of testators domiciled abroad bequeathing movables in England? Cook's reasoning seems logically attractive. Yet this is a case in which logic must yield to expediency. It is scarcely probable that an English court would hold that a conveyance of land in England, executed abroad by a foreigner, was formally valid unless it complied with the formalities prescribed by English domestic law. And English courts definitely hold that wills of land in England must comply with the formalities prescribed by the Wills Act, 1837, no matter what formalities are prescribed by the law of the testator's domicile.²²

If the land is situated abroad, English courts probably require that the conveyance shall comply with the formalities prescribed by whatever system of law the *lex situs* would apply.²³

A contract relating to land is formally valid if it complies with the formalities prescribed by the proper law of the contract²⁴ or (*semble*) by the *lex loci contractus*. The proper law of the contract is usually, but not necessarily, the *lex situs*.²⁵ So a conveyance of land in England, executed abroad by a person domiciled abroad, would not be valid as a conveyance unless it complied with the formalities prescribed by English domestic law; but it might be valid as a contract to convey, of which specific performance might be given.

(3) *Material or Essential Validity*.²⁶ The material or essential validity of a disposition of land, whether *inter vivos* or by will, is governed by the *lex situs*. The *lex situs* means, for an English court dealing with land in England, English domestic law, and means, for an English court dealing with land abroad, whatever system of domestic law the *lex situs* would apply. Interpreted in this sense, the *lex situs* determines what estates can legally be created,²⁷ whether the interests given infringe the rule against perpetuities or accumulations,²⁸ whether gifts to charities are

²¹ Pages 265-269.

²² *Coppin v. Coppin* (1725) 2 P.Wms. 291; *Pepin v. Bruyère* [1902] 1 Ch. 24; *post*, p. 536.

²³ *Adams v. Clutterbuck* (1883) 10 Q.B.D. 403.

²⁴ *Re Smith* [1916] 2 Ch. 206.

²⁵ Exception 1, *post*, p. 541.

²⁶ See Illustrations 8 and 9, *post*, p. 539.

²⁷ *Nelson v. Bridport* (1846) 8 Beav. 547.

²⁸ *Freke v. Carbery* (1873) 16 Eq. 461.

valid,²⁹ whether the testator is bound to leave a fixed part of his estate to his wife or family,³⁰ and so on.

The material or essential validity of a contract dealing with land is, however, governed by the proper law of the contract, which is usually but not necessarily the *lex situs*.³¹

(4) *Marriage as an Assignment of Foreign Immovables*.³²—The effect of marriage on the mutual rights of husband and wife with regard to any foreign immovable, i.e., any land situate out of England, is (in so far as the determination of such rights can fall within the jurisdiction of an English court) governed by the *lex situs* including its rules of the conflict of laws.

(a) *Where there is a Marriage Contract or Settlement*.—The courts of any country (e.g., France) where land is situate will probably wish to give effect to the marriage contract or settlement, but it is for the courts, or law, of the *situs* to decide what is the proper law of the marriage contract, and whether provisions allowed by that law are or are not prohibited by the local or domestic law (e.g., of France) in respect of French land.

English courts, if called upon to determine directly or indirectly the effect of a marriage contract on rights to French land, will attempt to decide the matter as a French court would decide it, i.e., will follow the *lex situs*.³³

(b) *Where there is no Marriage Contract or Settlement*.—Here, again, English courts, if called upon to determine the effect of a marriage on the mutual rights of husband and wife (e.g., to French land) will attempt to decide the matter as a French court would decide it, and will follow the *lex situs*.

(5) *Succession*.³⁴—Every question with regard to the succession of immovables, or land, in consequence of death is (subject, of course, to the Exceptions hereinafter mentioned) governed by the *lex situs*. And this is so whether the succession takes place under an intestacy or under a will, and whether the immovables be real property or personal property.

The result, as regards the succession to a deceased person's interest in English immovables, is as follows:—

The deceased's immovables (whether real property or personal

²⁹ *Duncan v. Lawson* (1889) 41 Ch.D. 394; *Re Hoyles* [1911] 1 Ch. 179.

³⁰ *Re Hernando* (1884) 27 Ch.D. 284; *Re Ross* [1930] 1 Ch. 377.

³¹ Exception 1, *post*, p. 541; *British South Africa Co. v. De Beers Consolidated Mines* [1910] 2 Ch. 502; [1912] A.C. 52; *Re Anchor Line* [1937] Ch. 483.

³² See Illustrations 10–12, p. 539, *post*. As to the law governing the effect on English immovables or lands, see Exception 2, pp. 541–544, *post*. For a statutory affirmation of this principle as regards heritable estate in Scotland, see the Married Women's Property (Scotland) Act, 1920, s. 7.

³³ *Re Pearce's Settlement* [1909] 1 Ch. 304.

³⁴ See Illustrations 13–20, pp. 539–540, *post*. *Freke v. Carbery* (1873) L.R. 16 Eq. 461; *In the Goods of Gentili* (1875) L.R. 9 Eq. 541; *De Fogassieras v. Dupont* (1881) 11 L.R. Ir. 123; *Coppin v. Coppin* (1785) 2 P.Wms. 290; *Re Müller* [1914] 1 Ch. 511; *Re Ross* [1930] 1 Ch. 377.

property) pass on his death to his personal representative for administration.

The beneficial succession to such immovables is governed by English domestic law. If the deceased died intestate, the immovables are distributed in accordance with English domestic law and not in accordance with the law of the deceased's domicile.³⁵ If he left a will, English domestic law determines whether it is formally valid. Thus a will executed in accordance with the Wills Act, 1837, but not in accordance with the law of the testator's domicile, is formally valid so far as immovables in England are concerned.³⁶ Conversely, a will executed in accordance with the law of the testator's domicile, but not in accordance with the Wills Act, 1837, is formally invalid so far as immovables in England are concerned.³⁷ The only exception to this is that wills made by British subjects are formally valid so far as personal estate in England is concerned, if executed in accordance with any system of law allowed by sections 1 or 2 of the Wills Act, 1861,³⁸ though not executed in accordance with the Wills Act, 1837.³⁹ This is because the Wills Act, 1861, speaks of 'personal estate'⁴⁰ (which includes chattels real) when no doubt the intention was to speak of movables only. English domestic law also determines whether the devise is materially or essentially valid,⁴¹ whether the will has been revoked (otherwise than by the subsequent marriage of the testator⁴²), and (*semble*) whether the testator had capacity to make a will.⁴³

Succession to immovables situated abroad, or of money representing such immovables,⁴⁴ is determined by whatever system of law the *lex situs* would apply. That law determines whether the deceased died testate or intestate, and if intestate, who is entitled to succeed to the immovables,⁴⁵ whether the will is formally valid or has been revoked (otherwise than by subsequent

³⁵ *Duncan v. Lawson* (1889) 41 Ch.D. 394; *In bonis Gentilis* (1875) Ir.R. 9 Eq. 541; *Re Rea* [1902] 1 Ir.R. 451; *Re Elder* [1936] 3 D.L.R. 422.

³⁶ *De Fogassieras v. Duport* (1861) 11 L.R. Ir. 123; *Murray v. Champenowne* [1901] 2 I.R. 232; see *Re Nicholls* [1921] 2 Ch. 11; *In bonis Almosnino* (1859) 29 L.J.P. & M. 46.

³⁷ *Coppin v. Coppin* (1725) 2 P.Wms. 291; *Pepin v. Bruyère* [1902] 1 Ch. 24; *Re Howard* [1924] 1 D.L.R. 1062; *Re Colville* [1932] 1 D.L.R. 47; *National Trust Co. v. Mendelson* [1942] 1 D.L.R. 438; *Re Landry & Steinhoff* [1941] 1 D.L.R. 699. For the refusal of English courts to be bound by foreign judgments as to the validity of wills of English land, see *Boyse v. Colclough* (1854) 1 K. & J. 124; and cf. *Foster v. Foster's Trustees* [1923] S.O. 212.

³⁸ See Rule 181, Exceptions 1 and 2, *post*, pp. 822, 826.

³⁹ *Re Watson* (1887) 35 W.R. 711; *Re Grassi* [1905] 1 Ch. 584; *Re Lyne's Settlement Trusts* [1919] 1 Ch. 80; *Re Casey Estate* [1936] 1 W.W.R. 30; *Re Gauthier* [1944] 3 D.L.R. 401.

⁴⁰ As to the meaning of 'personal estate', see *post*, p. 824.

⁴¹ *Re Hernando* (1884) 27 Ch.D. 284; *Freke v. Carbery* (1873) 16 Eq. 461; *Duncan v. Lawson* (1889) 41 Ch.D. 394; *Re Hoyles* [1911] 1 Ch. 179.

⁴² See Exception 7, *post*, p. 548.

⁴³ See *ante*, pp. 531-533.

⁴⁴ *Re Rea* [1902] 1 I.R. 451; contrast *Re Piercy* [1895] 1 Ch. 83, *post*, p. 538.

⁴⁵ *Re Rea*, *supra*.

marriage⁴⁶); whether the testator had testamentary capacity; and whether the devise is materially or essentially valid, for instance, whether the estates devised are valid,⁴⁷ whether the tenant for life is entitled to enjoyment in specie,⁴⁸ and whether the testator is bound to leave a *legitima portio* to his wife or family.⁴⁹

(6) *Guardianship, Curatorship, Bankruptcy, etc.*—The appointment of a guardian or an assignee in bankruptcy under the law of a foreign country does not operate as an assignment to such guardian, etc. of any immovable in England.⁵⁰

(7) *Prescription*.⁵¹—The question whether the possessor or occupier of an immovable or land has or has not acquired a title thereto by lapse of time, i.e., by prescription,⁵² is to be determined in accordance with the *lex situs*, and this is so whether the land is situate in England or in a foreign country, e.g., France.⁵³

Difficulties in application of Rule.—The principle that rights over land are governed by the *lex situs* is thoroughly well established. The application, however, of the principle may sometimes give rise to difficulty. It may be hard to determine how far a particular provision of the *lex situs* is in strictness a provision having reference to rights over land.⁵⁴ It may also not be easy to determine whether, and to what extent, the rights affected by a given transaction are rights over land.⁵⁵

Thus, in *Mayor of Canterbury v. Wyburn*⁵⁶ a testator domiciled in Victoria gave money to an English corporation to be laid out in the purchase of land in England which was to be used for charitable purposes. Such a gift was valid by the law of Victoria, but was invalid by English law as being contrary to the Mortmain and Charitable Uses Act, 1888 (since repealed). The Privy Council, sitting on appeal from Victoria, held that the gift was valid. But the policy of the English statute was to strike at gifts of land in England, or of money to be laid out in the purchase of land in

⁴⁶ See Exception 7, *post*, p. 548.

⁴⁷ *Nelson v. Bridport* (1846) 8 Beav. 547.

⁴⁸ *Re Moses* [1908] 2 Ch. 235.

⁴⁹ *Re Ross* [1930] 1 Ch. 377.

⁵⁰ See Illustrations 21, 22, pp. 540–1, *post*. *Ogilvy v. Ogilvy's Trustees* [1923] S.C. 83: foreign guardian cannot make good title to Scottish land.

⁵¹ See Illustration 23, p. 541, *post*.

⁵² *Beckford v. Wade* (1805) 17 Ves. 87; *Hicks v. Powell* (1869) L.R. 4 Ch. 741; *Re Peat's Trusts* (1869) L.R. 7 Eq. 302; *Pitt v. Dacre* (1876) 3 Ch.D. 295.

⁵³ See, however, as to the limitation to an action with regard to an immovable, Exception 5, p. 545, *post*.

⁵⁴ *Mayor of Canterbury v. Wyburn* [1895] A.C. 89.

⁵⁵ See *Re Percy* [1895] 1 Ch. 83. Compare *Re Rea* [1902] 1 Ir.R. 451.

An inquiry into a title of honour is assimilated to an inquiry as to a title to real estate and governed by the law of the country from whose sovereign the honour is held: see *Nelson v. Bridport* (1846) 8 Beav. 547; *Fenton v. Livingstone* (1859) 3 Macq. 497, 535; *Lauderdale Peerage* (1885) 10 App.Cas. 692, 715; *Re Duke of Wellington* [1948] Ch. 118 (C.A.). Compare Rule 121, *Proviso*, p. 497, *ante*.

⁵⁶ [1895] A.C. 89, criticised Cheshire, pp. 729–731; contrast *Att.-Gen. v. Mill* (1831) 2 Dow. & Cl. 393; *Att.-Gen. v. Stewart* (1817) 2 Mer. 143; *Re Dawson* [1915] 1 Ch. 626; *Re Hoyles* [1911] Ch. 179.

England, to be used for charitable purposes. The decision failed, it is submitted, to take that policy into account.

Again, in *Re Piercy*,⁵⁷ a testator domiciled in England who owned land in Sardinia, gave all his real and personal estate to trustees upon trust for sale and conversion and to hold the proceeds upon trust for his children for their respective lives with remainders to their issue. The law of Italy provided that any condition imposed upon an heir or legatee, no matter how expressed, that he was to retain the property and hand it over to a third party, was a trust substitution and was forbidden. It was held that the rents and profits until sale must devolve in accordance with Italian law, but that as the Italian law did not prohibit sale, it was the duty of the trustees to sell and remit the proceeds to England, and that the proceeds of sale must be held in accordance with English law upon the trusts of the will. In other words, the Italian law could not be allowed to operate upon the money into which the Italian land was directed to be converted. The reasoning by which the conclusion was reached is ingenious rather than sound. It was not shown that the Italian law (*lex situs*) regarded the land as notionally converted into money.

Illustrations

(1) CAPACITY.

1. A French subject domiciled in France is twenty years of age, and owns freehold land in England. He is under English law an infant. He conveys the land to a purchaser. The effect of his infancy on the validity of the conveyance is governed wholly by the law of England.

2. A man of twenty-two is the citizen of a foreign country where he is domiciled, and under the law of which he is an infant. He owns freehold land in England. He is under English law an adult. His capacity to convey land is unaffected by the fact that he is an infant by the law of his foreign domicile.

3. A foreign corporation is formed under the law of New York for the purchase of land, and with a right under the law of New York to hold land. The capacity of the corporation to hold land in England is governed by the law of England.⁵⁸

(2) FORMALITIES.

4. A domiciled Frenchman disposes of freehold land in England. The proper form of conveyance is determined by the law of England.

5. A domiciled Englishman conveys to a purchaser domiciled in England a right of shooting over lands in Scotland. The conveyance is made by an instrument in writing but not under seal. The law of England does, but the law of Scotland does not require such a conveyance to be under seal. The conveyance is valid, *i.e.*, the forms required are determined by the law of Scotland.⁵⁹

6. A domiciled Scotsman conveys to a purchaser, who is also a domiciled Scotsman, the right of shooting over land in England. The conveyance is made by an instrument not under seal. The conveyance is invalid, not being in accordance with the law of England (*lex situs*).⁶⁰

⁵⁷ [1895] 1 Ch. 83, criticised Cheshire, pp. 731-732; Beale, pp. 958-959.

⁵⁸ See as to corporations, Chap. 19, *ante*.

⁵⁹ *Adams v. Clutterbuck* (1883) 10 Q.B.D. 403.

⁶⁰ Inference from *Adams v. Clutterbuck*, *supra*.

7. M agrees to purchase land in Demerara of N, borrows money of A in England for the purchase, and agrees in England to secure the money by a mortgage of the land. The land is not properly conveyed to A according to the formalities required by the law of Demerara. M becomes bankrupt. X, M's assignee, completes the purchase of the land from N, sells it, and receives the purchase-money. Whether A has an equitable right to the purchase-money depends on the law of Demerara (*lex situs*), not of England.⁶¹

(3) MATERIAL OR ESSENTIAL VALIDITY.

8. A domiciled Frenchman is tenant for life of freeholds in England. His right to deal with the freeholds is governed wholly by the law of England.

9. A domiciled Englishman conveys land in New York upon trusts which infringe the New York rule against perpetuities. The validity of the trusts is determined by whatever law the law of New York (*lex situs*) would apply to the case.

(4) MARRIAGE AS AN ASSIGNMENT OF FOREIGN IMMOVABLES.

10. H, domiciled in England, marries W, domiciled in England. By an English marriage settlement, W covenants to settle all her after-acquired property. W acquires land in Jersey. By the law of Jersey, no trusts of land are permitted, and all transfers thereof must be for value. The land in Jersey is not caught by W's covenant.⁶²

11. H, domiciled in England, marries W, domiciled in France. There is no marriage settlement. H, after his marriage, purchases French land. On his death, the rights (if any), of W in respect of H's land in France are, according to the law of France (*lex situs*), governed by the domestic law of England. On the death of H, W has no right to 'community' in the French land.

12. H, a Frenchman domiciled in France, marries W, a Frenchwoman domiciled in France. The parties marry under the system of community. H, after his marriage, purchases leaseholds in Massachusetts. According to the law of Massachusetts (*lex situs*) the rights of a married woman, wherever domiciled, in respect of land in Massachusetts, are (*semble*) governed by the domestic law of Massachusetts. On H's death intestate the leaseholds are sold by his personal representative for £10,000. The money is lodged in a bank in England. The right of W in respect of the £10,000 is governed by the domestic law of Massachusetts (*lex situs*).

(5) SUCCESSION.

13. A domiciled Scotsman dies possessed of freeholds and leaseholds in England. He leaves no will, or, what in this case is the same thing, no will which is valid according to the law of England, by reason of contravention of the Mortmain Act. The freeholds and leaseholds in England will devolve in accordance with English domestic law.⁶³

14. T, a French citizen, dies domiciled and resident in a foreign country. He executes a will in accordance with the formalities required by the law of England, i.e., by the Wills Act, 1837, but not in accordance with the formalities required by the law of the foreign country. By his will T makes a devise of leaseholds and all other his real estate and chattels real in England to trustees. The devise is valid, i.e., the formal validity of the will as regards immovables is governed by the *lex situs*.⁶⁴

⁶¹ *Waterhouse v. Stansfield* (1852) 10 Hare 254.

⁶² *Re Pearce's Settlement* [1909] 1 Ch. 304.

⁶³ *Duncan v. Lawson* (1889) 41 Ch.D. 394.

⁶⁴ Compare *De Fogassieras v. Duport* (1881) 11 L.R.Ir. 123. This case is an Irish case, and refers to land in Ireland, but undoubtedly is sound in principle, and applies to immovables in England. Note that the will, which also contained bequests of movables, was, as regards them, invalid, as not being

15 T, a British subject domiciled in France, makes in France an unattested holograph will giving freeholds and leaseholds in England to X. By French law, holograph wills are valid. The will is invalid as to the freeholds,⁶⁵ but is valid as to the leaseholds under the Wills Act, 1861.⁶⁶

16 T, a British subject domiciled in England, makes a will devising freeholds and leaseholds in England to X. This will is well executed in accordance with the Wills Act, 1837. T acquires a French domicile without losing his British nationality, and makes an unattested holograph will, valid by French law, in which he revokes all former wills and devises the freeholds and leaseholds in England to Y. X is entitled to the English freeholds because T's second will is invalid by the *lex situs*; Y is entitled to the English leaseholds because T's second will is valid as to personalty under the Wills Act, 1861.⁶⁷

17. T, domiciled in England, makes an English will which devises and bequeaths all his real and personal estate both in England and in South Africa to his wife, W, for her widowhood, with remainders over. The property devised and bequeathed includes long leaseholds in the Transvaal, where Roman-Dutch law applies to it. W is therefore, entitled to enjoy the leaseholds *in specie* in accordance with such law.⁶⁸

18. T, domiciled in a foreign country, devises English immovables to trustees upon trust for sale and investment, and directs the investments to be held upon trust for accumulation extending beyond the periods allowed by the law of England. The restrictions on the devise of English immovables, and the proceeds thereof, are governed by the *lex situs*, and the devise is invalid.⁶⁹

19. T, domiciled in England, leaves by will lands in Italy to English trustees, upon trust to sell the same, and, having invested the proceeds in English investments, to hold such investments on certain trusts which are valid by the law of England and not valid by the law of Italy. The right of the trustees to take and to sell the land and the devolution of the rents while the lands are unsold are governed by the law of Italy (*lex situs*). The validity of the trusts as to the proceeds of the land is governed not by the law of Italy, but by the law of England (*lex domicilii*).⁷⁰

20. T, a British subject, domiciled in Italy, devises Italian land, making no provision for her son, S. He claims to be entitled to one-half thereof as his *legittima portio* under Italian law. The matter is to be governed by the *lex situs*, and that law is shown by evidence to apply English law as T's national law. The claim of S is therefore to be rejected.⁷¹

(6) GUARDIANSHIP, CURATORSHIP, BANKRUPTCY, ETC.

21. The proceeds of real estate (immovables) in England, belonging to a Chilean lunatic resident in Chili, sold under the Partition Act, 1868, represent

executed in accordance with the testator's *lex domicilii*, as to which see Chap. 31, Rule 181, *post*. See also *Atkinson v. Anderson* (1882) 21 Ch.D. 100; *Re Hernando* (1884) 27 Ch.D. 284, where the testatrix's will was executed in English form and held to pass leaseholds. Compare *Re Estate of Von Brentano* [1911] P. 172, for grant of probate of two wills, one in English form affecting English immovables, and one English and foreign movables, in the form of the testator's domicile; *Murray v. Champernowne* [1901] 2 Ir.R. 232 (power of appointment).

⁶⁵ *Pepin v. Bruyère* [1902] 1 Ch. 24.

⁶⁶ *Re Grassi* [1905] 1 Ch. 584.

⁶⁷ Suggested by *Re Colville* [1932] 1 D.L.R. 47; cf. *Re Howard* [1924] 1 D.L.R. 1062.

⁶⁸ *Re Moses* [1908] 2 Ch. 235.

⁶⁹ *Freke v. Carbery* (1878) L.R. 16 Eq. 461.

⁷⁰ *Re Piercy* [1895] 1 Ch. 83, criticised *ante*, p. 538.

⁷¹ *Re Ross* [1930] 1 Ch. 377.

such real estate, and are not payable to his Chilian curator, *i.e.*, the appointment of the foreign curator does not affect the title to English real estate.⁷²

22. A person resident in Victoria is the owner of real estate (immovables) in England. He becomes insolvent under a Victorian insolvency. The English real estate is not thereby vested *ipso facto* in the insolvent's assignee.⁷³

(7) PRESCRIPTION.

23. A agrees with X in England to convey to X land in India. X refuses to accept the conveyance, on the ground that A has not a title to the land. A claims a good title by prescription. In proceedings by A against X to compel X to accept a conveyance, the question whether A has a good title must be determined in accordance with the law of India (*lex situs*).⁷⁴

*Exception 1.*⁷⁵—The formal and material validity, interpretation and effect of a contract, and capacity to contract, with regard to an immovable are governed by the proper law⁷⁶ of the contract.

The proper law of such contract is, in general but not necessarily, the law of the country where the immovable is situate (*lex situs*).⁷⁷

Exception 2.—Where there is a marriage contract, or settlement,⁷⁸ the terms of the contract or settlement govern the mutual rights of husband and wife in respect of all English immovables (land) within its terms, which are then possessed or are afterwards acquired.

The marriage contract, or settlement, will be construed with reference to the proper law of the contract, *i.e.*, in the absence of reason to the

⁷² *Grimwood v. Bartels* (1877) 46 L.J.Ch. 788.

⁷³ *Waste v. Bingley* (1882) 21 Ch.D. 674. See Rule 98, p. 438, *ante*. The real estate may be made available but only through steps being taken to compel the insolvent to make over his interest: see *Stephens v. McFarland* (1845) 8 Ir.Eq. 444 (insolvent in South Australia); *Re Bolton* [1920] 2 Ir.R. 324 (bankrupt in South Africa); *Home's Trustees v. Home's Trustees* [1926] Sc.L.T. 214.

⁷⁴ Suggested by *Hicks v. Powell* (1869) L.R. 4 Ch. 741. Compare *Re Peat's Trusts* (1869) L.R. 7 Eq. 302.

⁷⁵ See as to this Exception, Rule 144, p. 657, *post*, and comment thereon; *British South Africa Company v. De Beers Consolidated Mines* [1910] 2 Ch. 502 (C.A.); *Re Smith* [1916] 2 Ch. 206.

⁷⁶ For meaning of 'proper law of the contract', see Chap. 24, Rule 136, p. 579, *post*, and as regards capacity see Rule 139, p. 619, *post*.

⁷⁷ *Semble*, approved by Kennedy, L.J., *British South Africa Co. v. De Beers* [1910] 2 Ch. (C.A.) 502, 508.

⁷⁸ In the absence of a contract the *lex situs* perhaps prevails. *Welch v. Tennent* [1891] A.C. 639, 646, *per* Lord Herschell; but see *Chiswell v. Carlyon* (1897) 14 S.C. 61 (Cape of Good Hope), *post*, p. 543.

contrary, by the law of the husband's actual domicile at the time of the marriage.

The husband's actual domicile at the time of the marriage is hereinafter termed the 'matrimonial domicile'.

Comment

Whether in this Exception and in the rest of this Digest the term 'matrimonial domicile' ought to be extended, so as to mean the intended domicile of the husband, when, as occasionally happens, he, though domiciled in one country, intends, to the knowledge of both parties to the marriage, to become immediately domiciled in another country (e.g., France), is a question on which there is no decisive English authority. On the theory, however, of a tacit or express contract between the parties about to marry, that their mutual property rights shall be determined by the law of their matrimonial domicile, the extension of that term so as to include the country in which they intend to become, and do become, domiciled immediately after their marriage seems to some authorities reasonable. For instance, if H, domiciled in England, marries in England W, domiciled in South Africa, and H and W sail to South Africa immediately after the ceremony intending to make it their permanent home, it would seem reasonable at first sight to hold that South Africa, and not England, was their matrimonial domicile.⁷⁹ The difficulty is, however, that there is no conclusive English authority in favour of this view,⁸⁰ and there are practical difficulties in its application. What if H and W do not sail to South Africa until a month—or a year—after the ceremony?⁸¹ Where is the line to be drawn? Are the rights of the spouses to be in suspense until they actually acquire a new domicile in pursuance of their pre-matrimonial intention? It is submitted that the safer rule to adopt is that the matrimonial domicile means the husband's domicile at the time of the marriage. In a clear case where the parties change their domicile very shortly after the marriage, in pursuance of a pre-matrimonial intention to that effect, the change of domicile might well be a 'reason to the contrary' within the meaning of the Exception. This way of looking at the matter has the advantage of avoiding the use of a term of ambiguous meaning which suggests either that a change of domicile can be effected by mere intention, or that 'matrimonial domicile' means something different from 'domicile' *simpliciter*.

Exception 2 means that English courts will not necessarily apply English domestic law in order to determine the rights of

⁷⁹ Cheshire, pp. 651-653.

⁸⁰ In *Collins v. Hector* (1875) L.R. 10 Eq. 334, the parties clearly did not intend to contract under the law of H's Turkish domicile.

⁸¹ Wolff, p. 366.

spouses to land in England.⁸² Thus, in *Re De Nicols*,⁸³ Kekewich, J., applied to English immovables the doctrine as to movables laid down by the House of Lords in *De Nicols v. Curlier*.⁸⁴ It is impossible to say whether this doctrine would then have commended itself to the House of Lords, and it is certain that the question at issue might have been decided on the simple ground that the land in England purchased by the husband represented movables, and, therefore, must fall under the same principle as movables. The validity of the doctrine must, therefore, be admitted to be not quite free from doubt. It is, however, now of considerable antiquity, it has not been questioned or overruled, and moreover it does not stand alone. In *Chruwell v. Carlyon*⁸⁵ H and W, domiciled in South Africa, were married there without an antenuptial contract. Consequently, the South African regime of community property applied to their present and after-acquired property. H acquired land in Cornwall. The question before the English court was whether this land was subject to the South African community. Stirling, J., sent a case for the opinion of the Supreme Court of Cape Colony. In other words, he decided that the rights of H and W in the English land were to be determined by South African law. The South African court gave an opinion that the English land was held in community, whether or not H and W had acquired an English domicile. Stirling, J., then gave judgment in accordance with this opinion.

Exception 2, however, which we assume to be well established, and which seems to be sound in principle, is subject to limitations which ought to be carefully noted.

(1) It applies to English immovables, but it does not apply to foreign immovables. The rights of the parties to a marriage over such immovables, *e.g.*, land situate in France or in Massachusetts, will (as already pointed out) be determined by an English court with reference to the *lex situs*, that is, by reference to the law which the court of the country where the property is situate, in the one instance France and in the other Massachusetts, deem applicable to the case.

(2) No marriage contract can give to the parties to a marriage any right in respect to English land which is prohibited by English law.

(3) No marriage contract can be enforced in England if its enforcement is opposed to any English rule of procedure or to any English rule as to the formalities with which English land can

⁸² Cf. Cook, pp. 276-279.

⁸³ [1900] 2 Ch. 410. Contrast *Re Hernando* (1884) 27 Ch.D. 284, where the matrimonial domicile was Spanish, but the proper law of the marriage settlement was English.

⁸⁴ [1900] A.C. 21. See Rule 170, p. 787, *post*.

⁸⁵ (1897) 14 S.C. 61 (Cape of Good Hope). The case is unreported in England, but the record number is 1897 A. 2919. The case is fully discussed in Cheshire, pp. 655-657.

be conveyed, such, for example, as the Statute of Frauds, ss. 4 and 7, or now ss. 40, 53-55, of the Law of Property Act, 1925. The principle was admitted by all parties in the argument of *Re De Nicols*. But the contention that the Statute of Frauds, ss. 4 and 7, made it impossible to enforce the merely tacit, and therefore unwritten, marriage contract between H and W with regard to land in England, was rejected by the court on the ground that the case did not fall within the scope of the statute,⁸⁶ which is inapplicable to a partnership in land.

Illustrations

1. H and W, French citizens domiciled in France, intermarry in Paris and are subject to the system of community. They afterwards acquire a domicile in England. H makes a fortune in trade and purchases freehold and leasehold land in England. On the death of H, W's rights to such land are governed by the law of the matrimonial domicile, *viz.* France, and W is entitled to a half share thereof and a will under which H attempts to dispose of the whole of such freehold and leasehold land is, as far as such disposition of W's half share goes, invalid.⁸⁷

2. H and W, domiciled in South Africa, marry there without an antenuptial contract. By South African law, the community property regime applies to their present and after-acquired property. They make a joint will disposing of the property held by them in community. H comes to England, and purchases land in Cornwall. W dies in 1893. H dies in 1895. The question whether the land in Cornwall passes under the joint will must be determined by South African law. *Semble*, it does so pass, whether or not H and W had acquired an English domicile.⁸⁸

*Exception 3.*⁸⁹—Under Exceptions 1 and 2 to Rule 181 [*i.e.*, under the Wills Act, 1861, ss. 1 and 2], a will made by a *British subject* may, as regards such immovables in the United Kingdom as form part of his personal estate⁹⁰ (chattels real), be valid as to form, though not made in accordance with the formalities required by the *lex situs*.

Exception 4.—An assignment of a bankrupt's property to the representative of his creditors under the English or the Irish or the Scottish Bankruptcy Acts is an

⁸⁶ Compare *Dale v. Hamilton* (1846-1847) 5 Hare 369; *Custance v. Bradshaw* (1845) 4 Hare 315; *Gray v. Smith* (1890) 43 Ch.D. 208.

⁸⁷ *Re De Nicols* [1900] 2 Ch. 410.

⁸⁸ *Chiwel v. Carlyon* (1897) 14 S.C. 61 (Cape of Good Hope).

⁸⁹ *Re Grass* [1905] 1 Ch. 584; *Re Watson* (1887) 35 W.R. 711. See comment on Exceptions 1 and 2 to Rule 181, *post*. See also, as to exercise of powers of appointment with regard to such immovables, Rules 188 and 190, *post*.

⁹⁰ As to the relation between 'personal estate', *i.e.*, 'personal property', and immovables, see pp. 45, 46, *ante*.

assignment of the bankrupt's immovables, wherever situate.⁹¹

*Exception 5.*⁹²—The limitation to an action or other proceeding in England with regard to a foreign immovable is probably governed by the *lex fori*.

Comment

Whether the possessor or occupier of land who has no title thereto has acquired by lapse of time a defence against an action or other proceeding for the recovery thereof, under a law (statute of limitations) which bars the *remedy* of the person otherwise entitled to recover the land, is a question of procedure which, on general principles, ought to be determined, and probably is determined, by English courts in accordance with the *lex fori*, that is, English law.

It is, however, arguable that the limitation to an action in regard to land is determined by English courts in accordance with the *lex situs*. But the authorities in support of this deviation from the well-established principle that procedure is governed by the *lex fori* are, to say the least, not conclusive. No certain inference can be drawn from cases having reference to land in England; for, when an action is brought in an English court with reference to English land, the *lex fori* and the *lex situs* coincide, and the case is decided, by whatever name the law be called, in accordance with the law of England. The cases in which English courts entertain proceedings with regard to foreign land are necessarily rare and exceptional.⁹³ And the reported cases having reference to such proceedings may suggest, but do not show conclusively, that English courts have held questions of limitation to be governed by the *lex situs*.

*Beckford v. Wade*⁹⁴ is not a case decided by an English court in reference to foreign land. It is a decision by the Privy Council as a Court of Appeal from Jamaica. It refers to *prescription*, and only shows that the acquisition of a title to land in Jamaica is determined by the law of Jamaica.

*Hicks v. Powell*⁹⁵ only establishes that, where the *lex situs* deprives a person of title to foreign land, he cannot enforce in England any right depending on the possession of a title under the

⁹¹ See Rule 54, p. 327, *ante*, and Rule 97, p. 437, *ante*.

⁹² See *Beckford v. Wade* (1805) 17 Ves. 87; *Hicks v. Powell* (1869) L.R. 4 Ch. 741; *Re Peat's Trusts* (1869) L.R. 7 Eq. 302; *Pitt v. Dacre* (1876) 3 Ch.D. 235.

As to the principle that all matters of procedure are governed by the *lex fori*, see Chap. 32, *post*.

⁹³ See Rule 20, p. 141, *ante*, and Exceptions thereon, pp. 145-151.

⁹⁴ (1805) 17 Ves. 87.

⁹⁵ (1869) L.R. 4 Ch. 741.

lex situs; but the language of Hatherley, C.,⁹⁶ suggests that, in proceedings with regard to land, questions of procedure may perhaps be governed by the *lex situs*.

*Re Peat's Trusts*⁹⁷ seems to have been in substance an Indian action. The question to be decided was, what were the shares claimable by different parties interested in a fund in England which represented the proceeds of the sale of land in India. But the decision seems to have rested on the assumption that the right to a share in the fund was the same as the right to a share in the Indian land, and that a person whose right to recover a share in the land was barred by an Indian statute of limitations could not in the English proceedings claim the share in the fund which represented such land. It was not, moreover, absolutely necessary to decide what was the effect, in the English proceedings, of the Indian statute of limitations.

*Pitt v. Dacre*⁹⁸ decides that, in an action to recover from a person in England the arrears of an annuity chargeable on and payable out of the rents of land in Jamaica, the time within which an action may be maintained for the recovery of the annuity is determined, not by the English Statute of Limitations, *i.e.*, the Real Property Limitation Act, 1833 (*lex fori*), but by the law of Jamaica (*lex situs*). This is the strongest authority in support of the view that the limitation to an action with regard to land is governed by the *lex situs*; but the case is not, even if rightly decided, quite conclusive. The law of Jamaica, as to the point in question, was the old law of England prior to 3 & 4 Will. 4, c. 27; and it is possible to explain the case simply on the ground that 3 & 4 Will. 4, c. 27, applies only to land in England, and that, as regards foreign land, the *lex fori* is the old law of England, which in this case coincided with the *lex situs*. It is probable that while the acquisition of title to land by prescription is governed by the *lex situs*, the effect of a Statute of Limitations which only bars the remedy for the recovery of land, and does not give a prescriptive title to land, is governed by the *lex fori*.

Illustration

X mortgages land in one of the British Colonies to A. X is in England. A brings an action to obtain a foreclosure decree against X. The time within which such an action can be brought in England is (*semble*) governed by the *lex fori*.⁹⁹

⁹⁶ P. 746.

⁹⁷ (1869) L.R. 7 Eq. 302.

⁹⁸ (1876) 3 Ch.D. 295. See also *Colonial Investment and Land Co. v. Martin* [1928] S.C. 440.

⁹⁹ See *Payet v. Ede* (1874) L.R. 18 Eq. 118; and compare Exception 1 (p. 145, ante) to Rule 20.

*Exception 6.*¹—A will of immovables is in general to be interpreted with reference to the law of the testator's domicile at the time when the will was made, but this presumption may be displaced by any facts, such as the use of technical terms, which indicate that the testator had in mind the law of the place where the immovables are situate or any other law.

Comment

There seems no reason to make an exception in the case of wills of immovables to the general rule² that the interpretation of a will is to be governed by the law of the domicile of the testator at the time when it is made, subject to any indications therein that the testator had in mind some different law, in this case normally the law of the place where the immovable is situate. Thus it has been held that where a testator charges money on land, it may be assumed that the currency, where there is a difference, is intended to be that of his domicile,³ and that where the testator devises land to the 'heir' of X, the heir is to be ascertained in accordance with the law of the testator's domicile.⁴

On the other hand, it is clear that the law of the place where the immovables are naturally determines what is included in a general devise of an estate, for instance, whether it means the lands and buildings thereon only, or includes slaves, live stock, or other movables necessary for the work of the estate.⁵ Further, the use of technical language of the country where the immovables are situate must necessarily be regarded as indicating an intention to deal with them according to the legal relations indicated by such language,⁶ even when the will deals also, as often, with movables, and generally must be interpreted according to the law of the domicile. There is special complexity when the testator deals with lands in two different countries under distinct systems of law and aims at producing identical results by the use of the technical language of one of the countries only. In any case the will cannot

¹ *Trotter v. Trotter* (1829) 4 Bli. 502; *Maxwell v. Maxwell* (1852) L.R. 4 H.L. 501; *Rutson v. Stordy* (1856) 1 Jur.(n.s.) 771; 2 Jur.(n.s.) 410. Contrast *Yates v. Thompson* (1835) 3 Cl. & F. 544, 588.

² See Rule 183, and Exception, *post*, pp. 831, 832.

³ *Wallis v. Brightwell* (1722) 2 P.Wms. 88; *Saunders v. Drake* (1742) 2 Atk. 468; *Lansdowne v. Lansdowne* (1820) 2 Bli. 60. Contrast *Balfour v. Cooper* (1883) 23 Ch.D. 472 (Irish interest allowed on charge on Irish land under settlement); *Re Quirk* [1941] Ch. 46 (gift of land in France free of all duties is free of French mutation duty).

⁴ *Macleay v. Treadwell* [1937] A.C. 626. The question whether legitimated children can take under a gift to children is not properly speaking a question of construction but a question of status. See *ante*, Rules 121, 122.

⁵ *Lushington v. Sewell* (1827) 1 Sim. 435; *Stewart v. Garnett* (1830) 3 Sim. 398.

⁶ *Bradford v. Young* (1885) 29 Ch.D. 617, 623, *per* Cotton, L.J.; *Re Hernando* (1884) 27 Ch.D. 284, 286, 297.

be interpreted so as to sanction any violation of the local law affecting the immovable. 'While the will is presumed, in the absence of anything to the contrary, to have been drawn in accordance with the law of the testator's domicile, and will be interpreted accordingly, its effect and validity in respect to the disposition of real property [immovables] or the creation of any interest therein will depend on the *lex rei sitæ*.' ⁷

Illustrations

1. T, domiciled in Scotland, devises English and Scottish lands in terms appropriate to create an estate in tail male in English land. It is clearly his intention that the estates in England and Scotland should descend to the same persons, but it is impossible to create the same estates in English and Scottish land. It is held that the use of technical terms of English law must prevail so as to create a strict entail in the English land, though the result is that, no such result being possible as regards Scottish land, A, to whom the lands were devised, has the power to dispose freely of the Scottish land, but no power to deal with the English land.⁸

2. T, domiciled in England, devises land in India to A, adding that on the sale of the land A is to pay £1,500 to B. The addendum is invalid, since it amounts to attempting to create an estate unknown to English law, the law *prima facie* applicable to the devise.⁹

Exception 7.—The question whether a will of immovables has been revoked by the subsequent marriage of the testator is determined by the law of the testator's domicile at the moment of the marriage.

Comment

Under the law of England, a marriage revokes any will made before marriage by either party to the marriage,¹⁰ unless the will is expressed to be made in contemplation of the marriage.¹¹ It has been held by the Court of Appeal that the English rule is part of English matrimonial law and not part of English testamentary law.¹² The consequence is that, so far as movables are concerned,

⁷ *Jacobs v. Whitney* (1910) 205 Mass. 477. If by any chance an English court had to deal with the question of a will affecting foreign land made by a person elsewhere domiciled, it would no doubt follow the interpretation which a court of the *locus rei sitæ* would give; *Re Duke of Wellington* [1947] Ch. 506, [1948] Ch. 118 (C. A.).

⁸ See *Re Miller* [1911] 1 Ch. 511. Compare the Scottish case, *Studd v. Cook* (1883) 8 App.Cas. 577, where it was held that a settlement of land in Scotland in which the technical terms of English law were used should be interpreted to create an estate in the land analogous to that created as regards English land by the same instrument. For a very confused case of an English will of Scottish land, see *Cripps' Trustees v. Cripps* [1926] Sc.L.T. 188.

⁹ *Re Elliot* [1896] 2 Ch. 353. Contrast *Re Moses* [1908] 2 Ch. 235, *ante*, where the local law was applied. Note that nothing was proved as to the law of India.

¹⁰ Wills Act, 1837, s. 18.

¹¹ Law of Property Act, 1925, s. 177.

¹² *Re Martin* [1900] P. 211.

the question whether a will has been revoked by the subsequent marriage of the testator is determined by the law of the domicile of the testator at the moment of the marriage.¹³ Since the domicile of a wife becomes, at the moment of the marriage, the same as the domicile of her husband, this rule means that the question whether marriage revokes a will is determined by the law of the husband's domicile at the moment of the marriage.

The reason for the rule, as given by the Court of Appeal, is wide enough to cover and, it is submitted, does cover wills of immovables as well as wills of movables. The question is not really one of succession at all. It is true that in *Re Caithness*¹⁴ it was held that the will of a testator domiciled in Scotland, which dealt with leasehold land in England, was revoked by his subsequent marriage. But that case was decided before the nature of the rule that marriage revokes a will had been finally settled by the Court of Appeal, and would, it is submitted, not be followed today.¹⁵

Illustrations

1. T, domiciled in Scotland, makes a will dealing with land in England. He marries and dies without having lost his Scottish domicile. His will is (*semble*) not revoked.

2. T, an Englishwoman domiciled in England, makes a will dealing with land in England. T marries a domiciled Scotsman and dies. T's will is (*semble*) not revoked because her domicile became Scottish at the moment of her marriage.

3. T, domiciled in England, makes a will dealing with land in Scotland. He marries and dies without having lost his English domicile. His will is (*semble*) revoked.

Exception 8.—The Court has no jurisdiction to make an order under the Inheritance (Family Provision) Act, 1938, for the maintenance of a testator's dependants out of the rents and profits of immovables in England unless the testator was domiciled in England at the date of his death.

Comment

In England, and in many common law jurisdictions of the British Commonwealth, the court has a statutory jurisdiction to make an order for the maintenance of a testator's dependants out of the income of his net estate if he does not make reasonable provision for them by his will. Such restrictions on a testator's freedom of testamentary disposition are closely analogous to the rule which

¹³ Rule 185, Exception 2, *post*, p. 837.

¹⁴ (1890) 7 T.L.R. 854.

¹⁵ Compare *Re Howard* [1924] 1 D.L.R. 1062, 1071.

prevails in Scotland and in many Continental countries, that the testator must leave a definite part of his estate (sometimes called a *legitima portio*) to his wife or children. It is now well settled that the Scottish and Continental rule raises a question of material or essential validity, and that the question whether the testator must leave a *legitima portio* to his wife or children, is governed so far as movables are concerned by the law of his domicile at the date of his death, and so far as immovables are concerned, by the *lex situs*.¹⁶ It would appear that on principle the question whether the court has jurisdiction to make an order for the maintenance of the testator's dependants should be governed by similar considerations. Accordingly, it has been held in common law jurisdictions of the British Commonwealth which have statutes similar in scope and purpose to the English Inheritance (Family Provision) Act, 1938, that the court has jurisdiction to make an order for maintenance out of immovables situated within the jurisdiction, no matter where the testator was domiciled at the date of his death.¹⁷ Unfortunately, the English Act only applies if the testator died domiciled in England,¹⁸ and therefore English courts have no jurisdiction to make an order for maintenance, even out of immovables situated in England, if the testator died domiciled abroad. As the illustration shows, the effect may well be to leave a serious gap in the scope of the Act.

Illustration

T dies domiciled in New Zealand. He leaves immovables in England. His will makes no provision for his dependants. The New Zealand court has no jurisdiction to make an order for their maintenance out of the English land, because it is not situated in New Zealand. The English court has no jurisdiction, because the testator did not die domiciled in England.

Exception 9.—The question whether a legatee of movables under a will must elect between the legacy and foreign land is determined by the law of the testator's domicile.

If a testator devises foreign immovable property (foreign land) under a will which on any ground is inoperative to pass the same to the devisee, and also either—

¹⁶ *Re Ross* [1930] 1 Ch. 377.

¹⁷ *Re Roper* [1927] N.Z.L.R. 731; *Re Butchart* [1932] N.Z.L.R. 125; *Re Ostrander Estate* (1915) 8 W.W.R. 367; *Williams v. Moody's Bible Institute* [1937] 4 D.L.R. 465 (Saskatchewan); *Re Rattenbury* [1936] 2 W.W.R. 554 (British Columbia); see *Morris* in 62 L.Q.R. 173-179; Falconbridge, Chap. 36.

¹⁸ Inheritance (Family Provision) Act, 1938, s. 1 (1); see *Re White* [1941] Ch. 192; cf. s. 2 of the Ontario Dependents' Relief Act. 1937

- (1) devises English immovable property (English land) to the heir of the foreign immovable property, or,
 - (2) being domiciled in England, bequeaths movable property wherever situate to the heir of the foreign immovable property,
- the court will not allow such heir to take any benefit under the will as regards (1) the English immovable property, or (2) the movable property, unless he fulfils the conditions of the will with respect to the foreign immovable property or compensates for his failure to do so; *i.e.*, the heir is put to his election.

Comment

Paragraph (1) of the second sentence of this Exception is, strictly speaking, an illustration of, and not an Exception to, Rule 127: but is included here for convenience so that the whole doctrine of election in the conflict of laws may be considered in one place.¹⁹

‘Election, in the sense here used, is the obligation imposed upon a party to choose between two inconsistent or alternative rights or claims in cases where there is clear intention of the person, from whom he derives one, that he should not enjoy both. Every case of election, therefore, presupposes a plurality of gifts or rights, with an intention, express or implied, of the party who has a right to control one or both, that one should be a substitute for the other. The party who is to take has a choice, but he cannot enjoy the benefits of both.’²⁰

‘If a testator’, says Lord Eldon,²¹ ‘gives his estate to A, and gives A’s estate to B, Courts of Equity hold it to be against conscience that A should take the estate bequeathed to him and at the same time refuse to effectuate the implied condition contained in the will of the testator.’

These descriptions of the doctrine of election are sufficient to indicate its origin and scope. But with the development of the doctrines of equity the question of the actual intention of the testator has been relegated to the background,²² and the matter is now regulated by technical rules, not all of which can logically be explained on the theory underlying the principle. For our purpose it is sufficient here to note that a singular tenderness has been shown by the courts for the English heir; thus if a testator devises English freehold land to A, and bequeaths movable property

¹⁹ See also Rule 184, *post*, p. 833.

²⁰ Story, *Equity Jurisprudence*, 3rd English ed., s. 1075, p. 450.

²¹ *Ker v. Wauchope* (1819) 1 Bli. 1, 92.

²² *Cooper v. Cooper* (1874) L.R. 7 H.L. 53, 67, *per* Lord Cairns.

to B, his heir, and if the devise turns out to be invalid, whether for want of capacity,²³ or defect of form,²⁴ or material invalidity (e.g., contravention of the rule against perpetuities),²⁵ then it has been held that B is entitled to take the land against the will, and to take the bequest under the will, though, if intention were any criterion, it would seem as if the testator meant precisely the reverse.

The rule applicable in the case of English heirs has not been applied to heirs of foreign immovable property. The explanation of this discrimination in treatment is simple; for a Court of Equity to insist on the doctrine of election in a case where the will was invalid as regards English land, would have been an indirect effort to overthrow the system of law regulating that land, and would have involved a serious struggle with the courts of common law on a ground unfavourable to doctrines of equity. In the case of foreign immovables no such struggle could arise. The English court had usually before it simply the question how it was equitably to deal with a claim to movable property in England put forward by an heir to foreign land who had taken that land against the terms of the will which bequeathed movable property to him; it could not, of course, affect directly the *lex situs*, but it owed that law no such respect as would induce it to refuse to apply the doctrine of election, lest thus indirectly it defeated the purposes of the *lex situs*. Logically the action of the English courts in the case of the foreign heir was obviously sounder than their attitude towards the English heir, but the distinction between the two cases had become firmly established by 1818.²⁶

The question of election by a foreign heir, as a matter of English law, can, it is clear, arise only when the distribution, as distinguished from the administration of a testator's property, falls to be determined by the English court, i.e., (1) when T, the testator, leaves immovable property in England, the distribution of which depends on the *lex situs*²⁷; or (2) when the testator dies domiciled in England, leaving movables either in England or elsewhere, whose distribution depends on the *lex domicilii*.²⁸ If T dies domiciled out of England and leaves no immovables in England, the distribution of his property depends on the law of his foreign domicile. Thus, if T dies in England leaving goods there, and land in Scotland, which would not pass under his will,

²³ *Hearle v. Greenbank* (1749) 1 Ves.Sen. 298; 3 Atk. 695, 715.

²⁴ *Re De Virte* [1915] 1 Ch. 920; *Dewar v. Maitland* (1866) L.R. 2 Eq. 834, 839.

²⁵ *Re Oliver's Settlement* [1905] 1 Ch. 191; *Re Bankes' Settlement* [1906] 1 Ch. 256; *Re Nash* [1910] 1 Ch. (C.A.) 1.

²⁶ *Brodie v. Barry* (1813) 2 V. & B. 127, 129, 133; *Re Ogilvie* [1918] 1 Ch. 492.

²⁷ Compare *Dundas v. Dundas* (1830) 2 Dow. & Cl. 349, which is a Scottish case, and the English cases, *Dewar v. Maitland* (1866) L.R. 2 Eq. 834 (lands in England and St. Kitt's, the latter invalidly devised); *Orrell v. Orrell* (1871) L.R. 6 Ch. 302 (lands in England and Scotland).

²⁸ *Anon.* (1723) 9 Mod. 66; *Brodie v. Barry* (1813) 2 V. & B. 127; *Trotter v. Trotter* (1828) 4 Bli. 502; *Allen v. Anderson* (1846) 5 Hare 163; *Harrison v. Harrison* (1873) L.R. 8 Ch. 342.

either because of formal or material invalidity, and T were domiciled in France, the question whether election arose would be purely a matter for French law, and if the English courts decided the issue, the law they would apply would be French law. Therefore, as between movables bequeathed to the foreign heir and foreign land devised away from the heir, the question whether the heir must elect is determined by the law of the testator's domicile.²⁹ But as between English immovables devised to the foreign heir and foreign land devised away from the heir, the question whether the heir must elect is determined by English law (*lex situs*) irrespective of the domicile of the testator. The statement in *Cheshire*³⁰ that 'the question whether a beneficiary is put to his election is governed by the law of the testator's domicile' thus appears to be too wide, since it is appropriate only to a case of election between movables and foreign land, and not to a case of election between English and foreign immovables.

The only point of the Rule which needs further explanation is the reference to compensation. On the strict application of the theory of election it might be argued that if T devises foreign land worth £10,000 to A, and bequeaths to E, the heir to the foreign land, a legacy of £20,000, E must choose between taking the legacy under the will, and surrendering the land which, by reason of the invalidity under the *lex situs* of T's devise, does not pass under the will to A, or keeping the land and giving up all claim to the legacy. The courts, however, hold that in such a case, if E determines to keep the land, he can do so, but as compensation to A, they sequester from out of the legacy to E the value of the land.³¹

If, for the sake of clearness, we assume that a deceased person has left immovable property in Scotland, and has died domiciled in England leaving there only movable property, the conditions under which the Rule as to election applies may thus be stated:—

(1) T, the deceased, must die testate; the Rule cannot apply to a case of total intestacy.

(2) T must leave a will intended to deal both with the English movable property and with the Scottish immovable property. If the will, in the opinion of the English court, is not intended to apply to the Scottish immovable property or land, then no question of election arises³²; the Scottish heir takes any legacy under the will, and succeeds apart from it to the Scottish land as heir. The question, whether T intended to deal with the Scottish land by his will, falls to be decided by the law of England as the law of his domicile, and under English law merely general terms, such as 'all

²⁹ Contrast *Re Allen* (1945) 114 L.J.Ch. 298, which it is submitted was wrongly decided: see *post*, Rule 184, pp. 833-835.

³⁰ P. 741.

³¹ *Gretton v. Haward* (1819) 1 Sw. 409; *Re Ogilvie* [1918] 1 Ch. 492.

³² *Allen v. Anderson* (1846) 5 Hare 163; *Trotter v. Trotter* (1823) 4 Bli. 502.

my real and personal estate wherever situate', are held insufficient to show an intention on the part of the testator to deal with property incapable of passing under the will.³³

(8) The will must be invalid as to the Scottish immovable property; whether it is invalid or not is to be determined by Scottish law (*lex situs*).

If these conditions are fulfilled the heir is put to his election. If he takes under the will the English movables given by the will, he must not take the Scottish land by descent. If he takes, against the will, the Scottish land by descent, then he must compensate the person, to whom the land was devised, out of the English movables, being entitled to receive only the excess value (if any) of the movables over the land.

The operation of this Rule can best be seen from the following illustrative cases, of which the first four are decisions of English courts, while the last is a decision of the House of Lords as the final Scottish Court of Appeal. The justification for adducing this illustration is the fact that there is unquestionably a close similarity between the English doctrine of election and the Scottish of 'approbate or reprobate',³⁴ but it cannot be asserted, of course, that the doctrines in the two countries have been, or can be, worked out on precisely parallel lines.

Illustrations

1. T, domiciled in England, dies possessed of immovable property in Scotland, and movable property in England, Scotland, and elsewhere. T, by his will, devises the Scottish immovables and bequeaths the movable property to trustees in trust to divide the whole equally amongst his nephews. The will is, under Scottish law, invalid as to the Scottish immovable property. A, one of the nephews, is under Scottish law heir to the Scottish immovable property. A is put to his election either to take the Scottish immovable property against the will as heir and give up his claim as legatee in so far as the legacy does not exceed the value of the Scottish property, or, if he takes the legacy in full, to let the Scottish immovable property go according to the will.³⁵

2. T, domiciled in England, dies possessed of movable property and also of immovable property in Scotland. He devises his immovable property in Scotland to B, and also bequeaths equal shares in his movable property to A and B. The will is under Scottish law inoperative as to the Scottish immovable property. A is T's heir under Scottish law. A is put to his election

³³ *Maxwell v. Maxwell* (1852) 2 De G.M. & G. 705. See also *Baring v. Ashburton* (1886) 54 L.T. 463: will incapable of devising French immovables does not put French heirs to election: *Johnson v. Telford* (1880) 1 Russ & My. 244.

³⁴ *Brown v. Gregson* [1920] A.C. 860, judgment of Lord Finlay, p. 870. Compare *Douglas-Menzies v. Umphelby* [1908] A.C. 228. A curious case of *quasi*-election arose in *Re Rea* [1902] 1 Ir.R. 451, where the widow of an intestate domiciled in Ireland, who left land in Victoria, under the law of which State the widow was entitled to £1,000 and a moiety of the residue, was not allowed to claim that provision as well as £500 under the Intestates' Estates Act, 1890.

³⁵ *Brodie v. Barry* (1813) 2 V. & B. 127.

whether he will take the Scottish immovable property as heir, or the bequest of movable property as legatee.³⁶

3 T, domiciled in England, directs by will that 'the whole of his property' should be divided equally amongst A, B, and C, his brothers and sisters. T leaves Scottish immovable property. The will, as to the Scottish immovable property, is invalid. A is T's heir and takes the Scottish land. He is not put to his election, *i.e.*, he also takes his share as legatee. The reason is that the words 'the whole of T's property' do not show an intention to devise the Scottish immovable property.³⁷

4. T dies domiciled in England, leaving a will in which he disposes of English movables, and devises immovable property in Paraguay to trustees in trust for charitable purposes. The law of Paraguay imposes strict limits on the power of testamentary disposition, under which the devise is invalid to the extent of four-fifths as against the heirs under Paraguayan law. E, to whom the English movables are left under the will, is the heir under the law of Paraguay. E is put to his election either not to take what he inherits under the law of Paraguay, or, if he does take it, to compensate the charity out of the English movables which he takes under the will for what it has lost by four-fifths of the Paraguayan immovables passing under the law of Paraguay to E.³⁸

5. T, domiciled in Scotland, leaves by will property including Scottish movables and land in Argentina to trustees for division among his children, E, F, and G. By a codicil he directs his trustees, in lieu of paying over her share to G, to hold it for her in life-rent, and after her death to divide it among her children who should then be alive and the issue of any who predeceased her, *per stirpes*. He also directs by his will that the provisions for his children therein must be accepted in lieu of legitim and of any other rights which they might assert by reason of his death, and that if any of them should repudiate the settlement thus made under the will, or claim their legal rights, they were to forfeit all title to any share of his estate which he could dispose of by law. G, despite the will, claims, and is awarded legitim, but it is decided that this fact in no way lessens her children's rights under the will.³⁹

The devise of Argentine land is wholly invalid, because the law of Argentina declines to recognise any form of trust or settlement as applying to land. Under a judgment in the Argentine court E, F and G succeed on the footing of an intestacy to equal shares of the Argentine land. The children of G are thus deprived of their right to G's share of the Argentine land on her death. They accordingly bring an action in the Court of Session in which they claim as against E and F that they should either secure them the interest in the Argentine land which was given them under the will, or alternatively compensate them out of their shares of the Scottish property taken by E and F under the will. It is finally decided by the House of Lords, overruling the Court of Session, that no case of election arises.⁴⁰

Comment

The decision in illustration 5 is, it is submitted, clearly in accordance with principle, if we bear in mind the fact that election (1)

³⁶ *Harrison v. Harrison* (1873) L.R. 8 Ch. 342.

³⁷ *Trotter v. Trotter* (1828) 4 Bli. 502. See also *Allen v. Anderson* (1846) 5 Hare 163; *Maxwell v. Maxwell* (1852) 2 De G.M. & G. 705. Contrast *Orrell v. Orrell* (1871) L.R. 6 Ch. 302, where the testator expressly devised the residue of his real estate situate in any part of the United Kingdom; *Harrison v. Harrison* (1873) L.R. 8 Ch. 342.

³⁸ *Re Ogilvie* [1918] 1 Ch. 492.

³⁹ [1916] S.C. 97.

⁴⁰ *Brown v. Gregson* [1920] A.C. 860 (Lord Cave dissenting), reversing the judgment of the Court of Session [1919] S.C. 483.

essentially implies the possibility of choice, and (2) is a doctrine of equity, from which it follows that it will not be pressed to yield inequitable results. Both these considerations would have been violated if the doctrine of election had been held to be applicable :—

(1) E and F in this case had no power to secure the children of G the interest in Argentine land which T desired them to have. No process could be devised by which, without violating the *lex situs*, the interest in question could be created. The case, therefore, fell under the rule laid down in *Re Lord Chesham*,⁴¹ where it was held that no case for election arose when T gave by will benefits to E and by the same will gave away chattels which under a settlement were attached to the mansion house of which E was tenant for life. The only dissentient judgment in the House of Lords was based on doubt as to whether this difficulty could not be surmounted.

(2) Had the doctrine of election been applied in these circumstances, it would have worked clear injustice and have defeated the plain intention of the testator, whose aim was to secure an equal distribution of his property among his children. G had already secured *legitim* and an equal share with E and F of the Argentine land, i.e., clearly more than T intended her and her family to have, and it would have been utterly inequitable to call on E and F to surrender part of their shares in T's property for G's children. The wishes of T could, of course, be simply carried out by G leaving the Argentine land to her children on her death.

Contrast on both points the Paraguayan case (Illustration 4). The law of Paraguay imposed no prohibition on the disposition of land *inter vivos* to charitable ends; it merely—like the law of Scotland—imposed definite restrictions on the power of a testator to pass over his heirs when making his will. E, therefore, in that case, had freedom to elect; he could legally hand over his Paraguayan land for the purpose of the charity, and take the whole of his legacy under the will. If he preferred to keep the land, he could have only the surplus of the value of the legacy over that of the land. Secondly, the making E elect was plainly equitable and in accordance with the intention of the will. The charity obtained what the testatrix intended, though in a different form, while E also obtained the bounty meant for him.

⁴¹ (1886) 31 Ch.D. 466. Compare *Hewit's Trustees v. Lawson* (1891) 18 R. 798; *Douglas's Trustees v. Douglas* (1862) 24 D. 1191.

MOVABLES¹

1. TANGIBLE AND INTANGIBLE THINGS

RULE 128.—The validity and effect of a transfer or assignment of movables depend on whether the movables are tangible or intangible.

Comment

*Tangible and Intangible things.*² The distinction between movables and immovables³ must not be confused with the distinction between tangible and intangible things.⁴ Tangible things are either movable (e.g., a horse) or immovable (e.g., land). Things may be the subject of legal interests. For example, A may own a horse, B may have an estate in fee simple in land, C may have a right of way over the same land. Such legal interests are, of course, intangible. It is unnecessary to assign a legal *situs* to a legal interest in a tangible thing as distinguished from the actual physical *situs* of the thing itself, since it is sufficient to regard a person's legal interest in a horse or a piece of land as situated where the horse or the land is situated. But complications arise if the thing which is the subject of the interest is itself intangible, e.g., debts, stocks and shares, patents, trade marks, copyright and goodwill. In reality, the distinction between movables and immovables is not appropriate to these intangible things, since a thing which cannot be touched obviously cannot be moved. Logically, therefore, things should be classified as being (1) tangible things, which may be either (a) movable or (b) immovable, and (2) intangible things. It is common, however, to classify

¹ Cheshire, Chap. 16; Wolff, ss. 488-525; Goodrich, ss. 149-159 and authorities cited, *post*, p. 558, note 8; p. 570, note 65. This chapter has been re-written as Rules 152 to 154 in the 5th edition of this work, which were tentatively formulated and to some extent inconsistent, had ceased to represent the law. Rule 153 in particular was held to be wrong in *Republica de Guatemala v. Nunez* [1927] 1 K.B. 669 and *Re Anziani* [1930] 1 Ch. 407.

The Rules in this chapter refer only to particular transfers or assignments of movables *inter vivos*, e.g., by sale or gift. They do not refer to general assignments of movables in consequence of (1) marriage (see Rules 170-172, pp. 787-798, *post*); (2) bankruptcy (see Rules 54, 97-100, pp. 327, 437-444, *ante*); or (3) death (see Rules 177, 178, pp. 814, 817, *post*).

² This paragraph is based substantially on the valuable discussion in Falconbridge, 433-435; cf. Cook, Chap. 11; Cheshire, 549-551.

³ *Ante*, p. 521, Rule 126.

⁴ This confusion is rife in the Restatement, ss. 46, 212, 213, and in Robertson, 192-194, 212.

all things as being movable or immovable, and to include intangible things in movables, and even to ascribe an artificial *situs* to intangible things in order to bring them within the scope of rules of law expressed in terms of *situs*.

The situs of intangible things. It was at one time supposed that a chose in action has no locality.⁵ But this doctrine, deduced as it was from the misleading maxim *mobilia sequuntur personam*,⁶ is now exploded, and it is recognised that an artificial *situs* or quasi-*situs* may have to be ascribed to intangible things for different legal purposes. These purposes, which are very various, include (1) administration of the assets of a deceased person (at any rate before the Administration of Justice Act, 1932); (2) taxation; (3) Treaty of Peace Orders; (4) the assignment of the intangible thing. It must be emphasised that the artificial *situs* may be different for different purposes, and it does not follow that because one *situs* has been ascribed to an intangible thing for the purposes of taxation, therefore the same *situs* must be ascribed to it for the purposes of the conflict of laws.

The *situs* of intangible things is fully discussed elsewhere in this work⁷ and it is sufficient here to note that the governing principle is that a debt is deemed to be situated where it is properly recoverable, that is where the debtor resides and presumably has assets to satisfy the debt.

2. TRANSFER OF TANGIBLE THINGS⁸

RULE 129.⁹—(1) A transfer of a tangible movable which is valid and effective by the proper law of the transfer (*lex actus*) and by the law of the place where the movable is at the time of the transfer (*lex situs*) is valid and effective in England.

(2) A transfer of a tangible movable which is invalid or ineffective by the *lex actus* and by the *lex situs* of the movable at the time of the transfer is invalid or ineffective in England.

⁵ *Lee v. Abdy* (1886) 17 Q.B.D. 309, 312, *per* Day, J.

⁶ *Sill v. Worswick* (1791) 1 H.Bl. 665, 690, *per* Lord Loughborough; *Re Ewin* (1880) 1 Cr. & J. 151, 156 *per* Bayley, B.

⁷ *Ante*, pp. 303 ff.

⁸ See, in addition to the authorities cited, *ante*, p. 557, n. 1, Falconbridge, Chap. 19; Morris, 22 B.Y.B.I.L. 232; Restatement, ss. 255-281.

⁹ *Cammell v. Sewell* (1860) 5 H. & N. 728; *Castrique v. Imrie* (1870) L.R. 4 H.L. 414, 429, *per* Blackburn, J.; *Inglis v. Usherwood* (1801) 1 East 515; *City Bank v. Barrow* (1880) 5 App.Cas. 664; *Embiricos v. Anglo-Austrian Bank* [1905] 1 K.B. 677 (cheque); *Re Korvine's Trusts* [1921] 1 Ch. 343.

Comment

The English authorities on the law which governs the transfer of tangible movables are scanty and unsatisfactory,¹⁰ though sweeping dicta are common. Thus in the leading case of *Cammell v. Sewell*¹¹ the Court of Exchequer Chamber say 'if personal property is disposed of in a manner binding according to the law of the country where it is, that disposition is binding everywhere'. On the other hand, Page Wood, V.-C., in *Simpson v. Fogo*¹² laid down the equally sweeping but flatly contradictory proposition that 'a good title acquired in one country is a good title all over the globe'. These propositions merely state the results reached in the two cases, which are not easy to reconcile. Both propositions emphasise that the *lex situs* is the governing law, but they are not in agreement as to which *lex situs* governs. On the other hand Kay, L.J., in *Alcock v. Smith*¹³ emphasised that the *lex actus* is the governing law: 'as to personal chattels, it is settled that the validity of a transfer depends not upon the law of the domicile of the owner, but upon the law of the country in which the transfer takes place'.

Equally sweeping dicta can be found in earlier cases¹⁴ for the proposition that the validity of transfers of chattels is governed by the law of the owner's domicile. But these dicta were expressly based on the misleading maxim *mobilia sequuntur personam*, which meant that chattels wherever situated were deemed to follow the law of the owner's domicile. This is a useful rule for general assignments and is applicable today, broadly speaking, to general assignments made on marriage and on death. In such cases it would clearly be inconvenient that each single chattel should devolve in a different way. But it does not follow that the same rule should be applied to particular transfers of individual chattels. It may have been true in early times that articles of personal estate were few and were usually located in the owner's domicile. It is entirely untrue in modern commerce.¹⁵ Accordingly, all modern writers and most modern judges have discarded the test of domicile, and it has been said that all that the maxim *mobilia sequuntur personam* means today is that succession to movables is governed by the personal law of the deceased.¹⁶

It follows that in simple cases where the *situs* of the movable remains constant throughout, the only two laws which can control are the *lex situs* and the *lex actus*. The *lex actus* does not

¹⁰ Cf. *Republica de Guatemala v. Nunez* [1927] 1 K.B. 669, 688-9, per Scrutton, L.J.

¹¹ (1860) 5 H. & N. 728, 744-5.

¹² (1862) 1 H. & M. 195, 222.

¹³ [1892] 1 Ch. 238, 267.

¹⁴ *Sill v. Worswick* (1791) 1 H.Bl. 665, 690, per Lord Longhborough; *Re Ewin* (1830) 1 Cr. & J. 151, 156, per Bayley, B.

¹⁵ Cf. Beale, 979; Wolff, 518.

¹⁶ *Provincial Treasurer for Alberta v. Kerr* [1933] A.C. 710, 721.

necessarily mean the law of the place where the transfer takes place (*lex loci actus*). It means the proper law of the transfer, ascertained in accordance with the principles which determine the proper law of a contract.¹⁷ No doubt the *lex loci actus* will often coincide with the proper law; but there may be cases where the two laws differ.

It is believed that Anglo-American courts tend more and more to prefer the *lex situs* to the *lex actus*. But where the two laws coincide, or where there is no difference between them, it is well established that they control the validity of the transfer in respect of capacity of parties, formalities and essential validity, and also govern its effects. Rule 129 may, therefore, be regarded as settled law. It applies not only when the *lex actus* and the *lex situs* are the same, as when a transfer is made in France of goods situated in France, but also when, though the two laws are not those of the same country, there is no material difference between them, as when a transfer is made in England of goods situated in France, and the validity and effect of the transfer are the same by English and French law.

Illustrations

1. A, a London merchant, instructs B, a factor in Russia, to procure certain goods. B delivers the goods in Russia to a ship chartered by A. Before the ship leaves Russia A becomes insolvent and B stops the goods. By English law B cannot stop the goods, by Russian law he can. B can stop the goods, i.e., Russian law (*lex situs*) governs.¹⁸

2. A, a London leather merchant, sends hides to B, a tanner in Quebec, for tanning and return. Instead of returning the hides to A, B pledges them in Quebec with the C bank as security for a loan. The question whether the title of the C bank is valid as against A is governed by the law of Quebec.¹⁹

3. A, a domiciled Russian, makes a *donatio mortis causa* to B in England of goods situated in England. A dies intestate domiciled in Russia. The validity of the *donatio mortis causa* is governed by English law (*lex situs*), since the transaction has for this purpose a closer affinity to transactions inter vivos than to succession on death.²⁰

RULE 130.²¹—Subject to the Exception hereinafter mentioned, when the proper law of the transfer (*lex actus*) differs from the *lex situs* of the tangible movable at the time of the transfer, the *lex situs* governs the effect

¹⁷ *Post*, p. 579, Rule 136 and Sub-Rules.

¹⁸ *Inglis v. Usherwood* (1801) 1 East 515; see Wolff, p. 521; cf. *Re Hudson Fashion Shoppe* [1926] 1 D.L.R. 199.

¹⁹ *City Bank v. Barrow* (1880) 5 App.Cas. 664.

²⁰ *Re Korvine's Trusts* [1921] 1 Ch. 343. Contrast *Re Craven's Estate* [1937] Ch. 428, better reported in 53 T.L.R. 694, where the matter was treated (wrongly, it would seem) as one of administration; see Falconbridge, Chap. 34. Cf. *Emery v. Clough* (1885) 63 N.H. 552.

²¹ *Inglis v. Robertson* [1898] A.C. 616; *Re Anziani* [1930] 1 Ch. 407, 420, per Maugham, J.; Falconbridge, Chap. 19; Goodrich, ss. 149, 150; Restatement, ss. 255-259.

of the transfer on the proprietary rights of the parties thereto and of those claiming under them in respect thereof.

Comment

The difficulties of this subject begin when there is a conflict between the *lex actus* and the *lex situs*. The tendency of Anglo-American courts in such circumstances is undoubtedly to prefer the *lex situs*. 'I do not think', says Maugham, J.,²² 'that anyone can doubt that with regard to the transfer of goods, the law applicable must be the *lex situs*. Business could not be carried on if that were not so.' 'The rule which looks to the law of the *situs*', says an American judge,²³ 'has the merit of adopting the jurisdiction which has the actual control of the goods and the merit of certainty.'

Nevertheless it is submitted that a distinction must be drawn between the contractual effects of the transfer and its proprietary effects. The contractual effects of the transfer, like those of any other contract, no doubt depend upon the proper law.^{23a} That law will, for instance, determine whether the seller is liable to the buyer for defects in the quality of the goods. And the transfer may be invalid as a transfer but valid as an executory contract to transfer. But the proprietary effects of the transfer depend, it is submitted, on the *lex situs*. That law will determine whether title passes to the transferee by mere agreement or whether delivery is necessary. If the *lex situs* says that no title passes to the transferee because the parties lack capacity to transfer or because of some defect of form or essential validity in the transfer, then other jurisdictions should, it is submitted, accept the fact that no title has passed, no matter what the *lex actus* may say. 'The contractual rights and duties of the parties can be enforced only in so far as they are consistent with the recognition of the property rights existing or created under the *lex rei sitæ*.'²⁴

Failure to note this vital distinction between the contractual and proprietary effects of the transfer has led Cheshire,²⁵ almost alone among modern writers, to maintain that the *lex actus*, and not the *lex situs*, governs the validity and effect of the transfer. The case he puts is that of a contract in London (the proper law of which is English) to transfer goods situated in Paris; the title passing by agreement in English law, in French law not until delivery.²⁶ Cheshire says that the buyer can compel the seller to make delivery by reason of the seller's contractual liability to

²² *Re Anziani* [1930] 1 Ch. 407, 420.

²³ *Lees v. Harding, Whitman & Co.* (1905) 68 N.J.Eq. 622, 629, *per* Swayze, J.

^{23a} See Rule 145, *post*, p. 662.

²⁴ Falconbridge, 385-6.

²⁵ At pp. 574-580.

²⁶ See Cheshire, p. 578. Since title to goods passes in French law by agreement (French Civil Code, Article 1583), the illustration would be more realistic if the goods were situated in Germany.

complete the transfer. He goes on to admit, however, that if before delivery the seller makes a disposition of the goods in France, in favour of a third party, the title recognised by the *lex actus* will not avail the buyer. This admission appears to cut most of the ground away from Cheshire's rule that the *lex actus* governs questions dependent upon the validity and effect of the original transfer—a rule which, be it noted, is expressly stated to apply not only between the parties themselves, but also between one of them and a third party.²⁷ Moreover, the only authorities cited by Cheshire in support of his rule are the ancient English case of *Inglis v. Usherwood*,²⁸ where the *lex situs* and the *lex actus* coincided and therefore it was unnecessary to decide between them; and the modern American case of *Yousoupoff v. Widener*,²⁹ where the court was dealing with the interpretation of a transfer and therefore with its contractual effects as between the original parties.

It is submitted that there are at least three reasons why the proprietary effects of a transfer are more important here than the contractual effects. In the first place, the transferor may fraudulently deliver the goods to a third party, as in the illustration discussed above. Secondly, the transferor may become insolvent before he has delivered the goods to the transferee, in which case the title to the goods might vest according to the *lex actus* in the transferee but according to the *lex situs* in the transferor's trustee in bankruptcy. In such a case it seems clear that the *lex situs*, having control of the goods, would prevail. Thirdly, the transfer may be by way of gift, so that the transferor may be under no contractual obligation to perfect the transferee's title. No useful purpose, it is submitted, is served by asserting that the transferor is contractually bound by the *lex actus* to perfect the transferee's defective title by the *lex situs*, because the transferor's contractual obligation may be either non-existent, as in the case of a gift, or valueless to the transferee, as when a third party has acquired rights in the goods or the transferor has become insolvent.

If at the time when the action is brought the goods remain in the place where they were when the transfer was made, and the court is not sitting in the country of the *situs* of the goods, there is a strong practical reason why the *lex situs* and not the *lex actus* or any other law should prevail. In the last resort only officials appointed by the *lex situs* can lawfully deal with the *res litigiosa*, and therefore any adjudication by other courts which purported to effect proprietary rights therein would be a *brutum fulmen*. It follows that, so long as the *situs* of the goods does not change, the *lex situs* should mean, for a court not sitting at the *situs*, not the domestic rules of the *lex situs*, but whatever system of law the conflicts rules of the *lex situs* has applied or would apply. If an English court has to determine the proprietary

²⁷ See Cheshire, 574.

²⁸ (1801) 1 East 515.

²⁹ (1927) 246 N.Y. 174.

effects of a transfer of goods situated in France made in London by a domiciled Italian, the English court should (it is submitted) apply not necessarily the domestic rules of French law, but the law of the country which French law would apply, which might conceivably be English law (*lex actus*) or Italian law (*lex domicilii*). This is one of the exceptional situations in which the total *renvoi* theory may be justifiable.⁴⁰

If the reasoning in the last paragraph is sound, it follows that there is no logical reason why a court sitting at the *situs* of the goods should necessarily apply its own domestic law to a transfer of goods made abroad, though no doubt most courts have done so.⁴¹ For the Rule that the *lex situs* applies obviously furnishes no guide whatever to a court sitting at the *situs* of the goods unless it is first assumed that the word 'law' in the Rule means (contrary to its meaning when other courts apply it) the domestic rules of the *lex situs*. If, for example, it is alleged that a foreign-executed deed transferring goods in England is void for failure to comply with some English statutory formality, the court should (it is submitted) consider the statute in the light of its purpose to see whether it applies to foreign-executed deeds.

There is not a great deal of English authority for the proposition that the *lex situs* and not the *lex actus* controls the proprietary effects of a transfer of goods, though American authority seems clear enough.⁴² In many of the English cases the *lex situs* and the *lex actus* were the same. In *Inglis v. Robertson*⁴³ the rights of unpaid sellers over whisky in Scotland were held not to be displaced by a hypothecation of the whisky in England, because 'the *situs* of the goods was in Scotland'. The paramount controlling influence of the *lex situs* is further illustrated by the cases on foreign confiscatory decrees.⁴⁴ Such decrees have no effect in England on property outside the jurisdiction of the country making the decree,⁴⁵ but do receive effect on property within that jurisdiction, even if it is later brought to England.⁴⁶ The only English case which appears to conflict with Rule 130 is *Dulaney v. Merry*,⁴⁷ where two Americans domiciled in Maryland

⁴⁰ See *ante*, pp. 47, 59-60; Morris, 22 B.Y.B.I.L. 237.

⁴¹ Cf. *ante*, pp. 530-531.

⁴² Goodrich, ss. 149, 150; Restatement, ss. 255-259.

⁴³ [1898] A.C. 616, stated, *post*, p. 564, Illustration 4. See especially, *per* Lord Watson at p. 625.

⁴⁴ *Ante*, p. 152, Rule 22.

⁴⁵ *Ogden v. Folliott* (1789) 3 T.R. 726; *The Jupiter* (No. 3) [1927] P. 122, 250; *Banco de Viscaya v. Don Alfonso* [1935] 1 K.B. 140; *Government of the Republic of Spain v. National Bank of Scotland* [1939] S.C. 413; *Tallina Laevauhisus A/S v. Tallinn Co., Ltd.* (1946) 175 L.T. 285; *Zarine v. Ramava* [1942] Ir.R. 148; *Frankfurter v. W. L. Exner, Ltd.* [1947] Ch. 629; contrast *Lorentzen v. Lydden* [1942] 2 K.B. 202, where the decree was not confiscatory; *Estonian S.S. Line v. S.S. Elise* [1948] 4 D.L.R. 247 (*sed dub.*).

⁴⁶ *Luther v. Sagor* [1921] 3 K.B. 532; *Princess Paley Olga v. Weiss* [1929] 1 K.B. 718.

⁴⁷ [1901] 1 Q.B. 536. See now the Deeds of Arrangement Act, 1914, and *Re Pilkington's Will Trusts* [1937] Ch. 574. Cf. *ante*, p. 280 n. 12; p. 442 n. 30.

executed a deed in Maryland purporting to assign all their property wherever situated to another American for the benefit of their creditors. It was held that chattels in England passed under the deed although it was not registered as required by the Deeds of Arrangement Act, 1887. The decision can be supported on two alternative grounds. First, the court was sitting at the *situs* of the goods and was therefore under no logical necessity to apply the domestic rule of the *lex situs* to a foreign-executed deed, but was free to examine the scope of the English statute in the light of its purpose. Secondly, the transfer was a general transfer, bearing much the same relation to assignment on bankruptcy as a marriage settlement does to assignment on marriage.³⁸ Rule 180, like the other Rules in this chapter, only applies to particular transfers.

Illustrations

1. A, domiciled and resident in England, is the owner of a horse situated in France. By oral words of gift spoken in England, A gives the horse to B. By English law delivery is necessary to complete the donee's title, by French law the words of gift pass the title to the donee. B is (*semble*) the owner of the horse.³⁹

2. A agrees to sell goods in Germany to B. The proper law of the transfer is English law. By English law title passes to the buyer when the contract is made, by German law not until delivery. Before delivery is made to B, A fraudulently delivers the goods in Germany to C. C's title (*semble*) prevails over that of B.

3. A in England agrees to sell goods in France to B. The proper law of the transfer is English law. By English law title passes to the buyer when the contract is made. By French domestic law no title passes to the buyer because the agreement is formally invalid by French law. By the French conflict of laws rule the formal validity of the transfer is governed by English law. B is (*semble*) the owner of the goods, *i.e.*, English domestic law applies.

4. A, a London wine merchant, buys whisky from B, wine and spirit merchants in Glasgow. The whisky is stored in a bonded warehouse in Glasgow. A receives a delivery order from the warehouse company stating that the whisky is held to his order 'or assigns by indorsement hereon'. A indorses the delivery order to C in England as security for a loan. C does not give notice to the warehouse company as required by Scots law. B, not having been paid the price of the whisky, arrests it in the hands of the warehouse company. B's title prevails over that of C, *i.e.*, Scots law (*lex situs*) and not English law (*lex actus*) governs.⁴⁰

Exception.⁴¹—If goods are in transit, and their *situs* is casual or not known, a transfer which is valid and effective by its proper law (*lex actus*) will (*semble*) be valid and effective in England.

³⁸ For assignment on bankruptcy, see *ante*, Rule 54, p. 327, and Rules 97-100, pp. 437-444; for assignment on marriage, see *post*, Rules 170-172, pp. 787-798.

³⁹ Cf. *Cochrane v. Moore* (1890) 25 Q.B.D. 57, where, however, French law was not pleaded.

⁴⁰ *Inglis v. Robertson* [1898] A.C. 616. Cf. *Green v. Van Buskirk* (1886) 7 Wall. 139.

⁴¹ See Wolff, ss. 494-496; Hellendall, 'The *Res in transitu* and similar problems in the Conflict of Laws', 17 Can.Bar Rev. 7, 105 (1939).

Comment

The arguments in favour of Rule 130, that is in favour of the *lex situs* as opposed to the *lex actus*, become least plausible when goods are in transit, so that their actual *situs* at any given moment is casual or temporary and not contemplated by or known to either party to the transfer. In such a case it would be pedantic to insist that the transfer must comply with the requirements of the *lex situs* and can only receive such effect as the *lex situs* ascribes to it. Accordingly, it is thought that it would be sufficient if the transfer complies with the requirements of its proper law. It should be noted that this Exception has a somewhat limited scope. It is expressed in positive terms only, and does not assert that a transfer which is invalid or ineffective by the *lex actus* will necessarily be treated as invalid or ineffective in England. Nor does it apply when the goods have come to rest at a definite stage in the transit, as when a ship is wrecked and the cargo saved.⁴² It may well be that the *situs* of a ship is deemed for some purposes at least to be at her port of registry and not at the place where she happens to be.⁴³

Illustrations

1. A, domiciled and resident in England, agrees in England to sell Turkish tobacco to B, also domiciled and resident in England. At the time of the agreement the tobacco is moving by rail from Istanbul to Calais. The proper law of the agreement is English law. The agreement is formally valid by English law but formally invalid by the law of Yugo-Slavia, where (unknown to A and B) the tobacco is at the time of the agreement. The agreement is formally valid.

2. A & Co., a Liverpool firm, hold bills of lading of a cargo on board a ship bound for Glasgow. They pledge the bills in Liverpool to the B bank as security for an advance. The bank then return the bills to A & Co. with authority to sell the cargo, but subject to an obligation to pay the proceeds of sale in satisfaction of the advance. A & Co. sell the cargo to C, a Glasgow merchant, and send him the bills of lading through D, to whom they are indebted. D arrests the price in the hands of C in Glasgow and claims that his right to do so has priority over that of the B bank. The B bank's right to the proceeds of sale is governed by English law (*lex actus*) and is valid as against D.⁴⁴

RULE 131.⁴⁵—A title to goods acquired or reserved in accordance with Rules 129 or 130 will be recognised as

⁴² *Cammell v. Sewell* (1860) 5 H. & N. 728.

⁴³ Revenue Act (No. 2) 1864, ss. 4, 5; Merchant Shipping Act, 1894, s. 44 (11); cf. *ante*, p. 304.

⁴⁴ *Northwestern Bank v. Poynter* [1895] A.C. 56, where, however, there was no difference between Scots and English law.

⁴⁵ *Cammell v. Sewell* (1860) 5 H. & N. 728; *Alcock v. Smith* [1892] 1 Ch. 238; *Embiricos v. Anglo-Austrian Bank* [1905] 1 K.B. 677; *Simpson v. Fogo* (1863) 1 H. & M. 195; *Liverpool Marine Credit Co. v. Hunter* (1867) L.R. 4 Eq. 62; (1868) L.R. 3 Ch. 479; *Hooper v. Gumm* (1867) L.R. 2 Ch. 282; Goodrich, ss. 152-154; Falconbridge, Chap. 19; Morris, 22 B.Y.B.I.L. 238-248.

valid in England if the goods are removed out of the country where they were situated at the time when such title was acquired, until such title is displaced by a new title acquired in accordance with the law of the country to which they are removed.

Comment

Up to this point it has been assumed that the *situs* of the goods remains constant⁴⁶ at all material times. But much more difficult problems arise if the *situs* of the goods changes, if for instance goods are taken out of one country (X) by someone not the owner and sold to an innocent purchaser or otherwise dealt with in a second country (Y). This situation is a common one in the American cases, but has arisen relatively seldom in England.

(1) It is clear in the first place that a title to goods in X is entitled to recognition in Y if the goods are subsequently removed to Y, until some new title validly acquired under the law of Y overrides the title acquired in X. If no such new title is acquired in Y after the removal of the goods to Y, the fact that the title acquired by the law of X would not have been acquired under the law of Y is immaterial, for the *situs* of the goods at the material time was in X. 'If, according to [Norwegian] law, the property passed by the sale in Norway to Clausen as an innocent purchaser, we do not think that the subsequent bringing the property to England can alter the position of the parties'.⁴⁷

(2) It is equally clear that if a new title is acquired under the law of Y after the removal of the goods to Y, which has the effect of overriding prior titles, the title previously acquired under the law of X is displaced. If, for instance, the goods are sold in market overt in Y, or seized there in distress for rent, or become subject to a lien, the new title thus acquired in Y will override the prior title acquired under the law of X.⁴⁸ It appears to be immaterial that the goods were removed to Y without the consent of the owner.⁴⁹

⁴⁶ Or immaterial. See Exception to Rule 130, *ante*, p. 564.

⁴⁷ *Cammell v. Sewell* (1860) 5 H. & N. 728, 742-3, *per curiam*, stated *post*, p. 569, Illustration 1. Cf. Restatement, ss. 260, 266, 273.

⁴⁸ *Cammell v. Sewell* (1860) 5 H. & N. 728, 744; *Alcock v. Smith* [1892] 1 Ch. 238, 267; *Embiricos v. Anglo-Austrian Bank* [1905] 1 K.B. 677 (cheque); *Todd v. Armour* (1882) 9 R. 901; *Willys-Overland Co. v. Evans* (1919) 104 Kan. 632; *Universal Credit Co. v. Marks* (1932) 164 Md. 180.

⁴⁹ *Cammell v. Sewell* (1860) 5 H. & N. 728, 745; *Embiricos v. Anglo-Austrian Bank* [1905] 1 K.B. 677; Goodrich, s. 152; Falconbridge, 379-385; Morris, 22 B.Y.B.I.L. 240-241; contrast Beale, 292-300, citing *Edgerly v. Bush* (1880) 81 N.Y. 199.

(3) The difficult intermediate case is where A has acquired or reserved a title to goods in X, and B takes the goods to Y, where they are sold by B to a purchaser or attached by B's creditors, not being creditors claiming a paramount lien. If the transaction by which A acquired or reserved a title by the law of X would not have had this effect by the law of Y, a very difficult problem in the conflict of laws is presented. The problem is the conflict of laws phase of the ancient question where the line is to be drawn between the security of titles and the security of transactions. Different systems of domestic law have taken different views on this matter; thus the policy of the common law, expressed in its maxim '*nemo dat quod non habet*', is different from the policy of French law, expressed in its maxim '*en fait de meubles possession vaut titre*'⁵⁰ and also different from the policy of the Factors Acts and other statutes which have modified the common law rule.

Most of the English and American cases uphold the title of the owner A against that of the purchaser C.⁵¹ The typical situation in the American cases is that chattels are validly mortgaged in X by B to A, with the result that A has a special property therein; or chattels are validly hire-purchased in X by A to B, on the terms that A reserves title until the price is fully paid: then the chattels are taken by B to Y and dealt with there in a manner inconsistent with A's rights. As the principles governing the chattel mortgage situation do not differ from the principles governing the hire-purchase or conditional sale situation, it is unnecessary to consider the two situations separately. Very often the law of Y differs from the law of X in that it does not admit that A has validly acquired a special property in the goods, or has validly reserved his title, either because the law of Y does not recognise the validity of chattel mortgages unaccompanied by delivery of possession, or because it requires that hire-purchase contracts must be registered in Y. The weight of authority prefers the title of A to that of purchasers or creditors from B. Sometimes this result is reached by holding that the statutory registration requirements of the law of Y are applicable only to hire-purchase contracts made in Y and affecting chattels in Y, and not to hire-purchase contracts made elsewhere and affecting chattels elsewhere. If the statutory registration requirements of the law of Y are wide enough to cover hire-purchase contracts wherever made,⁵² the case is covered by a conflicts rule of Y, and the statute is decisive for a court sitting in Y. But it is not decisive for a court sitting elsewhere, unless the chattel remains

⁵⁰ French Civil Code, Article 2279.

⁵¹ See Goodrich, ss. 153-154; Morris, 22 B.Y.B.I.L. 292; Falconbridge, Chap. 19; and cases cited, *post*, p. 569, notes 61 and 62.

⁵² See the American and Canadian Uniform Conditional Sales Acts.

in Y at the time of the action, in which case the principle of effectiveness requires that the court should follow what the *lex situs* has decided or would decide.⁵³ If the law of Y refuses to recognise chattel mortgages unaccompanied by delivery of possession, the refusal may be due to a rule of domestic public policy in Y, which may not be applicable to a conflict of laws case in Y and certainly is not applicable to a conflict of laws case tried elsewhere than in Y, because no court applies the public policy of any country but its own.

If the foregoing reasoning is sound, it follows that the question whether A loses his title when his goods are removed to Y depends entirely on the reason why the domestic law of Y would hold that his title is lost.⁵⁴ If the domestic law of Y says that A's title is lost because an event has taken place in Y after the removal of the goods there which by the law of Y overrides prior titles, *e.g.*, a sale in market overt or the attaching of a repairer's paramount lien, then the law of Y governs and A's title is lost. But if the domestic law of Y says that A's title is lost because it does not recognise that the transaction in X had the effect of vesting the title in A, then the law of X governs and A's title is not lost. This distinction, it is submitted, explains the great majority of the English and American cases. The result in the latter case appears to be the necessary consequence of the conclusion reached in paragraph (1) above. If A acquires a valid title to goods in X, we have seen that his title is upheld in Y if the goods are removed to Y, even though he would not have acquired a good title by the law of Y. Thus, if B removes A's goods to Y, A's title is still the better. If B now sells the goods in Y to C, there is no reason why B should be capable of passing a better title than he has himself, unless the law of Y attributes this special effect to the sale there.

(4) The converse situation to that discussed in the last paragraph arises when A's reservation of title in X is void or voidable as against subsequent purchasers by the law of X, but is valid as against subsequent purchasers by the law of Y; and the chattel is removed by B to Y and sold there to an innocent purchaser C. If the law of X says that A's reservation of title is void or voidable as against subsequent purchasers *in X*, then the law of Y governs and A's title prevails.⁵⁵ But if the law of X says that A's reservation of title is void or voidable as against subsequent purchasers *anywhere*, then the law of X governs and C's title prevails.⁵⁶

⁵³ *Ante*, pp. 562-568.

⁵⁴ See *Morris*, 22 B.Y.B.I.L. 239.

⁵⁵ *Marvin Safe Co. v. Norton* (1886) 48 N.J.L. 410, as explained by *Morris*, 22 B.Y.B.I.L. 246-247; cf. *Falconbridge*, 412.

⁵⁶ *Dougherty & Co. v. Krimke* (1929) 105 N.J.L. 470.

Illustrations

(1) TITLE ACQUIRED IN X, GOODS REMOVED TO Y.

1. A, a domiciled Englishman, is the owner of a cargo of deals shipped from Russia to England in a Prussian ship. The ship is wrecked on the coast of Norway. The master sells the deals in Norway to C in circumstances which give C a good title by the law of Norway but not by English law. C sends the deals to England. The title of C prevails over that of A, i.e., Norwegian law (*lex situs*) governs.⁵⁷

(2) TITLE ACQUIRED IN X, GOODS REMOVED TO Y, NEW TITLE ACQUIRED IN Y.

2. A is a domiciled Frenchman. His watch is stolen in Paris and sold to C in market overt in London. C acquires a good title against A, even if A shows that a sale in market overt does not give a good title according to the law of France.⁵⁸

3. A is domiciled in Germany, but is resident in lodgings in London. His goods are seized by the superior landlord, under a distress for rent due from the lodging-house keeper. The goods are sold to C in London. C, whatever the law of Germany, has a good title to the goods as against A.⁵⁹

4. A sells a motor-car in New York to B on hire-purchase terms. It is agreed that title shall remain with A till the price is fully paid and that B shall not take the car out of New York State. Before the price is fully paid, B takes the car to Maryland, where it is damaged. The car is repaired by C, a garage proprietor. By the law of Maryland, a garage proprietor has a lien on the car for the cost of repairs. C's lien prevails over A's title.⁶⁰

(3) VALID RESERVATION OF TITLE IN X, GOODS REMOVED TO Y, SALE IN Y.

5. A & Co., a California corporation, sell a motor-car in California to B, a California resident, on hire-purchase terms. It is agreed that title shall remain with A & Co. till the price is fully paid and that until then B shall not remove the car out of California. Before the price is fully paid, B takes the car to New York without the knowledge or consent of A & Co. and sells it in New York to C. By the law of California, the title of A & Co. is superior to any title derived from B on resale even to an innocent purchaser for value and even though the contract is not filed. By the law of New York, all such reservations of title are void against subsequent purchasers in good faith unless the contract is filed in New York. The contract never is filed anywhere. The title of A & Co. is good as against C.⁶¹

6. B, the owner of a British ship, mortgages it in England to A, and remains in possession with A's consent. B takes the ship to New Orleans, where it is seized by C, a Louisiana resident, one of B's creditors. C does not rely on any paramount lien: he is merely seeking execution against property which apparently belongs to his debtor B. The law of Louisiana does not recognise mortgages of chattels without delivery of possession. The ship returns to England. A's title prevails as against C.⁶²

⁵⁷ *Cammell v. Sewell* (1860) 5 H. & N. 728. *Freeman v. East India Co.* (1822) 5 B. & Ald. 617, so far as contra, must be regarded as overruled.

⁵⁸ *Cammell v. Sewell* (1860) 5 H. & N. 728, 744; *Alcock v. Smith* [1892] 1 Ch. 238, 267; cf. *Embricos v. Anglo-Austrian Bank* [1905] 1 K.B. 677 (cheque); *Todd v. Armour* (1882) 9 R. 901.

⁵⁹ *Ibid.*

⁶⁰ *Universal Credit Co. v. Marks* (1932) 164 Md. 180. Cf. *Willys-Overland Co. v. Evans* (1919) 104 Kan. 632; *Mehta v. Sutton* (1913) 108 L.T. 214.

⁶¹ *Goetschius v. Brightman* (1927) 245 N.Y. 186. Cf. *Cleveland Machine Works v. Lang* (1892) 67 N.H. 348; *Lees v. Harding, Whitman & Co.* (1905) 68 N.J.Eq. 622; *Reising v. Universal Credit Co.* (1935) 50 Ohio App. 289; *Commercial Corporation Securities, Ltd. v. Nichols* [1938] 3 D.L.R. 56.

⁶² *Simpson v. Fogo* (1868) 1 H. & M. 195. Cf. *Longworthy v. Little* (1853) 12 Cush. 109; *Bonin v. Robertson* (1893) 2 Terr.L.R. 21; *Sawyer v. Boyce*

(4) RESERVATION OF TITLE IN X VOID OR VOIDABLE AGAINST THIRD PARTIES, GOODS REMOVED TO Y, SALE IN Y.

7. A & Co. sell an iron safe in Pennsylvania to B on hire-purchase terms. It is agreed that title shall remain in A & Co. until the price is fully paid. Before the price is fully paid B takes the safe to New Jersey and sells it to C, who buys in good faith and without notice of A & Co.'s title. By the law of Pennsylvania A & Co.'s reservation of title is valid as against B but void as against creditors of or purchasers from B in Pennsylvania. By the law of New Jersey A & Co.'s reservation of title is valid as against third parties. A & Co.'s reservation of title is valid as against C, *i.e.*, the law of New Jersey governs.⁶³

8. A, a jeweller, delivers a diamond in New York to B, a broker, for the purpose of contemplated sale, but on the terms that no title is to pass to B. B takes the diamond to New Jersey and pledges it there to C. By the law of New York a factor entrusted with the possession of a chattel for the purpose of sale is deemed to be the true owner thereof so far as to give validity to any contract of sale made by him anywhere. By the law of New Jersey A's reservation of title is valid as against third parties. C's title is good as against A, *i.e.*, the law of New York governs.⁶⁴

3. ASSIGNMENT OF INTANGIBLE THINGS ⁶⁵

(1) Assignability.

RULE 132.—The question whether a debt or other intangible thing is capable of assignment, and if so under what conditions (so far as they affect the debtor) is governed by the proper law of the debt ⁶⁶ or the law governing the creation of the thing.

Comment

There is an acute conflict of opinion among writers on the conflict of laws as to what law should govern the transfer or assignment of intangible things. Story ⁶⁷ and Phillimore ⁶⁸ say that the law of the creditor's domicile is the test. But this view is a relic of the outworn maxim *mobilia sequuntur personam* and is not adopted

(1908) 1 Sask L.R. 280; *Hart v. Oliver Farm Equipment & Sales Co.* (1933) 37 N.Mex. 267; *General Motors Acceptance Corporation v. Nuss* (1939) 195 La. 209, *Metro-Plan Inc. v. Kotcher-Turner Inc.* (1941) 296 Mich. 400; 296 N.W. 304. Distinguish *Liverpool Marine Credit Co. v. Hunter* (1867) L.R. 4 Eq. 62; (1868) L.R. 3 Ch. 479, where there was no equity between A and C, *Hooper v. Gumm* (1867) L.R. 2 Ch. 282, where A and B conspired to conceal the existence of the mortgage in order to facilitate sales. See Morris, 22 B.Y.B.I.L. 244-246.

⁶³ *Marvin Safe Co. v. Norton* (1886) 48 N.J.L. 410.

⁶⁴ *Dougherty & Co. v. Krimke* (1929) 105 N.J.L. 470.

⁶⁵ See, in addition to the authorities cited, *ante*, p. 557, n. 1, Falconbridge, Chap. 20; Restatement, ss. 348-354. The Rules in this section do not deal with negotiable instruments, which are discussed in the chapter on Particular Contracts, *post*, pp. 693 ff.

⁶⁶ As to the meaning of the proper law of a contract, see *post*, Rule 136 and Sub-Rules, p. 579.

⁶⁷ Section 362.

⁶⁸ *iv* 544.

by modern writers. Domicile is of great importance in family law, but has little significance in commercial matters, except perhaps as an element in determining the proper law of a transaction. Westlake⁶⁹ and Dicey⁷⁰ said that the *lex situs* of the debt is the test. But this view, while it avoids problems of priorities as between competing transfers, involves the difficulty that only an artificial *situs* or quasi-*situs* can be ascribed to an intangible thing,⁷¹ which may be situated in more places than one; and it has been pronounced erroneous in two leading cases.⁷² Cheshire,⁷³ Wolff⁷⁴ and Falconbridge⁷⁵ think that the proper law of the debt is the test. This view avoids problems of priorities between competing assignments, and also avoids conflicts between the rights and obligations of the debtor and creditor on the one hand, and those of the assignor and assignee on the other. But in most cases the proper law of the debt coincides with its artificial *situs*, and therefore this test, like the *lex situs* test, is inconsistent with the most recent authorities.

It is submitted that the key to the problem lies in distinguishing between (1) questions of assignability, governed by the proper law of the debt (Rule 132); (2) questions of the intrinsic validity of the assignment, governed by the proper law of the assignment (Rule 133); (3) questions of priorities, governed by the proper law of the debt (Rule 134) and (4) questions of attachment or garnishment, governed by the *lex situs* of the debt (Rule 135). All the cases appear to be consistent with this view.

The proposition laid down in Rule 132, that the question whether a debt or other intangible thing is capable of assignment is governed by its proper law, would appear to be self-evident and to be clearly supported by the American cases,⁷⁶ though English authority is admittedly scanty.

It seems to follow that, if the debt or intangible thing is assignable, the assignment must comply with the conditions prescribed by the proper law of the debt so far as they affect the debtor. The liability of the debtor ought not to be increased by an assignment, whatever may be its proper law. Thus, if notice to the debtor is required by the proper law of the debt, or if by that law the assignee takes subject to equities, it would seem to be immaterial that different rules are laid down by the proper law of the assignment. On the other hand, if consideration is necessary for the validity of an assignment by the proper law of the debt, but not

⁶⁹ Section 152.

⁷⁰ 5th ed. Rule 153.

⁷¹ *Ante*, p. 558.

⁷² *Republica de Guatemala v. Nunez* [1927] 1 K.B. 669; *Re Anziani* [1930] 1 Ch. 407.

⁷³ Pages 599-602.

⁷⁴ Pages 548, 554.

⁷⁵ Pages 423-426.

⁷⁶ See Illustrations 1 and 2, *post*, p. 572.

by the proper law of the assignment, the assignment should be valid without consideration, because the question does not affect the debtor but only the assignor and assignee.

The principle of the Rule no doubt explains why English courts would not uphold assignments made abroad of English patents, trade marks or copyright unless they complied with the statutory conditions contained in the Patents and Designs Acts, 1907 to 1946, the Trade Marks Act, 1938, or the Copyright Act, 1911. 'The law under which a patent right is created applies to its assignment and the same is true of copyrights, trade marks and designs.'⁷⁷

Illustrations

1. A policy of life insurance made in Wisconsin and valid by its law is assigned in Minnesota. By the law of Wisconsin, policies of life insurance are assignable, but by the law of Minnesota they belong to the beneficiary alone and cannot be assigned. The assignment is valid.⁷⁸

2. A is employed by B in Indiana. A assigns to C in Illinois all the wages earned or to be earned by him under his contract of employment. By the law of Indiana, assignment of future wages is prohibited; by the law of Illinois it is permitted. The assignment is invalid.⁷⁹

3. Under the will of a testator domiciled in England, A is entitled to a share in a trust fund administered in England. A assigns his interest to B in New York. By New York law it is unnecessary for an assignee to give notice to the trustees. B does not give notice to the trustees, who, in ignorance of the assignment, pay A's share to A. The payment to A discharges the trustees, that is, the proper law of the trust and not the proper law of the assignment governs the requirement of notice, but without prejudice to any right which B may have against A.⁸⁰

4. A, who is domiciled in Florida and resident in New Jersey, owns shares in an English company. A in New Jersey executes transfers of the shares by way of gift to his son, and sends the transfers to England to be registered. By the English Defence Regulations, 1939, the company cannot register the transfers without the consent of the Treasury. The forms necessary for obtaining that consent are sent to A to sign in New Jersey. A signs and returns the forms, but dies before the consent is obtained. The transfers are incomplete and invalid, because English law applies.⁸¹

5. A, an Englishman, is the author of a book printed and published in England and the owner of the copyright therein. A in country X orally assigns the copyright in the book to B. The assignment is invalid, whatever be the law of X.⁸²

6. A is the registered owner of an English trade mark. A assigns the trade mark to B in country X. B has no right to use the trade mark in England, until he is the registered owner thereof.⁸³

⁷⁷ Wolff, 558.

⁷⁸ *Northwestern Mutual Life Insurance Co. v. Adams* (1914) 155 Wis. 335; 144 N.W. 1108.

⁷⁹ *Coleman v. American Sheet and Tin Plate Co.* (1936) 285 Ill.App. 542; 2 N.E. (2d.) 349.

⁸⁰ Inference from *Kelly v. Selwyn* [1905] 2 Ch. 117, stated *post*, Illustration 2, p. 577.

⁸¹ *Re Fry* [1946] Ch. 312. Cf. *Colonial Bank v. Gady* (1890) 15 App.Cas. 267, where, however, no conflict of laws arose; *Braun v. The Custodian* [1944] 4 D.L.R. 209.

⁸² Copyright Act, 1911, s. 5.

⁸³ Trade Marks Act, 1938, s. 25. Cf. *Lecouturier v. Rey* [1910] A.C. 262.

(2) *Intrinsic Validity of Assignment.*

RULE 133.⁸⁴—Subject to the Exception hereinafter mentioned, the intrinsic validity of an assignment of a debt or other intangible thing as between the assignor and the assignee is governed by the proper law⁸⁵ (*lex actus*) of the assignment.

Comment

English courts regard the assignment of a debt as a contract between the assignor and the assignee, and therefore determine the intrinsic validity of the assignment by its proper law in accordance with the ordinary principles regarding contracts. 'The assignment here in question,' says Day, J.,⁸⁶ 'is an assignment that exists if at all by virtue of a contract between assignor and assignee, and I cannot see how, if there was no valid contract between them, there can be any valid assignment'. It follows that when the intrinsic validity of an assignment is challenged on the ground that the assignor or assignee lacked capacity,⁸⁷ or that the assignment was void for lack of form,⁸⁸ or that the assignment was void in an essential or material respect,⁸⁹ it is necessary to apply the contracts rules in connection with capacity, form or essential validity. The essential or material validity of a contract is governed by its proper law.⁹⁰ The law which governs capacity to contract has not been settled with precision, but is probably the proper law of the contract which in this case means the law of the country with which the contract is most closely connected.⁹¹ A contract is formally valid if it complies with the formalities prescribed by either the *lex loci contractus* or the proper law.⁹² The same rules apply, it is submitted, to the intrinsic validity of assignments.

It is true that in some cases the judges have said that capacity to make an assignment or to take under an assignment is governed by the *lex domicilii* of the assignor or assignee.⁹³ But in those

⁸⁴ *Lee v. Abdy* (1886) 17 Q.B.D. 309; *Colonial Bank v. Cady* (1890) 15 App.Cas. 287; *Republica de Guatemala v. Nunez* [1927] 1 K.B. 669; *Re Anziani* [1930] 1 Ch. 407; *Finska Angfartygs A/B v. Baring Brothers* (1937) 54 T.L.R. 147, 150, *per* Luxmoore, J., affirmed on other grounds 54 T.L.R. 1031 (C.A.); 56 T.L.R. 222 (H.L.).

⁸⁵ For the meaning of the proper law of a contract, see *post*, Rule 136 and Sub-Rules, p. 579.

⁸⁶ *Lee v. Abdy* (1886) 17 Q.B.D. 309, 313.

⁸⁷ *Lee v. Abdy*, *supra*; *Republica de Guatemala v. Nunez* [1927] 1 K.B. 669.

⁸⁸ *Republica de Guatemala v. Nunez*, *supra*.

⁸⁹ *Re Anziani* [1930] 1 Ch. 407.

⁹⁰ *Post*, Rule 141, p. 630.

⁹¹ *Post*, Rule 139, p. 619.

⁹² *Post*, Rule 140, p. 624.

⁹³ *E.g.*, *Lee v. Abdy* (1886) 17 Q.B.D. 309, 313, *per* Day, J.; 315, *per* Willes, J.; *Republica de Guatemala v. Nunez* [1927] 1 K.B. 669, 686, *per* Bankes, L.J.; 689, 690, *per* Scrutton, L.J.; 701, *per* Lawrence, L.J.

cases the place where the assignment was made coincided with the *lex domicilii* of the assignor and assignee, and there was no necessity to decide between them. It is also true that in some cases the judges have said that the formal validity of an assignment is governed by the *lex loci actus*, that is the law of the place where it was made.⁹⁴ But here again there can be no doubt that the law of that place was the proper law of the assignment. It is also unfortunate that in the leading case⁹⁵ the four judges differed widely in their reasons, though they all agreed in the result. But once it is admitted that an assignment is a contract, the principle here contended for follows logically.

The scope of this Rule should be carefully noted. In the first place, it only applies to the intrinsic validity of the assignment as between the assignor and the assignee. It does not apply to the question whether the debt or other intangible thing is capable of assignment (which is governed by Rule 132), nor to questions of priorities between two or more competing assignments (which are governed by Rule 134). Secondly, the Rule must be read subject to Rule 198,^{95a} which lays down that all matters of procedure are governed by the *lex fori*. It is submitted that the rule of English law that an equitable assignee who cannot bring his case within the Law of Property Act, 1925, s. 136, must join the assignor as a party to the action, is a rule of procedure and as such applicable to an assignment governed by a foreign proper law.⁹⁶ Thirdly, it is clear that English courts will not recognise foreign confiscatory decrees so far as their effect on property in England is concerned, whether the property be tangible or intangible.⁹⁷

Illustrations

1. A, domiciled in Cape Province, insures his life with an English insurance company. A assigns the policy to his wife in Cape Province. By the law of Cape Province the assignment is invalid because the assignee is the wife of the assignor. The assignment is invalid, because it was effected in Cape Province and the assignor and assignee were domiciled there, and therefore Cape law was the proper law (*lex actus*) of the assignment.⁹⁸

2. A, the President of the Republic of Guatemala, in 1906 deposits £20,000 with a London bank. In 1919 A in Guatemala assigns the balance of his account to B, his illegitimate son. B is an infant domiciled in Guatemala. In 1920 A is deposed and imprisoned by his political opponents and in 1921, while he is in prison in Guatemala, he is forced to assign the balance of his

⁹⁴ *E.g.*, *Republica de Guatemala v. Nunez* [1927] 1 K.B. 669, 690-1, *per* Scrutton, L.J.; *Re Anzani* [1930] 1 Ch. 407, 422, *per* Maughan, J.

⁹⁵ *Republica de Guatemala v. Nunez*, *supra*.

^{95a} *Post*, p. 859.

⁹⁶ See *Morris*, *Cases*, 249; *Cheshire*, 615, 842-843; *Innes v. Dunlop* (1800) 8 T.R. 595; *O'Callaghan v. Thomond* (1810) 3 Taunt. 82; *Wolff v. Ozholm* (1817) 6 M. & S. 92, 99; *Jeffery v. McTaggart* (1817) 6 M. & S. 126; *Alison v. Furnival* (1834) 1 C.M. & R. 277, 296; *Trimbey v. Vignier* (1834) 1 Bing.N.C. 151.

⁹⁷ *Lecouturier v. Rey* [1910] A.C. 262; *Re Russian Bank for Foreign Trade* [1933] Ch. 745; *Banco de Viscaya v. Don Alfonso* [1935] 1 K.B. 140.

⁹⁸ *Lee v. Aday* (1836) 17 Q.B.D. 309.

account to the Republic of Guatemala. By Guatemalan law an assignment of money exceeding 100 dollars in amount, if made without consideration, is void unless made in writing before a notary and stamped; these formalities have not been complied with. Further, an infant cannot accept a voluntary assignment unless a tutor or legal representative has been appointed by a judge to act on his behalf; this has not been done (1) The assignment of 1921 to the Republic is void for duress (2) The assignment of 1919 to B is void, *per* Greer, J., because made in Guatemala; *per* Bankes, L.J., because A and B were domiciled in Guatemala; *per* Scrutton, L.J., (a) as to B's capacity, because A and B were domiciled in Guatemala and the assignment was made there; (b) as to the form of the assignment, because it was made in Guatemala. Lawrence, I.J., agreed with Scrutton, L.J., as to (a) but held (dissenting) that English law as the *lex situs* governed (b). (3) Neither assignment being valid, the fund goes to A's creditors.⁹⁹

3. A, an Italian lady domiciled in Italy, has a general power of appointment conferred by an English marriage settlement over English trust funds. A in Italy exercises the power, but the instrument of appointment is void by Italian law in an essential (not formal) respect. The appointment is invalid¹

Exception.—An assignment which is formally valid by the law of the place where it is made (*lex loci actus*) though not by its proper law (*lex actus*), is formally valid in England.

Comment

This Exception gives effect to the principle that a contract (and therefore an assignment) is formally valid if it complies with the formalities prescribed by either the *lex loci contractus* or the proper law.² The scope of the Exception is necessarily limited, because in the great majority of cases the law of the place where the assignment was made is the same as the proper law of the assignment. But cases are conceivable in which they might differ. Thus if A, a Frenchman, agreed to assign a debt to B, another Frenchman, and all the negotiations leading up to the agreement were conducted in France, but the actual document was executed while A was on a temporary visit to Spain, it might well be that French law was the proper law of the assignment, while Spanish law was the *lex loci actus*. By permitting the law of Spain to regulate formalities (but not capacity or essential validity) as an alternative to the law of France, the Exception provides for an exceptional situation.

⁹⁹ *Republica de Guatemala v. Nunez*, 95 L.J.K.B. 955; [1927] 1 K.B. 669 (C.A.). The C.A. decision on (1) is not reported, but it appears that Guatemalan law governed: see *per* Bankes, L.J. at pp. 682, 684, 686.

¹ *Re Anziani* [1930] 1 Ch. 407. Falconbridge's suggestion (p. 425, n. (r)) that English law should have been applied because the appointment was ancillary to the English settlement appears to run counter to *Re Pryce* [1911] 2 Ch. 288, *post*, p. 855, Rule 191; the power was general.

² *Post*, p. 624, Rule 140.

(3) *Priorities.*

RULE 134.³—The priority of competing assignments of a debt or other intangible thing is governed by the proper law of the debt or the law governing the creation of the thing.

Comment

Questions of priorities arise if there are two or more assignments, each intrinsically valid by Rule 133, of a debt or other intangible thing which is itself capable of assignment under Rule 132. In *Republica de Guatemala v. Nunez*⁴ Bankes, L.J., said that the dispute was one of priorities; but this remark must have been made *per incuriam*, since each of the assignments in that case was, for different reasons, invalid, and therefore no question of priorities arose.

It is obvious that questions of priorities cannot be governed by the *lex actus* of the assignment, because the assignments may have been made in different countries, and there is no reason why the law of one should govern rather than the law of the other. It appears that the only possible laws which can govern priorities are the proper law of the debt or other intangible thing, the *lex situs* of the debt, or the *lex fori*. It is submitted that the first of these laws accords best with principle and authority. In *Le Feuvre v. Sullivan*,⁵ where the three laws coincided, this was clearly the *ratio decidendi*, for the Privy Council said that the policy was 'in every sense an English instrument forming or evidencing an English contract'. In *Kelly v. Selwyn*,⁶ the court said that 'the order in which the parties are to be held entitled to the trust fund must be regulated by the court which is administering that fund'. In this case there is more doubt as to the exact ratio, and here again the three laws coincided. But it is submitted that the true ratio was the proper law of the fund.

Illustrations

1. A, domiciled in Jersey, effects a policy of insurance on his life with an English insurance company. In 1833 A in England deposits the policy with B, a domiciled Englishman, as security for a loan. In 1834 A falsely tells the company that he has lost the policy and asks for a duplicate. The company issues a duplicate to A without inquiry. In 1835 A assigns the duplicate policy to his wife in Jersey in consideration of £400 alleged to have been paid by her to A. The premiums are duly paid by A or his wife until A's death in 1842. A's wife begins an action on the policy in Jersey, in which B obtains leave to intervene. The Privy Council (reversing the Jersey Court, which had applied Jersey law) hold that the priorities are

³ *Le Feuvre v. Sullivan* (1855) 10 Moo.P.C. 1; *Kelly v. Selwyn* [1905] 2 Ch. 117.

⁴ [1927] 1 K.B. 669, 684.

⁵ (1855) 10 Moo.P.C. 1.

⁶ [1905] 2 Ch. 117.

governed by English law; and that B has priority, unless A's wife can prove that the assignment to her was made bona fide for valuable consideration and without notice of the deposit to B.⁷

2. A, domiciled in New York, is entitled under the will of an English testator to a share in a trust fund administered in England, and invested in English securities. In 1891 A assigns his interest to his wife in New York. No notice of this assignment is given to the English trustees, notice not being necessary by New York law. In 1894 A assigns his interest to B in England. B forthwith gives notice of this assignment to the trustees. B has priority.⁸

(4) Attachment and Garnishment.

RULE 135.⁹—The validity and effect of an attachment or garnishment of a debt are governed by the *lex situs* of the debt.

Comment

Garnishment is a process whereby a judgment creditor A is allowed to attach a sum of money owed to his judgment debtor B which is in the hands of a third party C (called the garnishee). A similar process (called arrestment in Scotland) is allowed by the laws of other countries. The principle of effectiveness¹⁰ requires that the garnishee should be subject to the jurisdiction of the court. But if the principal debtor (B) is not also subject to the jurisdiction, there is a risk that the garnishee may be compelled to pay his debt to the principal debtor a second time in a foreign country. In the United States the Supreme Court has held that other States are constitutionally bound to recognise that garnishment proceedings discharge the garnishee if he is personally served.¹¹ In England it has been held that garnishment proceedings will be allowed, although the principal debtor is out of the jurisdiction, if the debt is properly recoverable, that is situated, in England, but not otherwise. Thus a debt due from an English bank to a foreign debtor can be garnished,¹² but a debt due from the foreign branch of an English or foreign bank to a foreign debtor cannot be garnished.¹³

⁷ *Le Feuore v. Sullivan* (1855) 10 Moo.P.C. 1.

⁸ *Kelly v. Selwyn* [1905] 2 Ch. 117. As to the ratio, cf. Westlake, s. 152; Dicey, 5th ed., p. 619, note (a); Scrutton, L.J., in *Republica de Guatemala v. Nunez* [1927] 1 K.B. 669, 693; Morris, *Cases in Private International Law*, 248; Cheshire, 611-612; Wolff, 549; Halsbury's *Laws of England*, 2nd ed., Vol. 6, p. 240, note (s).

⁹ *Re Queensland Mercantile Agency Co.* [1891] 1 Ch. 536; [1892] 1 Ch. 219; *Re Maudslay, Sons & Field* [1900] 1 Ch. 602; *Martin v. Nadel* [1906] 2 K.B. 26; *Swiss Bank Corporation v. Boehmische Bank* [1923] 1 K.B. 673; *Sea Insurance Co. v. Rossia Insurance Co.* (1924) 20 Ll.L.R. 308; *Employers' Liability Assurance Corporation v. Sedgwick Collins & Co.* [1927] A.C. 95; *Richardson v. Richardson* [1927] P. 228; *Haydon v. Haydon and C. N. R.* [1937] 4 D.L.R. 617. And see *post*, p. 654.

¹⁰ General Principle, No. 3, *ante*, p. 22; R.S.C., Order XLV, r. 1.

¹¹ *Harris v. Balk* (1904) 198 U.S. 215; cf. Goodrich, s. 68; *Gould v. Webb* (1855) 4 E. & B. 933.

¹² *Swiss Bank Corporation v. Boehmische Bank* [1923] 1 K.B. 673.

¹³ *Martin v. Nadel* [1906] 2 K.B. 26; *Richardson v. Richardson* [1927] P. 228.

The making of an order is discretionary and it will be refused if there is a risk that the garnishee will be compelled to pay again abroad. But the risk must be a real risk, not a mere speculative or theoretical hazard.¹⁴

The *lex situs* of the debt also determines the effect of the garnishment or attachment. Thus, if the effect of garnishment or attachment by the *lex situs* is to give the attaching creditor priority over earlier or later assignees of the same debt, it will have that effect in England.¹⁵

Illustrations

1. A sues B, a German resident in Germany, in the High Court and recovers judgment for £1,400. B appeals unsuccessfully to the Court of Appeal and the House of Lords. As security for the costs of the appeal to the House of Lords, B deposits £500 with the Berlin branch of a German bank. The London branch of the bank enters into a recognisance for that amount. The London branch pays out £300 in respect of costs. A obtains a garnishee order nisi against the London branch for the remaining £200 to satisfy his judgment debt. The order is set aside, because of the risk that the bank will be compelled to pay B a second time in Germany.¹⁶

2. A sues B, a Czech bank carrying on business in Prague, in the High Court and recovers judgment for £29,000. B submits to the jurisdiction. A obtains a garnishee order attaching a debt owed to B by C, an English bank. C opposes the order on the ground that it may have to pay B again in Prague. The order is made absolute. There is no risk that C will be compelled to pay again, because the debt is situated and properly recoverable in England.¹⁷

3. A & Co., a Queensland company, issues debentures to B & Co., an English bank, charging its shares that are not yet fully paid up. After the capital has been called, but before it has been paid by the shareholders, C & Co., a Scottish company, sues A & Co. in Scotland, and issues arrestment process against Scottish shareholders of A & Co. A & Co. is ordered to be wound up in England. By Scots law (*lex situs* of the debts owed by the Scottish shareholders) C & Co. is entitled to priority over B & Co. in respect of unpaid calls owed by Scottish shareholders. By the law of England and Queensland, B & Co. as debenture holder has priority. C & Co. has priority, *i.e.*, Scots law governs.¹⁸

¹⁴ *Employers Liability Assurance Corporation v. Sedgwick Collins & Co.* [1927] A.C. 95, 112, *per* Lord Sumner.

¹⁵ *Re Queensland Mercantile Agency Co.* [1891] 1 Ch. 536; *Re Maudslay, Sons & Field* [1900] 1 Ch. 602.

¹⁶ *Martin v. Nadel* [1906] 2 K.B. 26.

¹⁷ *Swiss Bank Corporation v. Boehmische Bank* [1923] 1 K.B. 673.

¹⁸ *Re Queensland Mercantile Agency Co.* [1891] 1 Ch. 536; affirmed on other grounds [1892] 1 Ch. 219.

CONTRACTS. GENERAL RULES¹

1. PRELIMINARY

RULE 136.²—In this Digest the term ‘proper law of a contract’ means the law, or laws, by which the parties intended, or may fairly be presumed to have intended, the contract to be governed; or (in other words) the law or laws to which the parties intended or may fairly be presumed to have intended, to submit themselves.

Comment

A contract is a promise, or set of promises intended to be enforceable by law. The parties to a contract must always, therefore, intend, or be presumed to intend, that it shall be subject to, or governed by, the law of some country (*e.g.*, England, or Scotland, or France, or the State of New York). The law by which it is intended that a contract shall be governed may conveniently be termed ‘the proper law of the contract’.³

¹ Story, Chap. 8, ss. 241–373; Cheshire, Chap. 9; Cheshire, *International Contracts*, pp. 7–44; Wolff, ss. 393–460; Westlake, Chaps. 12 and 13; Foote, Chap. 7; Falconbridge, Chaps. 14–19; Johnson, Vol. 3, Chaps. 8 and 9; Savigny, ss. 369–374; Restatement, Chap. 8, ss. 311–347, ss. 355–376; Beale, Vol. 2, pp. 1042–1284; Goodrich, Chap. 7; Stumberg, Chap. 8; Lorenzen, Chaps. 10–12; Cook, Chaps. 14–16; Nussbaum, *Principles*, §§ 15–18, Rabel, *Conflict of Laws*, Vol. 2, Part 8, Chaps. 28–33; *ibid.* Vol. 1, pp. 83 ff.; Barbey, *Le Conflit des Lois en matière de Contrats*, 1938; Batiffol, *Les Conflits des Lois en Matière de Contrats*, 1938; Mann, *The Legal Aspect of Money*, 1938. This chapter deals with commercial contracts only. The law relating to contracts to marry and marriage settlement contracts will be found discussed in Chapter 27, *post*, p. 788.

² For the substance of this definition see *Lloyd v. Guibert* (1865) L.R. 1 Q.B. 115, 122, 123, *per curiam*, judgment delivered by Willes, J.; *Jacobs v. Crédit Lyonnais* (1884) 12 Q.B.D. 589; *per curiam*, judgment delivered by Bowen, L.J.; *Re Missouri Steamship Co.* (1889) 42 Ch.D. (C.A.) 321, 336, judgment of Halsbury, C.; *Hamlyn v. Tallisker Distillery* [1894] A.C. 202, 207 (*per Lord Herschell*), 212 (*per Lord Watson*); *Spurrier v. La Cloche* [1902] A.C. 446, 450 (*per Lindley, L.J.*); *British South Africa Co. v. De Beers Consolidated Mines, Ltd.* [1910] 2 Ch. 502 (reversed on a different point [1912] A.C. 52); *Re Smith* [1916] 2 Ch. 206; *The Adriatic* [1931] P. 241; *R. v. International Trustee for the Protection of Bondholders Aktiengesellschaft* [1937] A.C. 500, 529 (*per Lord Atkin*); *Mount Albert Borough Council v. Australasian Temperance and General Mutual Life Assurance Society, Ltd.* [1938] A.C. 224 (P.C.) 240 (*per Lord Wright*); *Vita Food Products Inc. v. Unus Shipping Co., Ltd.* [1939] A.C. 277 (P.C.) (*per Lord Wright*).

³ The ‘intention theory’ which is widely accepted in this country as well as in Canada and Australia is also frequently acted upon by the courts of other

In determining the obligations under a contract, English courts apply the proper law.⁴ This will be 'ascertained by the intention expressed in the contract, if any, which will be conclusive. If no intention is expressed, the intention will be presumed by the court from the terms of the contract and the relevant surrounding circumstances. In coming to its conclusion, the court will be guided by rules which indicate that particular facts or conditions lead to a *prima facie* inference, in some cases an almost conclusive inference, as to the intention of the parties to apply a particular law, *e.g.*, the country where the contract is made, the country where the contract is to be performed, if the contract relates to immovables, the country where they are situated, the country under whose flag the ship sails in which goods are contracted to be carried. But all these rules only serve to give *prima facie* indications of intention; they are capable of being overcome by counter indications, however difficult it may be in some cases to find such'.⁵

It is not illogical to allow the intention of the parties to determine the proper law before one has—with the help of 'objective' criteria—ascertained the proper law from which the contract derives its validity. It is the English conflict of laws, as the *lex fori*, which enables the parties to select the law governing their agreement, and it is the intention of the parties, whether it be expressed, implied, or imputed,⁶ which connects the facts of the case with the law to be applied by the court.⁷ The court may find, and

countries, especially by the courts of the United States. In the United States, however, one school of thought is opposed to the idea that the parties are free to choose the law which governs the contract. This view has found expression in the Restatement which was drafted by Beale, the leading opponent of the proper law doctrine in America. See Beale, Vol. 2, pp. 1079 *sq.* Beale and the Restatement have been severely criticised by Cook, pp. 389 *et seq.* Lorenzen, pp. 261 *et seq.*, while opposed to Beale's doctrine, is not prepared to accept the intention doctrine in all its aspects. See Willis, 'Two Approaches to the Conflict of Laws', 14 Can. Bar Rev. (1936) 1, 9; and Rabel, pp. 358 ff. The freedom of the parties to select the proper law of the contract does not necessarily imply a right to choose a system of law completely unconnected with the transaction. This is a separate problem discussed below, Sub-Rule 1, *post*, p. 584.

⁴ The parties are at liberty to submit their transaction to two or more laws. In this case the obligations of one party may be governed by one proper law and those of another party by another, or one aspect of the contract may be governed by one law and a different aspect by another law. Such cases are likely to be rare. See *per* Lord Hewart, C.J., in *Jones v. Oceanic Steam Navigation Co.* [1924] 2 K.B. 730, at p. 733, and *per* Evatt, J., in *Wanganui, etc. Board v. Australian Mutual Provident Society* (1934) 50 C.L.R. 581, at p. 604.

⁵ *Per* Lord Atkin in *R. v. International Trustee, etc.* [1937] A.C. 500, at p. 529; Lord Wright, *Legal Essays and Addresses*, p. 164, suggests that Lord Atkin must have meant that the expressed intention was only *prima facie* conclusive.

⁶ See *per* Lord Wright in *Mount Albert Borough Council v. Australasian, etc. Assurance Society, Ltd.* [1938] A.C. 224 (P.C.) at p. 240.

⁷ See Wolff, s. 895, p. 421, and 'The Choice of Law by the Parties in International Contracts', *Juridical Review* (1937), p. 110, especially at p. 115; Cook, p. 392.

has, in at least one case,⁸ found that there is implied an intention to select a foreign law in a clause which, under the domestic law of the court, would have been void. A contract which is invalid under English domestic law may nevertheless be a valid agreement to select the proper law in accordance with the established rules governing the conflict of laws.

The doctrine of the proper law of the contract as applied by the English courts has the merit of avoiding a number of difficulties which, in practice, are liable to lead to artificial and casuistic distinctions :

(1) Subject to a number of exceptions the formation and legality of the contract, its interpretation, and its discharge are all governed by the same law. This law therefore applies to the creation of the contract as well as to its performance.⁹ It is, however, open to the parties to agree that part of the contract shall be governed by the law of one country (*e.g.*, of England) where it is made and part of the contract by the law of another country (*e.g.*, of Scotland) where it is to be performed.¹⁰

(2) The obligations of both parties are, as a matter of principle, governed by the same law. In the absence of an express or implied intention to the contrary, the law which governs the liabilities of, *e.g.*, the seller of goods, will also govern those of the buyer, the same law will apply to the obligations of the charterer as applies to those of the shipowner.¹¹

(3) Although there is no direct authority on the point, it can be concluded from the proper law doctrine as formulated in the English cases that *renvoi* has normally no place in the law of contract, although there may be exceptions to this in connection with capacity and other matters. The proper law applies because the parties have intended, or are presumed to have intended, that it should apply. In the absence of strong evidence to the contrary, the parties must be deemed to have intended to refer to the domestic rules and not to the conflict of laws rules of their chosen law.¹²

⁸ *Spurrier v. LaCloche* [1902] A.C. 446 (P.C.).

⁹ According to the Restatement, ss. 332 *et seq.*, the 'creation' of a contract, including its validity, is governed by the *lex loci contractus*, while its 'performance' (ss. 358 *et seq.*), including the question whether a breach has occurred, is subject to the *lex loci solutionis*. From a practical point of view grave objection can be, and has been, raised against a theory which compels the court to embark upon a classification of contractual issues as 'matters of creation' or 'matters of performance'. It is, to say the least, doubtful whether the majority of American courts has ever adopted this rigid theory. See Cook, p. 378; Lorenzen, p. 276; Rabel, pp. 374 ff.

¹⁰ *Hamlyn v. Talisker Distillery* [1894] A.C. 202.

¹¹ The parties are free to 'split' the contract, but there is no rule of law to compel the court to do so in the absence of a clear indication of an intention of the parties to this effect. English law thus avoids some of the difficulties connected with the rigid theory of the *lex loci solutionis* adopted in some foreign countries. See Wolff, s. 436, p. 460.

¹² In the absence of authority this proposition is advanced with some hesitation. In *Ocean Steamship Co. v. Queensland State Wheat Board* [1941] 1 K.B.

Rule 136, and the grounds on which it rests, are clear, but when applied to a given case, the rule immediately gives rise to a difficult question: On what principles are we to determine what was the intention of the parties to a contract in reference to the law by which it should be governed? The answer to this question may often be hard to find, and this for two reasons.

(1) A contract which contains a foreign element may be so connected with different countries as to suggest not only two, but as many as five or six, different laws as the law by which the parties intended it to be governed. A, an Englishman, charters a French ship from X, its French owner, at a Danish port in the West Indies, for the carriage of the goods of A from Hayti to Genoa; the ship, under the stress of weather, puts into a Portuguese port, where transactions take place which result in a loss to A, and A claims damages from X, alleged to be due under the contract between them. In this position of things, which is suggested by a reported case,¹³ there are six countries the law of any one of which may conceivably have been intended by the parties to govern the contract as regards the issues between A and X. The court, therefore, when called upon to decide what are A's rights, has before it six different laws from which to select the law on which his rights depend.

(2) The intention of the parties, again, as to the law by which a contract is governed, is not generally expressed in the contract itself. What is more, it has often no real existence. Here, as in other branches of law, an enquiry into the intention of the parties is really an enquiry, not into the actual intention of X and A, for it possibly never had any real existence, but into the intention which would have been formed by sensible persons in the position

402 (C.A.), MacKinnon and Luxmoore, L.J.J., took the view that the incorporation in a bill of lading (expressly stated to be 'governed by the law of England') of the Australian Carriage of Goods by Sea Act, 1924, extended to a provision in that Act by which the parties were 'deemed to have intended to contract according to the law in force at the place of shipment', i.e., to an Australian rule of the conflict of laws. Nevertheless the case cannot be regarded as an authority against the principle stated in the text. It arose on an application for leave to serve a writ out of the jurisdiction pursuant to R.S.C. Ord. XI, r. 1 (e) (iii), and could have been, and was by du Parcq, L.J., decided on the ground that the discretion of the court should not have been exercised in favour of the applicant even on the assumption that the contract was governed by English law. For critical discussions of the decision see Falconbridge, pp. 353-355; J.H.C.M., 61 L.Q.R. 22-24; Morris, 'The Choice of Law Clause in Statutes, 62 L.Q.R., at p. 177 (1946). A dictum of Lord Wright in *Vita Food Products Inc. v. Unus Shipping Co., Ltd.* [1939] A.C. 277, at p. 292, appears to favour the use of the renvoi doctrine in the law of contract, but it is difficult not to agree with Falconbridge, p. 342, that this was a *lapsus calami*. Some authors who are otherwise favourably disposed towards renvoi reject the application of the doctrine to the law of contract. See, e.g., Nussbaum, p. 100; Wolff, s. 184, p. 193; Rabel, p. 480. Cook, p. 399, shares the view that renvoi does not apply to contracts. Westlake, p. 39, favours the extension of the renvoi doctrine to contracts. For renvoi generally, see *ante*, pp. 47 ff.

¹³ *Lloyd v. Guibert* (1865) L.R. 1 Q.B. 115.

of X and A, if their attention had been directed to the contingencies which escaped their notice. We are then driven back upon the further question: How are we to determine what is this natural assumption? The reply is, that a variety of circumstances must be considered, such as the nature of the contract, the customs of business, the place where the contract is made or is to be performed, and the like, any one of which may suggest conclusions as to the law likely to be intended by the parties; and English judges have consistently declined to tie themselves down by any rigid or narrow rule for determining the intention of the parties. It is, however, possible to formulate certain maxims by which English courts are in the main guided when called upon to determine the proper law of a given contract. These maxims are formulated in Sub-Rules 1-3. Sub-Rule 1 is, as was made clear in a recent case, a rule of law,¹⁴ but Sub-Rules 2 and 3 are in no sense rigid canons of construction from which a court will not deviate. They are rather presumptive rules of evidence which are in fact frequently followed by English judges, but which are not in any degree irrebuttable, and are liable to be displaced by circumstances of any kind which in a given case influence the opinion of the court.¹⁵

Two further observations are worth notice:—

(1) In particular classes of contracts¹⁶ custom has established¹⁷ definite rules as to the presumed intention of the parties. Where such established rules exist, recurrence to general presumptions is usually unnecessary, and Sub-Rules 2 and 3 are largely superfluous. But this does not invariably hold good, for the presumption established by custom may be rebutted by the circumstances of the case.¹⁸

(2) English statutory enactments determining the proper law may apply, and, insofar as they do, prevail over the intention of the parties.¹⁹

Illustrations

1. A firm in France agrees to sell goods to a firm in England. It is provided by the terms of the contract that the contract shall be governed by the law of France. French law is the proper law of the contract.

¹⁴ *Vita Food Products Inc. v. Unus Shipping Co.* [1939] A.C. 277. The expressed intention of the parties is 'conclusive'; see the dictum of Lord Atkin in *R. v. International Trustee* [1937] A.C. 500, 529, quoted above, p. 580.

¹⁵ See especially *Jacobs v. Crédit Lyonnais* (1884) 12 Q.B.D. (C.A.) 589, 601, judgment of Bowen. L.J.

¹⁶ For such contracts see Chap. 25, *post*, p. 657.

¹⁷ See *Lloyd v. Gubert* (1865) L.R. 1 Q.B. 115.

¹⁸ Compare, particularly, *Chartered Mercantile Bank of India v. Netherlands, etc. Co.* (1883) 10 Q.B.D. (C.A.) 521, 540, judgment of Lindley, L.J.; *The Industrie* [1894] P. (C.A.) 58; *The Adriatic* [1931] P. 241; *The St. Joseph* [1933] P. 119; *The Njegos* [1936] P. 90.

¹⁹ *E.g.*, Bills of Exchange Act, 1882, s. 72; Merchant Shipping Act, 1894, s. 265; Carriage of Goods by Sea Act, 1924; see Morris, 'The Choice of Law Clause in Statutes', 62 L.Q.R. 170 (1946). For the operation of section 265 of the Merchant Shipping Act in practice, see the decision of the Canadian Supreme Court in *Canadian National S.S. Co. v. Watson* [1939] 1 D.L.R. 275.

2. A firm in France agrees to sell goods to a firm in Scotland. It is provided by the terms of the contract that any disputes arising between the parties shall be settled by arbitration in England. English law is the proper law of the contract.²⁰

3. An insurance company incorporated and carrying on business in England lends money to a local authority in Scotland secured by a charge on land in Scotland. Interest is payable and the capital is repayable in England. Scottish law is the proper law of the contract.²¹

4. An English bank opens an acceptance credit to a firm in Hungary. English law is the proper law of the contract.²²

5. English underwriters issue a marine insurance policy on a Greek ship for a voyage from New York to Rio de Janeiro. English law is the proper law of the contract.²³

6. A French firm charters a Yugoslav ship for the carriage of grain from Argentina to Sweden. The charterparty is in the English language and contains a reference to the 'act of the King's enemies'. This is strong evidence that English law is intended as the proper law of the contract.²⁴

Sub-Rules for determining the Proper Law of a Contract in accordance with the Intention of the Parties

SUB-RULE 1.²⁵—When the intention of the parties to a contract, as to the law governing the contract, is expressed in words, this expressed intention determines the proper law of the contract, and, in general, overrides every presumption.

Comment

As the proper law of a contract is fixed by the intention of the parties, their expressed intention with regard to it must (in general) be decisive. 'It is true that, in questions relating to

²⁰ See *Hamlyn v. Tallisker Distillery* [1894] A.C. 202.

²¹ See *Mount Albert Borough Council v. Australasian, etc. Assurance Society, Ltd.* [1938] A.C. 224 (P.C.); *Wanganui Rangitikei Electric Power Board v. Australian Mutual Provident Society* (1934) 50 C.L.R. 581.

²² *Kleinwort, Sons & Co. v. Ungarische Baumwolle Industrie Aktien-Gesellschaft* [1939] 2 K.B. 678 (C.A.).

²³ See *Greer v. Poole* (1880) 5 Q.B.D. 272.

²⁴ See *The Njegos* [1936] P. 90.

²⁵ *Hamlyn v. Tallisker Distillery* [1894] A.C. 202; *Ex p. Dever* (1887) 18 Q.B.D. (C.A.) 660; *Perry v. Equitable Life Assurance Society of the United States* (1929) 45 T.L.R. 468, 470; *Anderson v. Equitable, etc. Society* (1926) 42 T.L.R. 123 (C.A.) 306; *Vita Food Products Inc. v. Unus Shipping Co., Ltd.* [1939] A.C. 277 (P.C.). For Canada, see *Nicholson v. Hamburg American Packet Co.* (1904) Q.R. 25 S.C. 34; *Canada Sugar Refining v. Furness Withy Co.* (1905) 27 *ibid.* 502; *Brousseau v. Bergevin, ibid.* 102; *Re Naubert* (1920) 46 O.L.R. 210; *Hart & Son, Ltd. v. Furness Withy Co., Ltd.* (1904) 37 N.S.R. 74; *Manitoba Pump Co. v. McLelland* (1911) 4 Sask.L.R. 127; for Australia, see *Barcelo v. Electrolytic Zinc Co. of Australasia, Ltd.* (1932) 48 C.L.R. 391; *Mynott v. Barnard* (1939) 62 C.L.R. 68. For New Zealand, see *New Zealand Shipping Co. v. Tyree* (1912) 31 N.Z.L.R. 825; for South Africa, *Joffe v. African Life Assurance Society, Ltd.* [1933] T.P.D. 189; for Ireland, *Limerick Corporation v. Crompton* [1910] 2 Ir.R. 416. Cheshire, p. 325; Cheshire, *International Contracts*, pp. 15-44; Wolff, ss. 400 *et seq.*; Cook, pp. 389 *et seq.*; Falconbridge, pp. 306, 344; Johnson, III, pp. 420, 429. Compare Savigny, ss. 369, 370, pp. 194, 197, and s. 372, p. 221, especially para. B, p. 227.

the conflict of laws, rules cannot generally be stated in absolute terms, but rather as prima facie presumptions, but, where the English rule that intention is the test applies, and where there is an express statement by the parties of their intention to select the law of the contract, it is difficult to see what qualifications are possible, provided the intention expressed is bona fide and legal, and provided there is no reason for avoiding the choice on the ground of public policy.²⁶ It seems to follow from this that a bona fide express selection of the proper law is valid—in the absence of considerations of public policy—whether or not the law thus selected has any objective ‘real connection’ with the facts of the contract.²⁷ The judgment of the Privy Council from which the above words are quoted establishes this principle at any rate for those cases in which English law is chosen by the parties as the proper law of their contract. ‘Connection with English law is not, as a matter of principle, essential.’ Lord Wright, who read the judgment of the Judicial Committee, mentioned that ‘the provision in a contract (e.g., of sale) for English arbitration imports English law as the law governing the sale transaction, and those familiar with international business are aware how frequent such a position is, even where the parties are not English, and the transactions are carried out completely outside England.’ If the parties can, by an implied selection through an arbitration clause, submit their contract to English law, though that law has no connection with the contract itself, this must *a fortiori* be the case, if they expressed their choice in a formula such as: ‘This contract is governed by English law’.

Despite the far-reaching importance of the decision in the Vita Food Case, and of the dicta of Lord Wright, quoted above, many problems affecting this controversial topic remain unsolved. The decision does not deal *expressis verbis* with the selection of a law other than English law. Supposing the parties select, say, French

²⁶ Per Lord Wright in *Vita Food Products Inc. v. Unus Shipping Co., Ltd.* [1939] A.C. 277. For an earlier decision to the same effect, see *British Controlled Oilfields v. Stagg* [1921] W.N. 31, 66 S.J. 18, discussed *post*, p. 661. Evatt, J., appears to agree with this view. *Barcelo v. Electrolytic Zinc Co. of Australasia, Ltd.* (1932) 48 C.L.R. 391; *Merwin Pastoral Company Proprietary, Ltd. v. Moolpa Pastoral Co. Proprietary, Ltd.* (1932) 48 C.L.R. 565; see, on the other hand, the views expressed by Dixon, J., in *McClelland v. Trustees Executors and Agency, Ltd.* (1936) 55 C.L.R. 483, at p. 492, by Latham, C.J., in *Mynott v. Barnard* (1939) 62 C.L.R. 68, at p. 80, and by Denning, L.J., in *Boissevain v. Weil* [1949] 1 All E.R. 146.

²⁷ For the controversy aroused by this aspect of the decision in the *Vita Food Case*, see Morris and Cheshire, ‘The Proper Law of a Contract in the Conflict of Laws’ (1940) 56 L.Q.R. 320; Cook, pp. 419–432; Cheshire, pp. 326–329; Cheshire, *International Contracts*, pp. 31–33; Wolff, s. 401; Nussbaum, p. 169; Falconbridge, Chap. 16; Morris, ‘The Choice of Law Clause in Statutes’ (1946) 62 L.Q.R. 170; Notes in 3 M.L.R. 61; 55 L.Q.R. 323; 21 B.Y.B.I.L. 212–214; Rabel, pp. 402–408. It is submitted that the general question whether a valid express selection of the proper law requires a ‘real connection’ between the selected law and the contract should not be confused with the special issues raised by ‘international legislation’ such as the Hague Rules.

law, as the proper law of the contract, would that selection be valid, although the contract had no visible real connection with France? In the *Vita Food Case*, English law was not the *lex fori*, since the Judicial Committee was sitting on appeal from the courts of the Canadian Province of Nova Scotia. It cannot therefore be said that the selection of English law as the proper law has, by virtue of the *Vita Food Case*, special force in an English court, solely on the ground that it is the law of the court itself. Three reasons suggest themselves which might justify an interpretation of the *Vita Food Case* by which validity would be accorded to the selection of English law in circumstances in which the choice of any other law would not be upheld: (1) The principles of Nova Scotia conflict of laws which the Judicial Committee applied were, in fact, identical with those of English law, and one might therefore conclude from the decision that, wherever the English rules of conflict of laws govern the case, a selection of English—and only English—domestic law is valid, in the absence of a ‘real connection’. (2) Owing to their world-wide importance preference might be given, especially in maritime matters, to the ‘familiar principles of English commercial law’. (3) A judge should not needlessly resist his natural and wholesome inclination to decide a case in accordance with a legal system which he knows and which he can apply without relying on expert evidence.

In delivering the judgment of the Judicial Committee, Lord Wright pointed out that the ship in question, ‘though on the Canadian register’, was ‘subject to the Imperial Statute, the Merchant Shipping Act, 1894, and the underwriters (were) likely to be English’. The case was, therefore, not entirely unconnected with England, and the fact that Lord Wright drew attention to this, somewhat detracts from the weight of his dictum about the lack of any need for a ‘real connection’.

The intention must be ‘bona fide and legal’ and there must be ‘no reason for avoiding the choice on the ground of public policy’. The proper law will not be applied, insofar as its application would lead to results at variance with a public policy of the *lex fori*, fundamental enough to compel the court to disregard the selection of the proper law by the parties. This is in accordance with the general principle discussed below in Rule 137. The requirement that the selection must be ‘bona fide and legal’ raises more difficult issues. English courts have not in the past developed a doctrine of law evasion in connection with the conflict of laws. Nevertheless, no one can maintain that persons who really contract under one law can, by pretending that they are contracting under another law, render valid an agreement which that law treats as void or voidable. If it is clear that they meant to contract with reference to one law, *e.g.*, the law of Scotland, no declaration of intention to contract under another law, *e.g.*, the

law of England, so as to give validity to the contract, will avail them anything. This result follows because in the view of the court their real intention was to enter into a Scottish contract and the court must determine its validity with reference to the law under which the parties really intended to contract.²⁸

If it is expressly stated that one part or aspect of a contract is to be governed by a certain law (e.g., if it is said that the rules of construction of English or of some foreign law are to apply) it may be presumed that this was contemplated as the proper law of the contract as a whole, unless, of course, there is anything else to show that the contract was to be governed in different respects by different laws.²⁹ A distinction must, however, be made between the reference, or submission of the contract, to a given law, and the incorporation into the contract of a law other than the proper law of the contract. If parties contracting under English law agree that the seller's obligation to warrant the fitness of the goods is to be determined in accordance with the relevant articles of the French Civil Code, they do not thereby submit their contract to French law. They simply use a 'short-hand' method of expressing their intention that the seller should or should not be liable in certain events, and the court will have to construe this English contract, 'reading into it as if they were written into it the words' of the French statute.³⁰ It often

²⁸ On the doctrine of evasion in the conflict of laws see Graveson, 19 J.Comp.Leg. (1937) 21; Wolff, ss. 184-187; Nussbaum, § 13. The principles of public policy and of evasion are already clearly distinguished by Huber, *De Conflictu Legum*, § 8. See also Comment to Rule 141, *post*.

²⁹ See *Jones v. Oceanic Steam Navigation Co.*, [1924] 2 K.B. 730. Compare *Kadel Chajkin, Ltd. v. Mitchell Cotts & Co., Ltd.* (1948) 64 T.L.R. 89. Reference to Norwegian statute in a bill of lading, contract held not to be governed by English law for purposes of R.S.C. O. XI, r. 1 (e) (iii), despite use of English language and of English technical terms.

³⁰ *Per* Lord Esher, M.R., in *Dobell & Co. v. The S.S. Rossmore Co., Ltd.* [1895] 2 Q.B. 408, at p. 412; *Ex p. Dever. Re Suse and Sibeth* (1887) 18 Q.B.D. 660, especially *per* Lord Esher, M.R., at p. 664, and *per* Bowen, L.J., at p. 666. The importance of the distinction emerges most clearly if there is a change in the law between the time of the making of the contract and its performance. Thus, in *Barcelo v. Electrolytic Zinc Co. of Australasia, Ltd.* (1932) 48 C.L.R. 391, debentures created in 1902 provided that they were to be construed in accordance with the law of the State of Victoria. This was held to be a reference to the law of Victoria in its totality with the result that the rate of interest was reduced by the Victoria Financial Emergency Act, 1931. Had it been merely an incorporation of the Victorian rules of construction, a change in the law of Victoria subsequent to 1902 could not have affected the contract. On the other hand, where a statute such as the Canadian Water Carriage of Goods Act, 1910, or the American Harter Act, is incorporated as a contractual term in a contract of carriage, it remains a part of the contract although as a statute it may have been amended or repealed. See, e.g., *Timm v. Northumbrian Shipping Co., Ltd.* (1937) 58 Ll.L.R. 45; *Vita Food Products v. Unus Shipping Co.* [1939] A.C. 277. In practice the distinction is often difficult to draw and to apply. See, e.g., *Ocean S.S. Co., Ltd. v. Queensland State Wheat Board* [1941] 1 K.B. 402, and *Macnamara v. Owners of S.S. Hatteras* [1931] Ir.R. 73, 337; [1933] Ir.R. 675. In *The Torni* [1932] P. 78, 84, Scrutton, L.J., suggested that a clause in a bill of lading by which the contract was 'to be construed' in accordance with English law should not be considered as a selection of English

happens that statutes governing the liability of a sea carrier, such as the former Harter Act in the United States, or statutes implementing the Hague Rules, such as the English Carriage of Goods by Sea Act, 1924, are thus 'incorporated' in a contract governed by a law other than that of which the statute forms part.³¹ The statute then operates not as a statute, but as a set of contractual terms agreed upon between the parties.

Illustrations

1. English underwriters execute in England a policy of insurance of which it is one of the express terms that it shall be construed and applied in accordance with French law. The law of France is the proper law of the contract.³²

2. A insures his life with X & Co., an American corporation, at its Russian branch office. The policy provides that all disputes shall be settled under Russian law by Russian courts. In 1919 the contract is cancelled without compensation by a decree of the Russian government. A claims payment from the company in England. The proper law of the contract is Russian.³³

3. A company incorporated and carrying on business in Nova Scotia issues in Newfoundland bills of lading for the carriage of a cargo from Newfoundland to New York. The bills of lading provide that the contract shall be governed by English law. English law is the proper law of the contract.³⁴

4. An English underwriter enters into an English policy of insurance with an English shipowner. It is part of the terms of the contract that a particular term in it shall be interpreted in accordance with French law. This is a borderline case. It depends on the intention of the parties whether the law of England and the law of France are to be regarded as the proper laws of several parts of the policy, or whether this is to be construed as an incorporation of the French rules of interpretation into part of the policy.

5. An English underwriter enters into a policy of insurance with a German shipowner. It is part of the terms of the contract that the ship is warranted to be seaworthy in accordance with the provisions of the German Commercial Code. The law of England—and only that law—is the proper law of the contract in which the provisions of the German Commercial Code as to seaworthiness are incorporated as contractual terms. As such they will remain

law as the proper law, but merely as an incorporation of the English rules of construction. This, however, was (rightly, it is submitted) rejected by Lord Wright in the *Vita Food Case*, who pointed out that the distinction between 'to be construed' and 'shall be governed' was 'merely verbal'. See, to the same effect, the Australian decision in the *Barcelo Case*, above, and *Hume Pipe and Construction Co., Ltd. v. Monacrete, Ltd.* [1942] 1 K.B. (C.A.) 189.

³¹ On 'incorporation' see, further, Cheshire, p. 309; Wolff, ss. 404-405; on the incorporation of usages and customs, see Johnson, Vol. 3, Chap. 9, and (1937) 15 Can.Bar Rev. 68; Mann (1937) 18 B.Y.B.I.L. 97, 101. See also *post*, p. 646. Rabel, pp. 361 ff., 391 ff., is opposed to the distinction between reference and incorporation.

³² See *Greer v. Poole* (1880) 5 Q.B.D. 272, especially *per curiam*, at p. 274.

³³ *Perry v. Equitable Life Assurance Society of the United States of America* (1929) 45 T.L.R. 468, based on accurate knowledge of Russian law as compared with *Buerger v. New York Life Assurance Co.* (1927) 43 T.L.R. 601; 96 L.J.K.B. 930. On the effect of revolutionary changes in the proper law, see Wolff, s. 406.

³⁴ *Vita Food Products Inc. v. Unus Shipping Co. Ltd.* [1939] A.C. 277.

effective even if, during the currency of the contract, the relevant provisions of German law are changed.³⁵

6. By a charterparty made in English form for the purpose of carrying grain, Swedish shipowners agree to let the ship, 'she being . . . in every way fitted to carry bulk and general cargoes'. English law is the proper law of the contract, but the Swedish provisions as to the liability of the shipowner to equip the ship for the carriage of grain are incorporated in the contract.³⁶ In contracts of affreightment, though there is no doubt as to the proper law of the contract, the customs of foreign ports as to loading, etc., are often expressly or implicitly incorporated.³⁷

SUB-RULE 2.—When the intention of the parties to a contract with regard to the law governing the contract is not expressed in words, their intention is to be inferred from the terms and nature of the contract, and from the general circumstances of the case, and such inferred intention determines the proper law of the contract.³⁸

Comment

In the absence of an express selection 'the only certain guide is to be found in applying sound ideas of business, convenience, and sense to the language of the contract itself, with a view to discovering from it the true intention of the parties'.³⁹ If the parties to a contract agree that the courts of a given country shall have jurisdiction in any matters arising out of a contract, it can—in the absence of evidence to the contrary—be assumed that they intended those courts to apply their own law, i.e., that they have selected the law of that country as the proper law of the contract.⁴⁰ Similarly—and this is of particular importance in practice—a clause in a contract by which disputes are submitted to arbitration in a given country usually enables the court to conclude that the parties have submitted their contract to the

³⁵ See cases *ante*, note 30, p. 587, and *Tudor Accumulator Co., Ltd. v. Oceanic Steam Navigation Co., Ltd.* (1924) 41 T.L.R. 81, *Studebaker Distributors, Ltd. v. Charlton Steam Shipping Co., Ltd.* [1938] 1 K.B. 459 (Harter Act).

³⁶ *Rederi A/B 'Unda' v. W. W. Burdon & Co., Ltd.* (1937) 57 Ll.L.R. 95.

³⁷ Contrast, however, *The St. Joseph* [1933] P. 119, 128.

³⁸ This principle can be traced back to Lord Mansfield's judgment in *Robinson v. Bland* (1760) 2 Burr. 1077. For recent application of the principle: *R. v. International Trustee, etc.* [1937] A.C. 500; *The Adriatic* [1931] P. 241; *The Njegos* [1936] P. 90.

³⁹ See *Jacobs v. Crédit Lyonnais* (1884) 12 Q.B.D. 589, 601, *per* Bowen, L.J.

⁴⁰ See *N. V. Kwik Hoo Tong Handel Maatschappij v. James Finlay & Co.*, [1927] A.C. 604; Wolff, s. 419, who quotes the old legal proverb: 'Qui eligit iudicem eligit ius'. The converse proposition does not, of course, apply: the selection of a given system of law is not equivalent to a submission to the jurisdiction of the courts which apply that law, although by a positive enactment, such as R.S.C. O. XI, r. 1 (e), the courts of a country can be given jurisdiction with respect to actions for the enforcement, etc. of contracts which are by their 'terms or by implication to be governed by' the *lex fori*; see *ante*, p. 189. For a discussion of the whole problem see Johnson, Vol. 3, p. 448 ff.

law of that country.⁴¹ This inference may be drawn even if the arbitration clause as such is void according to the law of the country in which the contract is made and to be performed.⁴² The use of terms such as 'Act of God' or 'King's enemies' in a contract suggests that English law was intended to govern.⁴³ A reference to a 'judicial sale' by American courts and to a permission to act in accordance with the opinion of American counsel implies that the parties have submitted the contract to American law.⁴⁵ In certain cases a cautious inference may be drawn from the use of a particular language, *e.g.*, if a charterparty referring to a German ship is drawn up in English,⁴⁶ but if the court has to choose, say, between American and English law this will not be of assistance. The legal or even the merely commercial connection between one contract and another may lead to the conclusion that the parties must have intended that both contracts should be governed by the same law. Thus, if a charterparty is, either by virtue of an express term of selection or by virtue of an arbitration clause, subject to the law of a given country, the court may infer that the parties intended to submit the bills of lading to the law selected for the charterparty, although the bills of lading—taken in isolation from the charterparty—might not have pointed to that law.⁴⁷ All these are merely examples of facts permitting a *prima facie* inference that a given law was intended as the proper law. Whether or not this inference should be drawn, depends on all the circumstances of the case. Other factors, including the place of residence or business of the parties or of either of them, or even their nationality, may be taken into account by the court for guidance as to the law with reference to which the parties intended to contract. It may even be said, although the importance of this point should not be overemphasised, that the court may incline towards applying a system of law under which the contract would be valid, because the parties cannot be assumed to have intended to contract under a law by which their agreement would be void or voidable. The court may—though it will not very easily—find that the intention of the parties was directed towards a law under

⁴¹ The leading cases on this frequently applied principle are *Hamlyn v. Tallisker Distillery* [1894] A.C. 202, and *Spurrier v. LaCloche* [1902] A.C. (P.C.) 446. For its application to marine insurance cases see *Norske Atlas Insurance Co., Ltd. v. London General Insurance Co., Ltd.* (1927) 28 Ll.L.R. 104; and *Maritime Insurance Co., Ltd. v. Assekuranz Union von 1865* (1935) 52 Ll.L.R. 16.

⁴² *Spurrier v. LaCloche* [1902] A.C. 446.

⁴³ Compare *The Industrie* [1894] P. (C.A.) 58; contrast *Kadel Chajkin, Ltd. v. Mitchell Cotts & Co., Ltd.* (1948) 64 T.L.R. 89.

⁴⁵ *R. v. International Trustees, etc.* [1937] A.C. 500.

⁴⁶ *The Industrie* [1894] P. 58; *The Adriatic* [1931] P. 241. But note the warning implied in the *dictum* of Langton, J., at p. 250, against over-estimating the use of the English language and of English bill of lading forms in a case to which the Hague Rules apply.

⁴⁷ *The Njegos* [1936] P. 50; *The Adriatic* [1931] P. 241, at p. 247.

which, in the event, their contract—or part of it—turned out to be void.⁴⁸

The above principles apply to contracts to which either the British or a foreign government is a party. The fact that a sovereign is a party to a contract does not establish conclusively that the law of that sovereign's country is the law which is to apply. 'It is an element of weight to be considered, but it is no more than that.'⁴⁹ 'The circumstance that a government is a party is entitled to great weight in drawing the appropriate inference, but it is not conclusive and is only one factor in the problem'.⁵⁰ Thus, a loan raised by the British Government in the United States during the first World War was held to be governed by the law of the State of New York,⁵¹ and, similarly, a contract entered into by a foreign government for the purchase of land outside its own territory, or a contract of affreightment with the owners of a foreign ship on the terms expressed in a foreign bill of lading, or for the employment of foreign labour in a foreign country, are unlikely to be governed by the law of the

⁴⁸ It is very dangerous to put too much reliance in this connection on the principle 'ut res magis valeat quam pereat'. It is true that in *Peninsular and Oriental Steam Navigation Co. v. Shand* (1865) 3 Moo. P.C. (N.S.) 272, Turner, L.J., used this argument in order to demonstrate that the parties must have intended their contract to be governed by English law, but the case of *South African Breweries v. King* [1899] 2 Ch. 173, [1900] 1 Ch. 273, shows that, especially where the parties contract 'with their eyes open' as to the possibility of part of their agreement being void, it is not normally possible to imply the selection of a given system of law merely on the ground that it would make the contract valid in its entirety. In *Maritime Insurance Co., Ltd. v. Assekuranz Union von 1865* (1935) 52 Ll.L.R. 16, Goddard, J., held that a re-insurance contract between an English and a German insurance company, made and to be performed in Hamburg, was, as a result of an English arbitration clause, governed by English law and consequently void for want of an English stamp, and rejected the argument *in favorem contractus*, although he admitted that it was 'very often a strong argument'. To the same effect, *Royal Exchange Assurance Corporation v. Vega* [1902] 2 K.B. 384 (C.A.); see Cheshire, pp. 324-5; Wolff, s. 420; Johnson, Vol. 3, 460; Rabel, pp. 474 ff. If one accepts the principle that the choice of the parties is not restricted to systems of law which have a real connection with the contract, one is driven to a very cautious application of the interpretation *in favorem contractus*. See also *per* Cozens-Hardy, M.R., in *British South Africa Co. v. De Beers Consolidated Mines, Ltd.* [1910] 2 Ch. 502, at p. 513, whose rejection of the argument *in favorem contractus* was approved by the other judges and by the House of Lords [1912] A.C. 52.

⁴⁹ *Per* Lord Russell of Killowen in *R. v. International Trustee, etc.* [1937] A.C. 500, at p. 557.

⁵⁰ *Ibid.*, *per* Lord Atkin, at p. 531.

⁵¹ *R. v. International Trustee* [1937] A.C. 500. The House of Lords rejected the view that a sovereign who, without his consent, cannot be sued on a contract in the courts of another state cannot, for that reason, be deemed to have agreed to be bound by the law of that state. The dictum of Lord Romilly, M.R., in *Smith v. Wuegelm* (1869) L.R. 8 Eq. 198, at pp. 212, 213, approved by Lord Selborne in *Goodwin v. Roberts* (1876) 1 App.Cas. 476, at p. 494, in so far as it purports to enunciate a general rule to the contrary, was disapproved of. On the problem of 'The Law governing State Contracts' see Mann, 21 B.Y.B.I.L. (1944) 11; Schmitthoff, 'The International Government Loan' (1937) Jo.Comp.Leg. 179; note in 1 M.L.R. 168.

state which is party to the contract.⁵² On the other hand, a different conclusion may be drawn where, *e.g.*, a government raises a loan in a number of different countries. It is all entirely a matter of the implied intention of the parties.

Illustrations

1. X and A contract at Edinburgh for the performance by A of certain agency work for X in France. They agree that the High Court shall have jurisdiction in any matters arising out of the contract. The law of England is *prima facie* the proper law of the contract.⁵³

2. X and A enter into a contract in London which is to be performed, except as to the arbitration clause, in Scotland. It is an express term of the contract that any dispute arising out of it 'shall be settled by arbitration by two members of the London Corn Exchange in the usual way'. English law is the proper law of the contract.⁵⁴

3. A, a resident of Jersey, insures his stamp collection with X & Co., an English company. The premiums and the insurance money are payable in Jersey. The policy, which is made in Jersey through the Jersey agent of X & Co., provides that disputes shall be settled by arbitration under the English Arbitration Act. The arbitration clause would be void under the domestic law of Jersey. Nevertheless it permits the inference that English law was intended as the proper law of the contract, and under this law the arbitration clause is valid.⁵⁵

4. A charterparty is made in London in English form for the carriage of rice from India in a German ship. English law is the proper law of the contract.⁵⁶

5. A, an Englishman, ships a cargo on board the ship of X & Co., a Dutch company, registered under Dutch law, but whose shareholders are identical with those of an English company registered under English law. The goods are shipped at Singapore—for this purpose an English port—under a bill of lading in English form and language. English law is the proper law of the contract of carriage.⁵⁷

6. A French firm charters a Yugoslav ship for the carriage of grain from Argentina to Sweden, under a charterparty which, by virtue of an arbitration clause, is governed by English law. Bills of lading are issued by the shipowner which, whilst incorporating all the terms of the charterparty, do not refer to arbitration in England. The arbitration clause in the charterparty cannot be regarded as incorporated in the bills of lading, but the legal and commercial connection between the bills of lading and the charterparty shows

⁵² *Per* Lord Atkin, *l.c.* at p. 531. The view expressed in the text is based on the judgments of Lord Atkin, Lord Russell of Killowen and Lord Maugham. Lord Roche took a different view. He agreed with the majority only because he regarded the war loan as a 'transaction . . . of a very exceptional character' and regarded the doctrine enunciated by Lord Romilly as 'still generally applicable to most transactions of the character of the transaction now in question' (at p. 574).

⁵³ For the effect of a submission to the jurisdiction by contract, see B.S.C. O. XI, r. 2A; and see Cheshire, pp. 140-141; Cheshire, *International Contracts*, pp. 39-44; Wolff, s. 69; compare *Limerick Corporation v. Crompton* [1910] 2 Ir.R. 416. See also Graupner, 'Contractual Stipulations Conferring Exclusive Jurisdiction', 69 L.Q.R. 227 (1943).

⁵⁴ *Hamlyn v. Talisker Distillery* [1894] A.C. 202.

⁵⁵ *Spurrier v. LaClosche* [1902] A.C. 446.

⁵⁶ *The Industrie* [1894] P. 58 (C.A.).

⁵⁷ *Chartered Mercantile Bank of India v. Netherlands Co.* (1888) 10 Q.B.D. 521 (C.A.); especially *per* Brett, L.J., at p. 530, and *per* Lindley, L.J., at p. 540. Contrast *Lloyd v. Guibert* (1865) L.R. 1 Q.B. 115; *The August* [1891] P. 328. See *post*, Rules 147, 148.

that the parties intended the bills of lading to be governed by English law.⁵⁸

7. X & Co., a firm carrying on business in Egypt, agree to reserve room for the shipment of cotton seed to London for A & Co., a British company with a branch office in Egypt. X & Co. charter a Swedish steamer and issue bills of lading as agents for the shipowner, by which the cargo is to be delivered in London to A's order on payment of freight. The bills of lading which are in English language and form are governed by English law.⁵⁹

8. X, a resident of South Africa, agrees with A & Co., an English company carrying on business in South Africa, to serve them as brewer in their business at Johannesburg. The contract is made at Johannesburg in English form and language. In view of the residence of X and the place of business of A & Co., and the fact that Johannesburg is the intended place of performance, South African law is the proper law of the contract, although a clause in the contract which under English law would have been valid, is void under South African law.⁶⁰

9. X, residing in England, offers marriage to A, residing in Denmark, and is accepted. X and A intend to set up their matrimonial domicile in England. Later X fails to carry out his undertaking, and A sues him in England for breach of promise. English law is the proper law of the contract.⁶¹

10. An English solicitor is employed in a foreign country by Englishmen, on a retainer sent from England. He renders a bill of costs. The proper law of the contract is English, and his bill of costs must be taxed according to English law.⁶²

11. A company registered in England, but owning land abroad, issues debentures by which it undertakes to create a charge upon the land abroad. The proper law of the debentures is English law, whether the debentures have been issued in England or abroad, and the validity of the undertaking to create the charge is governed by English law.⁶³

12. A company consisting of Englishmen is founded in Turkey in accordance with the provisions of Turkish law, but its governing body sits in London, and its contracts are made in different places. As regards the rights *inter se* of its members the proper law of the contracts is Turkish.⁶⁴

SUB-RULE 3.—In the absence of countervailing considerations, the following presumptions as to the proper law of a contract have effect :

First Presumption :—Prima facie the proper law of the contract is presumed to be the law of the country

⁵⁸ *The Njegos* [1936] P. 90.

⁵⁹ *The Adriatic* [1981] P. 241.

⁶⁰ *South African Breweries, Ltd. v. King* [1899] 2 Ch. 173; [1900] 1 Ch. 273 (C.A.).

⁶¹ See *Hansen v. Dixon* (1906) 23 T.L.R. 56.

⁶² *Re Maugham* (1885) 2 T.L.R. 115 (C.A.). A barrister's right to recover a remuneration appears to depend on the law affecting his bar: *R. v. Doutre* (1884) 9 App.Cas. 745. See Johnson, Vol. 3, p. 468.

⁶³ *British South Africa Co. v. De Beers Consolidated Mines, Ltd.* [1910] 1 Ch. 354 (C.A.), reversed on different grounds; [1912] A.C. 52; *Re Anchor Line (Henderson Bros.), Ltd.* [1937] Ch. 483: validity of floating charge created by English company in Scotland with respect to immovable property situated in Scotland governed by English law as the proper law of the contract. See also *Re Smith* [1916] 2 Ch. 206; *Re a Mortgage J. to A.* [1933] N.Z.L.R. 1512; *Dennys Lascelles, Ltd. v. Borchard* [1933] V.L.R. 46.

⁶⁴ *Pickering v. Stephenson* (1872) L.R. 14 Eq. 322, at p. 339. The law under which a company is incorporated is generally the proper law of the contracts concluded between its members as such. See also *Brailey v. Rhodesia Consolidated, Ltd.* [1910] 2 Ch. 95.

where the contract is made (*lex loci contractus*); this presumption applies with special force when the contract is to be performed wholly in the country where it is made, or may be performed anywhere, but it may apply to a contract partly or even wholly to be performed in another country.

Second Presumption:—When the contract is made in one country, and is to be performed either wholly or partly in another, then the proper law of the contract may be presumed to be the law of the country where the performance is to take place (*lex loci solutionis*). This presumption may, in a given case, be applicable only to certain aspects of a contract. It will usually apply to the mode of performance as distinguished from the substance of the obligation.⁶⁵

Comment

'The proper law of the contract means that law which the English or other court is to apply in determining the obligations under the contract. English law, in deciding these matters, has refused to treat as conclusive rigid or arbitrary criteria, such as *lex loci contractus* or *lex loci solutionis*, and has treated the matter as depending on the intention of the parties, to be ascertained in each case on a consideration of the terms of the contract, the situation of the parties, and generally on all the surrounding facts.' In the absence of an express selection 'the court has to impute an intention, or to determine for the parties what is the proper law which, as just and reasonable persons, they ought to or would have intended if they had thought about the question when they made the contract. No doubt there are certain *prima facie* rules to which a court, in deciding on any particular contract, may turn

⁶⁵ *Scott v. Pilkington* (1862) 2 B. & S. 11; *P. & O. Co. v. Shand* (1865) 3 Moo.P.C. (N.S.) 272; *Jacobs v. Crédit Lyonnais* (1884) 12 Q.B.D. 589 (C.A.), especially p. 600, *per* Bowen, L.J.; *Ruby Steamship Corporation v. Commercial Assurance Co., Ltd.* (1933) 39 Com. Cas. 48 (C.A.). For the second presumption, see in particular *Chatenay v. Brazilian Submarine Telegraph Co.* [1891] 1 Q.B. 79 (C.A.); *Benaim & Co. v. Debono* [1924] A.C. 514 (P.C.), where (at p. 520) the second presumption was approved. See also *Re Trye*; *Ex p. Guillebert* (1887) 2 Deac. 509; *Burgess v. Richardson* (1861) 29 Beav. 487; *Jones v. Oceanic Steam Navigation Co.* [1924] 2 K.B. 730. For Canada, see *Niagara Falls International Bridge Co. v. G.W.Ry. Co.* (1863) 22 U.C.R. 592; *German Savings Bank v. Tétrault* (1904) Q.B. 27 S.C. 447; *John Morrow Screw and Nut Co. v. Hankin* (1919) 53 S.C.R. 74; *Re Naubert* (1920) 46 O.L.R. 210; Quebec Civil Code, Art. 8; *The Queen v. Ogilvie* (1897) 6 Ex.C.R. 21, reversed on facts, 29 Can.S.C.R. 299; *Brown v. Canadian Pacific Ry. Co.* (1887) 4 Man.L.R. 396; *Rogers v. Mississippi, etc. Co.*, 14 Q.L.R. 99; see Johnson, Vol. 3, pp. 420, 429, 457, 467.

for assistance, but they are not conclusive. In this branch of law, the particular rules can only be stated as *prima facie* presumptions'.⁶⁶

Sub-Rule 3 is an attempt to summarise these *prima facie* presumptions, *i.e.*, the rules which usually guide the courts when 'imputing' an intention. Both presumptions are grounded on the probable intention of the parties.

First Presumption. No rigid rules can be laid down to define the scope of this presumption. Since it is based upon the presumable intention of the parties, it is unlikely to apply whenever the place of contracting is purely fortuitous. There is nothing to compel an English court to apply Belgian law to a contract made between two parties resident in England for the sale of goods to be delivered and paid for in England, merely on the ground that the letter of acceptance was posted in Belgium.⁶⁷ Nor is there any need for applying the law of the country in which the letter of acceptance was posted if the contract was the result of negotiations and it was a matter of chance which of the two parties was the offeror and which the acceptor of the contract ultimately concluded.⁶⁸ This is so because the presumption in favour of the *lex loci contractus* does not rest upon an *a priori* doctrine that rights arising from a contract are the 'creature' of that law.⁶⁹ Since it rests upon the intention imputed by the court to the parties, the court will pay attention to the degree to which there is a substantial connection between the contract and the place where it was made. The *lex loci contractus* will have to give way to some other system of law, even in the absence of an express or implied intention of the parties, if that other system, *e.g.*, the *lex loci solutionis*, is more closely connected with the contract.

There are numerous decisions in which the presumption in favour of the *lex loci contractus* was applied in this sense. It was

⁶⁶ Per Lord Wright in *Mount Albert Borough Council v. Australasian, etc. Assurance Society, Ltd.* [1938] A.C. 224, at p. 240 (P.C.).

⁶⁷ The difficulties and incongruities arising from a rigid application of the *lex loci contractus* are convincingly demonstrated by Cook, Chap. 14; see especially pp. 380-388; see also Falconbridge, pp. 276-7; Wolff, s. 413; Cheshire, p. 318; Lorenzen, pp. 287-8; Rabel, pp. 460 ff.

⁶⁸ See *Benaim & Co. v. Debono* [1924] A.C. 514 (P.C.), where a contract of sale concluded between a firm in Gibraltar and a firm in Malta was 'completed' by an acceptance posted from Malta, the law of which was therefore the *lex loci contractus*. The goods had been sold f.o.b. Gibraltar, and Gibraltar was therefore the *locus solutionis*, the law of which was applied by the court. Compare this businesslike solution of the problem with the rigid application of the *lex loci contractus* in the similar case of *Clarke v. Harper and Robinson* [1938] N.I. 162, where a contract of sale to be performed in Northern Ireland was held to be governed by English law solely by reason of the fortuitous fact that the offer had been accepted in England.

⁶⁹ See for a demonstration of the fallacies involved in an *a priori* conception of 'territoriality', Lorenzen, Chap. 1; see also Falconbridge, p. 15, and Cook, *passim*. See also Wiles, 14 Can. Bar Rev. 1, especially p. 9, where the 'conceptual' and the 'practical' approach to the problem discussed in the text are effectively contrasted; and Rabel, pp. 443 ff.

succinctly formulated by Lord Esher, M.R., as follows: 'One inference which has always been adopted is this: If a contract is made in a country to be executed in that country, unless there appears something to the contrary, you take it that the parties must have intended that the contract as to its construction and as to its effect, and the mode of carrying it out (which really are the result of its construction), is to be construed according to the law of the country where it was made'.⁷⁰

Again, Willes, J., delivering the judgment of the Exchequer Chamber, said it was 'generally agreed that the law of the place where the contract is made, is *prima facie* that which the parties intended or ought to be presumed to have adopted as the footing upon which they dealt, and that such law ought therefore to prevail in the absence of circumstances indicating a different intention, as for instance, that the contract is to be entirely performed elsewhere, or that the subject matter is immovable property, situated in another country, and so forth'.⁷¹

That the application of the *lex loci contractus* rests upon the imputed intention of the parties must be emphasised, because some older reports and textbooks reiterate the maxim that a contract is governed by the law of the place where it was made, and because this language has sometimes produced the impression that something like exclusive authority is attributed by the English courts to the law of the country where the contract is concluded. This is erroneous. There are, indeed, to be found in the reports dogmatic assertions that a contract is governed by the law of the place where it was made and that contractual rights are the 'creature' of that law. But, as a comparison of the dictum of Willes, J., quoted above, with his dictum in *Phillips v. Eyre*⁷² shows, in this country the apparent contradiction between the 'intention' theory and the 'creature' theory is little more than verbal. The contradiction originates in the Continental writings the influence of which upon English legal thought in these matters has been profound. It can be traced back at least as far as Huber's *De Conflictu Legum* (1689).⁷³ Huber, having stated (No. 5) that contracts are entirely governed, as regards form and substance, by the *lex loci contractus*, in effect retracts this statement by warning the reader (No. 10) that 'if the parties in contracting have another place in mind' ('*si partes alium in contrahendo locum*

⁷⁰ *Chatenay v. Brazilian Submarine Telegraph Co.* [1891] 1 Q.B. 79, at p. 82; compare *Gibbs v. Société Industrielle et Commerciale des Métaux* (1890) 25 Q.B.D. 399 (C.A.), at p. 405, per Lord Esher, M.R.

⁷¹ *Lloyd v. Guibert* (1865) L.R. 1 Q.B. 115, at p. 122, per curiam.

⁷² (1870) L.R. 6 Q.B. 1, at p. 28.

⁷³ For reprints with translations see Lorenzen, Chap. 6, and Llewelyn Davies, *The Influence of Huber's De Conflictu Legum on English Private International Law*, 18 B.Y.B.I.L. (1937) 49. Huber attempted to combine an *a priori* conception of territoriality with what we should call a proper law doctrine. He attempted to bridge the gulf by a fiction. In doing so he followed earlier writers, especially Bartolus.

conspexerint'), the *lex loci contractus* should not prevail. In view of its strong influence on the development of Anglo-American law this passage in Huber's treatise may perhaps be called the *fons et origo* of the proper law doctrine. It does, however, introduce an element of confusion by using as an authority the passage from the Digest⁷⁴: '*Contraxisse unusquisque in eo loco intelligitur in quo ut solveret se obligavit*'. This fiction has produced a misapprehension that any law other than that of the place of contracting can claim application only by masquerading as a *lex loci contractus*. Lord Mansfield's judgment in *Robinson v. Bland* (1760),⁷⁵ the first English authority on the proper law doctrine, shows Huber's influence. In holding that English law applied to a contract made in France, Lord Mansfield said: 'The parties had a view to the law of England. The law of the place (of contracting) can never be the rule, where the transaction is entered into with an express view to the law of another country as the rule by which it is to be governed', and he quoted Huber's dictum, including the reference to the Digest. Similarly, Story, having discussed at great length the basic rule that the *lex loci contractus* governs in all respects, qualifies his analysis by restricting it to cases in which 'the performance of the contract is to be in the place where it is made, either expressly or by tacit implication'.⁷⁶ In other cases 'the general rule is, in conformity to the presumed intention of the parties, that the contract, as to its validity, nature, obligation, and interpretation, is to be governed by the law of the place of performance', a result said to follow from 'natural justice', and from the Digest text quoted above.

This fiction explains the lip service which, in the past, English courts thought it necessary to pay to the *lex loci contractus*, but the preference which they thus expressed for that law has not, in this country or elsewhere in the British Commonwealth, been allowed to have an influence on their decisions. The conflict between the view that the *lex loci contractus* derives its force from the intention of the parties and the theory that contractual rights are of necessity the 'creation' of that law, has not, in English law, had more than a theoretical importance, while in the United States it appears to have had a far more practical significance.

When, following Lord Mansfield's authority, English courts began to give effect to laws other than the *lex loci contractus*, they interpreted this term as meaning 'not the law of the country where a contract was made', but the 'law of the country with a view to the law whereof the contract was made'.⁷⁷ This law

⁷⁴ D. 44, 7, 21: 'Everyone is deemed to have contracted in that place in which he is bound to perform' (Prof. Llewelyn Davies' translation).

⁷⁵ (1760) 2 Burr. 1077.

⁷⁶ Chap. 8, § 280.

⁷⁷ For the transition from the older to the later and more correct doctrine, see *Rothschild v. Currie* (1841) 1 Q.B. 43, 49; *Allen v. Kemble* (1848) 6 Moore P.C. 314, 322.

may be the *lex loci contractus*, but may, it is manifest, be the law of some other country, and is very frequently the law of the country where the contract is to be performed. The substitution of the *lex loci solutionis* for the *lex loci contractus* was the easier, because, in the vast majority of instances, persons intend that their contracts shall be performed in the country in which they are made. In many cases, therefore, the proper law of the contract may, with almost equal propriety, be described as the *lex loci solutionis* or the *lex loci contractus*. This, however, is not usually true of those commercial transactions which give rise to the most important and difficult questions of conflict of laws. Contracts for the sale of goods from one country to another, contracts for the carriage of goods and passengers by sea and air, contracts of marine insurance, international loans, acceptance credits, powers of attorney designed to have an international operation, etc., are normally intended to be executed in a country or countries other than that in which they happen to be concluded. It is in connection with such contracts that a rigid insistence upon the *lex loci contractus* is apt to lead to results at variance with the intentions of the parties and with the realities of the situation.⁷⁸ To over-emphasise the *lex loci solutionis* may, on the other hand, be equally unfortunate, especially in those numerous cases in which the various parties to the contract have to perform their obligations in different countries.⁷⁹ The traditional adherence of the English courts to the *lex loci contractus* has had the advantage of providing them with a rule capable of being used as a last line of defence in order to determine the law governing contracts connected with more than one country and exhibiting no tendency on the part of the parties to give preference to one of them.⁸⁰ In such cases the courts still fall back upon the law of the country where the contract was made, especially when the contract was made in England. In this, as in other matters, there is traceable in the courts of every country a more or less unconscious tendency to settle any new or undecided point of law in accordance with the *lex fori*.

Where the court decides to apply the law of the place of contracting, it must determine the place at which the contract was concluded. In an English court this question must be decided according to English law, because it concerns the interpretation of an English rule of the conflict of laws. In so far as the *lex loci contractus* is as such the proper law of the contract, the place of

⁷⁸ See *post*, p. 626.

⁷⁹ This is the principal argument against Savigny's view, according to which, in the absence of an express selection, the contract is governed by the *lex loci solutionis*. See Wolff, s. 414.

⁸⁰ See *Hamlyn v. Talisker Distillery* [1894] A.C. 202, 212, language of Lord Watson; and see *Ruby Steamship Corporation v. Commercial Union Assurance Co., Ltd.* (1988) 39 Com.Cas. 48 (C.A.).

contracting is the 'connecting factor' which links the facts of a given case with a given system of law, and it is for the *lex fori* to define the 'connecting factors' or 'points of contact' which it considers as relevant.⁸¹ An English court will apply for purposes of the conflict of laws the rule of English domestic law that a contract made by correspondence is deemed to have been concluded at the place at which the letter of acceptance is posted. There does not seem to be any English authority to this effect, but there is a dictum of Lord Darling, delivering the judgment of the Privy Council in *Benaim v. Debono*⁸² and there is a fairly recent decision in Northern Ireland.⁸³ This question is not likely to be as important in the elastic system of determining the proper law which has been adopted in this country, as it would be if the courts had endorsed the rigid principle of *lex loci contractus* suggested by the American Restatement.⁸⁴ Where the rights and liabilities of the parties would depend on the fortuitous circumstance whether one or the other happened to be the offeror or the offeree, an English court would, it is submitted, hesitate to apply the *lex loci contractus*, and, as the Privy Council did in *Benaim v. Debono*,⁸⁵ would prefer to apply the law of the place of performance.

Second Presumption. The principal authority on which this presumption rests is the famous judgment of Lord Esher, M.R., in *Chatenay v. Brazilian Submarine Telegraph Co.*⁸⁶: —

'The business sense of all business-men', said Lord Esher, 'has come to this conclusion, that, if a contract is made in one country to be carried out between the parties in another country, either in whole or in part, unless there appears something to the contrary, it is to be concluded that the parties must have intended that it should be carried out according to the law of that other country. . . . Therefore, the law has said that, if the contract is to be carried out in whole in another country, it is to be carried out wholly according to the law of that country, and that must have been the meaning of the parties. But, if it is to be carried out partly in another country than that in which it is made, that part of it which is to be carried out in that other country, unless something appears to the contrary, is taken to have been intended to be carried out according to the laws of that country'.

⁸¹ Falconbridge, p. 98; Robertson, p. 110; Lorenzen, p. 123; Cheshire, p. 70; Cheshire, *International Contracts*, p. 55; Wolff, ss. 130-133; Restatement, § 311; Rabel, pp. 452 ff. See *ante*, p. 71.

⁸² [1924] A.C. 514, at p. 520.

⁸³ *Clarke v. Harper and Robinson* [1938] N.I. 162.

⁸⁴ §§ 332-347; compare the elaborate rules for the determination of the place of contracting in §§ 312-331 and the criticism by Cook, Chap. 14.

⁸⁵ [1924] A.C. 514.

⁸⁶ [1891] 1 Q.B. 79, at pp. 82, 83; compare also *Jacobs v. Crédit Lyonnais* (1884) 12 Q.B.D. 589, at p. 600, *per* Bowen, L.J.; *Hamlyn v. Tallisier Distillery* [1894] A.C. 202, 212, *per* Lord Watson; *Valery v. Scott* (1876) 3 R. 965, *per* Inglis, L.P.; for South Africa, *Stewart v. Ryall* (1887) 5 S.C. 146.

What has been said about the elastic nature of the first presumption applies with equal force to the second. Great weight will be given to the law of the place of performance as being the proper law of the contract, especially when a contract is made in one country, but wholly or partially to be performed elsewhere. How easily the presumption in favour of the *lex loci solutionis* can be rebutted even in this case, cannot be more clearly demonstrated than by a reference to the case of *Jacobs v. Crédit Lyonnais*.⁸⁷ In justifying the application of English law to a contract made in London between merchants carrying on business there for the sale of esparto to be shipped from Algeria and paid for in London, Bowen, L.J., said this: 'This maxim (*viz.*, the presumption in favour of the law of the place of performance) must of course give way to any inference that can legitimately be drawn from the character of the contract and the nature of the transaction. In most cases, no doubt, where the contract has to be wholly performed abroad, the reasonable presumption may be that it is intended to be a foreign contract determined by foreign law; but this *prima facie* view is in its turn capable of being rebutted by the expressed or implied intention of the parties as deduced from other circumstances . . . even in respect of any performance that is to take place abroad, the parties may still have desired that their liabilities and obligations shall be governed by English law; or it may be that they have intended to incorporate the foreign law to regulate the method and manner of performance abroad, without altering any of the incidents which attach to the contract according to English law. Stereotyped rules laid down by juridical writers cannot, therefore, be accepted as infallible canons of interpretation in these days, when commercial transactions have altered in character and increased in complexity; and there can be no hard and fast rule by which to construe the multiform commercial agreements with which in modern times we have to deal'.

Scottish law is to the same effect, 'although English and Scottish decisions differ in regard to the relative weight which ought to be attributed to' the *locus contractus* and the *locus solutionis* if they do not coincide.⁸⁸

The *lex loci solutionis* may thus be the proper law of the entire contract. If it is, it will govern the validity of the contract as well as its interpretation. If an intention to this effect can be imputed to the parties, the law of the place where one party has to fulfil his obligation may be the proper law, although the other party or parties has (or have) to perform elsewhere. On the other hand, the parties may (in exceptional cases) be deemed to have intended to 'split' the contract, in which case the obligations or some of the obligations of one party may be governed by a law

⁸⁷ (1884) 12 Q.B.D. 589, at pp. 600 ff.

⁸⁸ See the dictum of Lord Watson, quoted note 80, *ante*, p. 598.

different from that applicable to other aspects of the contract. Thus, if an international loan agreement gives to bond holders the right to claim payment of capital or interest at a number of alternative places at their option, it may well have been the intention of the parties to subject each 'act of performance'⁸⁹ to the law of the country in which it takes place, with the result that, *e.g.*, the validity of a gold value clause may be governed by New York law if payment is demanded in New York, but by English law if the creditor exercises his right to demand payment in London. Such a 'scission' of the contract is apt to give rise to very difficult problems and there does not appear to be any English case in which the court has imputed to the parties an intention to this effect.⁹⁰

The parties may, however, and normally do, intend that, while the substance of all obligations is governed by one law, the mode, or, as Bowen, L.J., put it, the 'method and manner' of the performance should, in each case, be regulated by the law of the place in which it occurs. If, under an English contract, a party undertakes to deliver goods in Paris 'during the usual business hours', it will presumably be for French law to say what business hours are 'usual', but English law will determine whether, *e.g.*, performance is excused owing to frustration⁹¹ or to what extent the seller is liable for defects in the goods delivered. If an English charterparty provides that the charterer is to pay £5 *per diem* for detention from the time of the ship being ready to unload and 'in turn to deliver', the 'regulations and practice' of the foreign port of discharge are incorporated in the English contract to the extent to which such incorporation is necessary in order to determine the meaning which the words 'in turn to deliver' bear in the particular circumstances.⁹² If, on the other hand, timber which has been shipped under a foreign charterparty is discharged at Liverpool,

⁸⁹ See Wolff, s. 437.

⁹⁰ Lord Wright's judgment in *Adelaide Electricity Supply Co., Ltd. v. Prudential Assurance Co., Ltd.* [1934] A.C. 122, p. 151, can hardly be regarded as based on this principle. In *Auckland Corporation v. Alliance Assurance Co., Ltd.* [1937] A.C. 587, at p. 606, and again in *Mount Albert Borough Council v. Australasian, etc., Society, Ltd.* [1938] A.C. 224, Lord Wright, delivering the judgment of the Privy Council, explained that the decision of the House of Lords in the *Adelaide Case* was based on the 'well-known principle of the conflict of laws, namely, that the mode of performance of a contract is to be governed by the law of the place of performance' and, especially in the *Mount Albert Case*, he deprecated the idea that a 'splitting off' of the substance of the obligation from the proper law had been intended by the House of Lords in the *Adelaide Case*. See also *post*, p. 649. Greer, L.J., in *British and French Trust Corporation v. New Brunswick Ry.* [1937] 4 All E.R. 516, at p. 526, expressed his inability to reconcile the decisions in the *Adelaide* and *Mount Albert Cases*. In *St. Pierre and Others v. South American Stores, etc., Ltd.* [1937] 3 All E.R. 349, the Court of Appeal held that under a Chilean contract the rights and liabilities of the parties with respect to an obligation to be performed in England were governed by Chilean law.

⁹¹ As in *Jacobs v. Crédit Lyonnais* (1884) 12 Q.B.D. 589.

⁹² *Robertson v. Jackson* (1845) 2 C.B. 412, esp. *per* Tindal, C.J., at pp. 427-428.

the dock regulations in force at Liverpool will determine when the ship is ready to discharge, when, therefore, she is an 'arrived' ship so that the lay days allowed for unloading begin to run.⁹³ Again, if a New Zealand local authority borrows money from an insurance company in the Australian State of Victoria under a contract governed by the law of New Zealand, and if interest is payable in Victoria, it may well be a matter for the law of Victoria to decide whether interest payments may be made by cheque or must be made in cash, but the rate of interest,—a matter appertaining to the substance of the obligation,—is certainly governed by the law of New Zealand.⁹⁴ It is possible to explain the application of the *lex loci solutionis* to the mode of performance on the ground that the parties must be deemed to have implicitly incorporated in their contract those parts of that law which refer to the manner in which the contractual obligations are to be discharged.

In short, whenever the law of the place of performance is not the proper law of the contract or of any part of it, the court will incline towards the view that a line must be drawn between the substance of the obligation (governed by the proper law) and the mode of performance (governed by the *lex loci solutionis*). Any issue which arises between the parties must be classified as affecting the obligation itself or as one referring to the method in which it is to be performed. Many of the problems which have arisen in connection with gold clauses and with the determination of the currency in which a monetary obligation is expressed or to be discharged have in fact been caused by the difficulty of applying the distinction between the substance of the obligation and the manner of its performance to such cases.⁹⁵

Finally, it should be mentioned that the legality of the performance is, at any rate in certain cases, governed by the *lex loci solutionis* whether it is the proper law or not. This point is discussed below, see Rule 141, Exception.⁹⁶

In those cases in which the court regards the *lex loci solutionis* as the proper law, the parties will usually, either expressly or by implication, have determined the place where the contractual obligations are to be fulfilled. In the absence of such agreement the court will have to define the *locus solutionis* in accordance with English law. Thus, the place where the seller has to perform will be ascertained on the principles laid down in the Sale of Goods Act, 1898, and in those numerous decisions which deal with contracts c.i.f. and f.o.b. With regard to monetary obligations, the rule that the debtor must seek out his creditor, and the exceptions

⁹³ *Norden Steamship Co. v. Dempsey* (1876) 1 C.P.D. 654, esp. per Brett, J., at pp. 662-663. See also *Atwood v. Sellar* (1880) 5 Q.B.D. 286 (C.A.).

⁹⁴ *Mount Albert Borough Council v. Australasian, etc., Society, Ltd.* [1938] A.C. 224.

⁹⁵ See post, pp. 727, 734.

⁹⁶ Post, p. 637.

(e.g., in the case of banks) grafted upon that rule, will apply, and this will lead to the desirable result that, according to English law (in contradistinction to some Continental systems) the seller and the buyer will have to perform at the same place.

Illustrations

1. X, a Frenchman domiciled and resident in France, incurs in London a debt to A for goods there sold by A to X. English law (*lex loci contractus*) is the proper law of the contract.

2. A contracts with X & Co., an English company, for the carriage by them of goods from England to Mauritius in a British ship. A takes a ticket at Southampton which contains a condition limiting the liability of the company. A's goods are lost in Egypt. The condition, according to English law, covers the liability of X & Co. According to the law of Mauritius it does not cover their liability. English law (*lex loci contractus*) is the proper law of the contract.⁹⁷

3. By a contract made in London A, a firm carrying on business there, agrees to sell to X, another firm carrying on business in London, a quantity of esparto to be shipped from ports in Algeria, payment to be made in England. English law is the proper law of the contract and governs the question whether performance is excused owing to impossibility of delivery caused by an insurrection.⁹⁸

4. X, an Englishman carrying on business in England, while in New York, gives N, of New York, a letter of credit to the following effect: 'You have authority to draw exchanges upon me, and all such exchanges will be duly honoured.' This letter is shown to A, who, on the faith thereof, purchases a bill drawn by N on X. X does not accept the same. X is not liable to A by the law of England for not accepting the bill, but he is liable by the law of New York. The law of New York (*lex loci contractus*) is the proper law of the contract.⁹⁹

5. X, a company incorporated in Nova Scotia, makes in New York a contract with A, a firm of insurance brokers, by which A undertake and are authorised to enter into a marine insurance contract on behalf of X. They insure a ship belonging to X with U, an English underwriter. The contract between X and A is governed by New York law as the *lex loci contractus*, and as a result, that law is held to govern A's authority to cancel the policy.¹

6. X, an Englishman, makes a contract in London with A, a Scotsman, under which A is to act as traveller for X in Scotland. *Semble*, English law is the proper law of the contract.²

7. X, a Brazilian subject resident in Brazil, executes in favour of A, a stock broker carrying on business in London, a power of attorney to purchase and sell securities. The power of attorney is in the Portuguese language and executed in Brazil in the form required by Brazilian law. In so far as

⁹⁷ *P. and O. Co. v. Shand* (1865) 3 Moo.P.C. (N.S.) 272; see *Horn v. N.B. Ry.* (1875) 5 R. 1055.

⁹⁸ *Jacobs v. Crédit Lyonnais* (1884) 12 Q.B.D. 589 (C.A.).

⁹⁹ *Scott v. Pilkington* (1862) 81 L.J.Q.B. 81, esp. *per* Cockburn, C.J., at p. 90. See 2 B. & S. 11, 43, 44.

¹ *Ruby Steamship Corporation v. Commercial Union Assurance Co., Ltd.* (1933) 39 Com.Cas. 43 (C.A.). See *post*, p. 714.

² *Arnott v. Redfern* (1825) 2 C. & P. 88; *Re Anglo-Austrian Bank* [1920] 1 Ch. 69; see also *Mynott v. Barnard* (1939) 62 C.L.R. 68; contrast *South African Breweries v. King* [1900] 1 Ch. 273, and *Hicks v. Manton*, 1 W.C.C. 180.

the authority is intended to be acted upon in England, its extent (at any rate, in so far as third parties are concerned) is governed by English law.³

8. X, a firm carrying on business in Gibraltar, agrees to sell to A, a firm carrying on business in Malta, a quantity of anchovies f.o.b. Gibraltar, which is the place of performance. On this ground the law of Gibraltar is the proper law of the contract, and that law decides up to what moment A can exercise their right of rescission on the ground that the anchovies were not of merchantable quality.⁴

9. A contracts with X & Co., an English company, for a life insurance. He deals throughout with and pays premiums to an agent of the company in Scotland, but the policy is prepared in England and sent from its head office in London. On a claim by A against X & Co., the proper law of the contract is English law.⁵

10. X, a New Zealand local authority, borrow money from A, a corporation incorporated by the law of Victoria. The contract is governed by the law of New Zealand, but interest is payable in Victoria. Subsequent to the granting of the loan a statute comes into force in Victoria by which the rate of interest on loans of this kind is reduced. This statute does not apply to the loan granted by A to X, because the rate of interest is a matter belonging to the substance of the obligation and not to the mode of performance.⁶

RULE 137.—The validity or invalidity of a contract must be determined in accordance with English law, independently of the law of any foreign country whatever, if and in so far as the application of foreign law would be opposed to the public policy of English law, or to the provisions of an Act of Parliament which, by the terms of the Act or by virtue of established principles of statutory interpretation, applies to the contract.⁷

³ *Chatenay v. Brazilian Submarine Telegraph Co.* [1891] 1 Q.B. 79 (C.A.); see also *Sinfra Aktien-Gesellschaft v. Sinfra, Ltd.* [1939] 2 All E.R. 675; contrast *Ruby Steamship Corporation v. Commercial Union Assurance Co., Ltd.* (1933) 39 Com.Cas. 48 (C.A.).

⁴ *Benaim v. Debono* [1924] A.C. 514 (P.C.); see, however, *Clarke v. Harper and Robinson* [1938] N.I. 162. Compare, also, *Kennedy v. London Express Newspapers, Ltd.* [1931] I.R. 532 (Supr. Ct.), where, however, Irish law was applied on the ground that the *locus contractus* as well as the *locus solutionis* was in Eire.

⁵ Compare *Parken v. Royal Exchange Assurance Co.* (1846) 8 D. 865; *Rowett, Leakey & Co. v. Scottish Provident Institution* [1927] 1 Ch. 55 (C.A.); *National Trust Co. v. Hughes* (1902) 14 Man. L.R. 41; contrast *Re McGregor* (1909) 10 W.L.R. 435; *Meagher v. Aetna Insurance Co.* (1861) 20 U.C.R. 607.

⁶ *Mount Albert Borough Council v. Australasian, etc., Society, Ltd.* [1938] A.C. 224 (P.C.); contrast *Barcelo v. Electrolytic Zinc Co. of Australasia, Ltd.* (1932) 48 C.L.R. 391, where the law of Victoria was the proper law of the contract, and compare *Wanganui-Rangitikei Electric Power Board v. Australian Mutual Provident Society* (1934) 50 C.L.R. 581, esp. *per* Evatt, J., at p. 604.

⁷ See Cheshire, Chap. 6, pp. 174-196; also pp. 329-330; Wolff, s. 158 ff., 174, 428; Westlake, pp. 307-309; Foote, pp. 405-408; Falconbridge, pp. 312-314; Johnson, Vol. 8, pp. 479-532; Story, §§ 244-259b; Restatement, § 612; Goodrich, s. 108; Lorenzen, Chap. 1, pp. 12 ff.; Nussbaum, § 12; Rabel, Chap. 33; Stumberg, pp. 251-252; Savigny, p. 78.

Comment

Contracts contrary to public policy. It is a general principle of the conflict of laws that the courts of a State will not apply any foreign law, if and in so far as its application would lead to results contrary to the fundamental principles of public policy of the *lex fori*. The courts of all countries insist, on the other hand, on applying to a case otherwise governed by foreign law those principles of their own law which, in their own view, express basic ideas of morality.⁸ The English courts have given effect to this principle in the law of contract, *e.g.*, by refusing to enforce contracts which are opposed to the general policy of, or to the morality upheld by, English law.⁹ This principle has been stated by Fry, J., with reference to a particular case:—

It has been 'insisted that, even if the contract was void by the law of England as against public policy, yet, inasmuch as the contract was made in France, it must be good here, because the law of France knows no such principle as that by which unreasonable contracts in restraint of trade are held to be void in this country. It appears to me, however, plain on general principles that this court will not enforce a contract against the public policy of this country, wherever it may be made. It seems to me almost absurd to suppose that the courts of this country should enforce a contract which they consider to be against public policy, simply because it happens to have been made somewhere else'.¹⁰

Thus, contracts in restraint of trade,¹¹ contracts involving trading with the enemy,¹² champertous contracts,¹³ the stifling of a criminal prosecution,¹⁴ and a collusive arrangement for a divorce,¹⁵ have been held void by the English courts although, on general principles of the conflict of laws, these contracts were governed in each case by a foreign legal system according to which they would have been valid.

The same principle applies where it is not the substance of the contract, but the circumstances in which it was made, which render it incompatible with English ideas of justice and morality. This was the main ground on which the Court of Appeal refused to

⁸ Wolff, s. 158-161; Kuhn, *Comparative Commentaries on Private International Law*, pp. 38-49.

⁹ Anson, *Principles of the English Law of Contract*, 19th ed., pp. 247-249; Pollock, *Contracts*, 12th ed., Chap. 8.

¹⁰ *Rousillon v. Rousillon* (1880) 14 Ch.D. 351, at p. 369; for Canada see *Genesee Mut. Ins. Co. v. Westman* (1852) 8 U.C.R. 487; *Carroeth v. Railway Asbestos Co.* (1913) 9 D.L.R. 631; contrast *National Surety Co. v. Larsen* [1929] 4 D.L.R. 918.

¹¹ *Rousillon v. Rousillon* (1880) 14 Ch.D. 351.

¹² *Dynamit Aktien-Gesellschaft v. Rio Tinto Co., Ltd.* [1918] A.C. 292, esp. per Lord Dunedin at pp. 293-294, per Lord Atkinson at pp. 297-299, per Lord Parker at p. 302. See also *Schering, Ltd. v. Stockholms Enskilda Bank Aktiebolag* [1946] A.C. 219.

¹³ *Gröll v. Levy* (1864) 16 C.B. (n.s.) 73.

¹⁴ See *Kaufman v. Gerson* [1904] 1 K.B. 591 (C.A.).

¹⁵ *Hope v. Hope* (1857) 8 De G.M. & G. 781.

enforce an agreement between two French citizens domiciled and resident in France, made and to be performed there, which was valid according to French law, but had been procured by what the Court of Appeal regarded as coercion.¹⁶

It must not be thought, however, that this rule will be applied whenever a contract governed by foreign law would be void according to the principles of English domestic law, if English law was the proper law of the contract. Not only have foreign contracts been enforced by English courts in circumstances in which they would have been void under an English statute, if English law had applied,¹⁷ but contracts subject to foreign law have also been held valid, although they ran counter to a principle of the common law. Thus, English courts have enforced a contract subject to foreign law which was not supported by consideration,¹⁸ and the principle by which an agreement for a penalty is void was not allowed to impede the enforcement of a foreign judgment.¹⁹ The fact, therefore, that a rule of the common law, such as the requirement of consideration or the invalidity of contractual penalties, is 'imperative', i.e., cannot be contracted out by a contract subject to English law, does not permit the conclusion that this rule will also claim application to a contract governed by a foreign legal system. Only if the court regards a common law principle as one expressing a basic public policy, will it enforce it in a case in which otherwise foreign law applies. To adopt the convenient language used by French jurists: Not every rule of law which belongs to the '*ordre public interne*' is necessarily part of the '*ordre public externe* or *international*'.²⁰

The principle of public policy may not only induce a court, in a given case, to regard as void a contract which would be valid under its proper law. It may also produce the opposite effect and lead to the enforcement of a contract in an English court, although under the law which governs the contract, it is void. Thus, an English court ignores foreign legislation which deprives a contract of effectiveness if the legislation to which the contract is opposed is regarded by English law as discriminatory or penal.²¹ Similarly, by an express provision of the Bills of Exchange Act, a bill of exchange otherwise subject to foreign law can be enforced in this country despite the fact that under the foreign law by which it is governed it would be void by reason that it is not stamped in

¹⁶ *Kaufman v. Gerson*, *supra*; see also *Société des Hôtels Réunis v. Hawker* (1913) 29 T.L.R. 878; not followed in Canada: *National Surety Co. v. Larsen* [1929] 4 D.L.R. 918, see Falconbridge, p. 313.

¹⁷ E.g., *Saxby v. Fulton* [1909] 2 K.B. 208 (C.A.); *Shrichand v. Lacon* (1906) 22 T.L.R. 245; *Santos v. Illidge* (1860) 8 C.B. (n.s.) 861.

¹⁸ *Re Bonacina* [1912] 2 Ch. 394; *Scott v. Pilkington* (1862) 2 B. & S. 11.

¹⁹ *Godard v. Gray* (1870) L.R. 6 Q.B. 139; see Wolff, s. 163.

²⁰ See, e.g., Niboyet, *Manuel de Droit International Privé*, sect. 381; Chesbire, pp. 44-45; Wolff, s. 159.

²¹ See *Ogden v. Felliot* (1789) 3 T.R. 1790; *Wolff v. Ozhelm* (1817) 6 M. & S. 92; *Banco de Vizcaya v. Don Alfonso* [1985] 1 K.B. 140.

accordance with that law.²² There may be cases in which an English court will not be prepared to treat a contract as invalid solely on the ground that its making or its performance constitutes a violation of the foreign exchange restrictions forming part of the proper law.²³

According to one of the most important rules of English public policy a contract is void which is opposed to British interests of state, and, in particular, which is apt to jeopardise the friendly relations between the British Government and any other government with which this country is at peace.²⁴ A contract governed by English law 'to raise money to support the subjects of a government in amity with our own, in hostilities against their government' is void.²⁵ On the same principle of English public policy a contract is void if its object is to violate the laws of a friendly country, such as the former prohibition legislation of the United States.²⁶ It is probable that this also applies if the laws in question are revenue or exchange control laws.²⁷ Although there does not appear to be direct authority on the point, it is possible that this rule of English domestic law²⁸ must be regarded as one of those which an English court will enforce even if the contract in question is governed by foreign law. The decision of the Court of Appeal in *Foster v. Driscoll*²⁹ might have been the same if the proper law of the partnership agreement had not been English law, but the law of some foreign country under which the contract would have been valid.

The mere fact, however, that a contract, not made with the object of defying the laws of a foreign country, involves the doing of something prohibited by its laws, will not, it seems, invalidate the contract, unless the prohibition forms part either of the proper law or—possibly—of the *lex loci solutionis*.³⁰

Contracts contrary to Acts of Parliament. It has never

²² Sect. 72 (1), proviso (a).

²³ *Mann, Legal Aspect of Money*, pp. 262–268; in *New Brunswick Ry. v. British and French Trust Corporation, Ltd.* [1939] A.C. 1, p. 24, Lord Maughan, L.C., suggested that an abrogation of a gold clause by the proper law of the contract without compensation to the detriment of an English creditor might not be recognised by the Court, but this was merely obiter dictum. See Rule 162, *post*.

²⁴ *De Wütz v. Hendricks* (1824) 2 Bing. 314; *Foster v. Driscoll* [1929] 1 K.B. 470; see Anson, 19th ed., p. 218.

²⁵ *Per Best, C.J.*, in *De Wütz v. Hendricks*, *supra*, at pp. 315, 316.

²⁶ *Foster v. Driscoll*, *supra*.

²⁷ 'There is no trustworthy authority for a dictum of Lord Mansfield (in *Holman v. Johnson* (1775) 1 Cowp. 343) that "no country ever takes notice of the revenue laws of another", and it seems now clear that an agreement to break the revenue or other laws of a friendly state would not furnish a cause of action' (Anson, 19th ed., p. 218).

²⁸ That this is not a question of the conflict of laws, is now recognised. See *Falconbridge*, pp. 312, 342; *Mann*, 18 B.Y.B.I.L. (1937), 109; *Cheshire*, p. 347, note 2; *aliter*, apparently *Rabel*, p. 587.

²⁹ [1929] 1 K.B. 470.

³⁰ See Rule 141 and Exception thereto, *post*, pp. 630, 637; see *Rabel*, pp. 587 ff.

been held that an Act of Parliament is capable of yielding a principle of public policy which an English court would have to apply to a contract not governed by English law, unless the case was within the express terms of the statute. The extensive application of common law principles of public policy to cases not otherwise subject to English law has not been accorded even to such statutes as might have been held to express fundamental principles of justice and morality. This has led to remarkable results. A contract for the sale of slaves governed by the law of Brazil was held to be enforceable in England,³¹ the prohibition against slave trading being embodied in a statute, while contracts in restraint of trade and champertous contracts were considered as contrary to universal justice. Why should a principle of morality have the power to invalidate a foreign contract if it happens to have been formulated by judges, but not if it was formulated by Parliament? The matter is one of continuing practical importance, because it is this different treatment of judicial and parliamentary legislation which serves as a justification for the refusal to give international force to Acts of Parliament dealing with gaming contracts³² and with money-lending.³³

Whether or not an Act of Parliament affects the validity and interpretation of a given contract depends, in the first place, on such 'choice of law clauses'³⁴ as may be contained in the statute itself, and, in the absence of such clauses, on the proper application of the principles of statutory interpretation.³⁵

Sometimes, though not often, an Act of Parliament lays down a 'general choice of law clause', *i.e.*, it determines the law which is to apply to a given type of contract and thus attempts to solve the problem of the conflict of laws, *e.g.*, section 72 of the Bills of Exchange Act, 1882, and the concluding words in section 265 of the Merchant Shipping Act, 1894.³⁶

More frequently the general problem as to what law is to govern is left open by the statute, but the statute delimits the scope of its own application, *i.e.*, it defines those cases to which it applies, but gives no guidance on the selection of the law to be applied outside the scope of the statute. Examples can be found in the Merchant Shipping Act, 1894,³⁷ in the Carriage of

³¹ *Santos v. Illidge* (1860) 8 C.B. (N.S.) 361; see also *Madrazo v. Willes* (1820) 3 B. & A. 353.

³² See *per* Vaughan Williams, L.J., in *Saaby v. Fulton* [1909] 2 K.B. 208, at p. 226.

³³ *Shrichand v. Lacon* (1906) 22 T.L.R. 245.

³⁴ See Morris, 'The Choice of Law Clause in Statutes', 62 L.Q.R. 170 (1946).

³⁵ See *Tomalin v. Pearson* [1909] 2 K.B. 61, esp. *per* Farwell, L.J., at p. 65.

³⁶ *Canadian National S.S. Co. v. Watson* [1939] 1 D.L.R. 275; see Falconbridge, Chaps. 43 and 44. For the Carriage by Air Act, 1932, see *post*, p. 672.

³⁷ *E.g.*, the first branch of s. 265 in conjunction with s. 113-116 on the one hand, and with s. 127 on the other: whether the provisions on the form of the contract of service ('agreement with the crew') apply, depends on the ports

Goods by Sea Act, 1924,³⁸ and in the Law Reform (Frustrated Contracts) Act, 1948.³⁹ Whenever an Act of Parliament by its express terms thus applies to the validity or invalidity of a contract, an English court must obey the enactment, without considering the effect of any foreign law which might otherwise be applicable to the case.⁴⁰

If the statute is silent, the general rule of interpretation comes into play, according to which an English statute is not to be deemed to have any extra-territorial operation, unless such operation is required by the express terms of the Act or by its 'object or subject-matter or history'.⁴¹ 'Extra-territorial' operation in connection with the law of contract will frequently and, perhaps, usually, mean operation with regard to a contract governed by foreign law.^{41a} Thus Stamp Acts,⁴² statutes affecting the validity of wagering contracts,⁴³ and statutes reducing the rate of interest⁴⁴

between which the ship is employed in trading, but those on discharge, payment of wages, etc., apply only to British ships. Compare also the limitation of liability clause in s. 502, which applies to British ships only, with that in s. 503 which, it seems, a British court must apply irrespective of any connection with any foreign legal system that the case may have, and irrespective of the nature of the claim, i.e., not only in tort but also in contract.

³⁸ Sect. 1. The Act applies whether the proper law of the contract is English or foreign. *Scrutton, Charterparties and Bills of Lading*, 14th ed., p. 470; *Morris, l.c.*, p. 176. The Hague Rules will thus be applied by an English court to shipments from a United Kingdom port, whatever be the proper law of the contract, but otherwise the freedom of the parties to select the proper law is unimpaired. The Australian Carriage of Goods by Sea Act, 1924, s. 9, however, excludes the freedom of the parties to choose the proper law. *Scrutton, l.c.*, p. 570; *Falconbridge*, pp. 353-355; see *Ocean Steamship Co. v. Queensland State Wheat Board* [1941] 1 K.B. 402.

³⁹ Sect. 1 (1). On this see *Glanville Williams, The Law Reform (Frustrated Contracts) Act, 1948*, p. 19, and 7 M.L.R. 69 (1944); *Morris, l.c.*, p. 179 ff.; *McNair*, 60 L.Q.R., p. 160 (1944); *Falconbridge*, Chap. 17.

⁴⁰ This has been decided in connection with statutes concerning the validity of marriages, see Rule 169, Exception 3, *post*, p. 786. See also *The Tagus* [1903] P. 44, 51, and, for Canada, *Patez v. Klein*, 13 L.C.R. 433.

⁴¹ *Maxwell, Interpretation of Statutes*, 9th ed., p. 149. *cp. Davidsson v. Hill* [1901] 2 K.B. 606, with *Tomalin v. Pearson* [1909] 2 K.B. 61, and with *Yorke v. British and Continental Steamship Co., Ltd.* (1945) 78 Ll.L.R. 181.

^{41a} *Bossevain v. Weil* [1949] 1 All E.R. 146.

⁴² *Norske Atlas Insurance Co., Ltd. v. London General Insurance Co., Ltd.* (1927) 23 Ll.L.R. 104; 43 T.L.R. 514; *Maritime Insurance Co., Ltd. v. Assekuranz Union von 1865* (1935) 52 Ll.L.R. 16; 79 S.J. 403. See *Finance Act, 1933*, s. 42.

⁴³ *Robinson v. Bland* (1760) 2 Burr. 1077; *Quarrier v. Colston* (1842) 1 Ph. 147; *Saxby v. Fulton* [1909] 2 K.B. 208 (C.A.); *Cheshire*, p. 351; *Wolff*, s. 173; *Falconbridge*, pp. 314-319; *Westlake*, p. 308; and see *per Fletcher Moulton, L.J.*, in *Moulis v. Owen* [1907] 1 K.B. 746 (C.A.), at pp. 757 ff., 764 ff.

⁴⁴ *Mount Albert Borough Council v. Australasian, etc., Assurance Society, Ltd.* [1938] A.C. 224 (P.C.); *Barcelo v. Electrolytic Zinc Co. of Australasia, Ltd.* (1932) 48 C.L.R. 391; *Wanganui-Rangitikei Electric Power Board v. Australian Mutual Provident Society* (1934) 50 C.L.R. 581; *Re a Mortgage J. to A.* [1933] N.Z.L.R. 1512; similarly with regard to hire-purchase statutes: *Commercial Corporation Securities, Ltd. v. Nichols* [1933] 3 D.L.R. 56; see *Morris, l.c.*, p. 183; it is doubtful whether the application of statutes providing for moratoria depends on the proper law or on the law of the place of performance: compare the cases on bills of exchange *Rouquette v. Overmann* (1875) L.R. 10 Q.B. 525, and *Re Francke and Rasch* [1918] 1 Ch. 470 (*lex loci*

have been held to apply only to contracts the proper law of which is English law or the law of that part of the British Commonwealth in which the relevant statute was enacted. Provisions which merely supplement the express terms of the contract, like those on implied conditions and warranties in the Sale of Goods Act, are only applicable to English contracts.

On the other hand, it is clear that, whatever be the proper law of the contract, no English court will enforce a promise to do something in this country which is prohibited by an English statute.⁴⁵ If England is the place of performance, English statutes control the legality of the performance. But even if the contract is to be performed abroad, an English court will not enforce it if either the making of the contract or its performance involves the violation of an Act of Parliament such as a revenue or exchange control statute which, by virtue of the residence or place of business of either or both of the parties, or for some other reason, is, by its express terms, intended to apply to the transaction.^{45a} Again, although there does not appear to be any authority on the point, one may surmise that statutes designed to implement a social policy such as, e.g., the Hire-Purchase Act, 1938, including its compulsory provisions on implied conditions and warranties,⁴⁶ would, in certain circumstances, be applied by an English court to a contract which, by agreement between the parties, has been subjected to a foreign law.⁴⁷

Contracts contrary to English rules of procedure. On general principles, a contract otherwise valid cannot be enforced if its enforcement is opposed to any English rule of procedure. In view of the wide meaning of the term 'procedure', illustrations of this

solutionis) with a number of Australian decisions on the New South Wales Moratorium Act, 1931, which suggest that the Act applies to contracts subject to the law of New South Wales, even if the place of payment is elsewhere: *Merwin Pastoral Proprietary, Ltd. v. Moolpa Pastoral Proprietary, Ltd.* (1932) 48 C.L.R. 565; *McClelland v. Trustees Executors and Agency Co., Ltd.* (1936) 55 C.L.R. 483; *Dennys Lascelles, Ltd. v. Borchard* [1933] V.L.R. 46.

⁴⁵ *Ralli Brothers v. Compania Naviera Sota y Aznar* [1920] 1 K.B. 614; 2 K.B. 287 (C.A.).

^{45a} *Bossevain v. Weil* [1949] 1 All E.R. 146 (C.A.)

⁴⁶ Section 8.

⁴⁷ Most of the duties imposed upon employers by social legislation have either been construed as non-contractual, e.g., duties under Workmen's Compensation and Factories Acts, or are, as in the case of minimum wage legislation, so closely connected with British administrative law that their scope of application clearly depends on the place where the work is done. The controversy about the treatment of Workmen's Compensation Acts, in cases involving a foreign element, was settled in England by *Tomalin v. Pearson* [1909] 2 K.B. 61, in favour of the view that, in the absence of an express statutory provision, the Acts apply to accidents which happened in this country. As a result of the National Insurance (Industrial Injuries) Act, 1946, this has lost its practical importance in Great Britain. The view taken by the English courts has also been adopted in Australia (*Beasley v. Ryan* (1935) V.L.R. 135; *Mynott v. Barnard* (1939) 62 C.L.R. 68), in Canada (*Desharnais v. C. P. R.* [1942] 3 W.W.R. 594), and in Northern Ireland (*Cash v. Rainey* [1941] N.I. 52), but dissented from in Eire (*Keegan v. Dawson* [1984] Ir.R. 292; see, however, *Scanlon v. Hartlepool Seatonias S S. Co., Ltd.* [1929] Ir.R. 52).

principle are numerous, the best known being the Statute of Frauds which has been classified as procedural.⁴⁸ A person who alleges that a contract is unenforceable on this ground, must show that the rule of law which prevents the enforcement of the contract in an English court is a rule of procedure. But there is no need to prove that it has extra-territorial operation, i.e., that it was intended by Parliament to operate outside England. This is the marked distinction between procedural statutes and Acts of Parliament which make a given contract valid or invalid.

Wagering contracts. A statute, for example, makes wagering contracts void. If it is alleged that this enactment renders void a wager made in a foreign country where the wager is lawful and valid, then the person relying on the invalidity of the wager must show that the statute was intended to apply to wagers made out of England. If, on the other hand, a statute enacts that no action shall be brought for the recovery of money lost on a wager, then it is necessary for the person relying on the statute for a defence against the action to show what, in the particular instance, is self-evident, that the enactment lays down a rule of procedure; but there is no need to show that the enactment was intended to operate beyond the limits of England.⁴⁹ These observations may be of assistance in elucidating the complex topic of the effect which English statutes have on wagering contracts made abroad. The decided cases can be explained if three principles are borne in mind: (1) An English statute which makes wagering contracts void applies only to contracts the proper law of which is English law. (2) An English statute which makes wagering contracts unenforceable, i.e., forbids the bringing of an action on the contract, applies to all actions brought in an English court on wagering contracts, irrespective of their proper law. (3) English law governs the validity of a negotiable instrument, e.g., a cheque, payable in England but issued or negotiated by way of conditional payment of, or security for, a debt arising from a foreign wagering contract.

The Gaming Act, 1845, s. 18, makes wagering contracts null and void. It also forbids suits being brought to recover money won on wagers. It is, therefore, a statute which deals both with the validity and with the enforceability of such contracts. The validity of a foreign wagering contract is not affected by this statute, but, though valid, it cannot be sued upon in an English court.⁵⁰

The Gaming Act, 1892, s. 1, makes null and void a promise

⁴⁸ *Leroux v. Brown* (1852) 12 C.B. 801; see *Gibson v. Holland* (1865) L.R. 1 C.P. 1; *Leroux v. Brown* has often been criticised, see, e.g., Cheshire, pp. 76-78; Falconbridge, Chap. 4, § 4; Lorenzen, Chap. 11, pp. 322 ff.; Cook, pp. 225 ff.; Robertson, pp. 253-259; see also the South African case *Berman v. Winrow* [1943] T.P.D. 213, where the statute was treated as substantive law. See *post*, Chap. 32.

⁴⁹ Cp. Cohen, 20 L.Q.R. 127-130.

⁵⁰ See *per* Collins, M.R., in *Saaby v. Fulton* [1907] 1 K.B. 746 (C.A.), at p. 753.

to pay any person any money paid by him under or in respect of a contract rendered void by the Act of 1845. It also forbids suits being brought to recover money alleged to be owing under such promise.⁵¹ The Act of 1845 cannot be interpreted as rendering null and void wagering contracts governed by foreign law (though it makes them unenforceable). Hence, it would seem to follow that the Act of 1892 cannot apply to transactions with respect to such contracts, even if it applies to a similar transaction with respect to an English wagering contract. Since the Act of 1892 has nothing to do with a promise to pay money lost under a wagering contract rendered unenforceable, but not void, by the Act of 1845, one is inclined to conclude that such a promise is not only valid, but—despite the Act of 1892—also enforceable in an English court. There does not appear to be any authority on the point.

Neither of these statutes makes the transactions concerned illegal. As a result, however, of the Gaming Act, 1710, and of the Gaming Act, 1835, a 'note, bill or mortgage' given by way of security for money won by gaming or betting on games, or for money lent for gaming or betting, is deemed to have been given for an illegal consideration. If the security is governed by English law,⁵² it is therefore void, unless it has been negotiated to a holder in due course. It is void, whether the wagering contract itself is governed by foreign or by English law. Whether an English negotiable instrument is deemed to have been given for an illegal consideration, is a matter decided by English law, although the consideration may be a debt governed by foreign law. This is the true explanation of *Moulis v. Owen*.⁵³

This, however, leaves open the problem whether money lent for gaming or betting can be recovered in an English court, if the contract is governed by a foreign law under which a loan of this kind is valid. A loan made with the object of enabling the borrower to make bets, in contradistinction to a loan made with the object of enabling him to pay lost bets, is outside the statutes of 1845 and 1892.⁵⁴ There is no English statute which *expressis verbis* declares such a loan to be either illegal or void or unenforceable. As a matter of English domestic law it is still not clear whether, as a result of the Gaming Acts, 1710 and 1835, such a loan is void. The statutes only say that a security given for the

⁵¹ It is uncertain to what extent—as a matter of English domestic law—the Act renders it impossible to recover money lent for the purpose of enabling the borrower to pay lost debts. All that is certain is that money paid directly to the winner by a third person for the benefit of the loser cannot be recovered from the latter. See *Tatam v. Reeve* [1893] 1 Q.B. 44; *Carney v. Plummer* [1897] 1 Q.B. 634; *Saffery v. Mayer* [1901] 1 K.B. 11 (C.A.); *Re O'Shea* [1911] 2 K.B. 981 (C.A.). See Anson, *Contracts*, 19th ed., p. 212.

⁵² See Chap. 25, Rule 153, p. 684, *post*.

⁵³ [1907] 1 K.B. 746 (C.A.) (Collins, M.R., and Cozens-Hardy, L.J., Fletcher Moulton, L.J., dissenting).

⁵⁴ See Anson, *l.c.*, p. 213.

loan is deemed to have been given for an illegal consideration. It has been decided that by implication the statutes of 1710 and 1835 strike not only at the security, but also at the debt itself for which the security has been given, so that money lent for wagering purposes is irrecoverable if the proper law of the contract is English.⁵⁵ If, however, the proper law of the contract of loan is foreign and if under that foreign law the loan is valid, the money can be recovered in an English court. This is the result of the decision of the Court of Appeal in *Saxby v. Fulton*.⁵⁶ If the borrower has given the lender a security subject to English law, that security cannot be enforced in England, but there is nothing to prevent the lender from suing on the consideration. Even if he has received a security subject to English law, e.g., a cheque on an English bank, he can still recover on the contract of loan itself.⁵⁷ To permit the enforcement of such contracts in England is not against public policy.⁵⁸

Illustrations

1. A contract for the sale of copper ore made between an English company owning copper ore mines in Spain and a German company contains a clause by which, in the event of war between Britain and Germany, the mutual obligations under the contract are to be suspended during the hostilities and for a reasonable time afterwards. The contract is governed by German law. Even on the assumption that the contract would be valid according to German domestic law, it is void in England on the ground that the English principles with regard to trading with the enemy are a matter of public policy.⁵⁹

2. X, a Swiss citizen, domiciled in France and resident in England, enters in France into an agreement with A, a French citizen resident in France, by which X undertakes not to compete with A in England. The contract, which would be valid according to French domestic law, is void in this country, because the English principles on restraint of trade are a matter of public policy. *Quære*: Would the decision have been the same if the agreement had referred to competition in France? ⁶⁰

3. X in France enters into an agreement with A that A shall conduct an action for X in England on the terms of A being paid for his work by a share of the damages, if any, to be recovered by X in the action. Such an agreement is lawful by the law of France. The contract is opposed to the policy of English law and invalid. *Quære*: Would this also apply to a champertous contract referring to litigation abroad? ⁶¹

4. In 1857 a husband and wife, British subjects, are domiciled in France. They enter in France into an agreement for the collusive conduct of a divorce suit in England and for the abandonment by the husband of the custody of

⁵⁵ See *Carlton Hall Club v. Laurence* [1929] 2 K.B. 159, at pp. 162–164, *per* Shearman, J.

⁵⁶ [1909] 2 K.B. 208.

⁵⁷ *Société Anonyme des Grands Etablissements du Touquet Paris-Plage v. Baumgart* (1927) 96 L.J.K.B. 789.

⁵⁸ This was suggested by Cozens-Hardy, L.J., in *Moulis v. Owen* [1907] 1 K.B. 746, at p. 756; see, *per contra*, the dictum of Vaughan Williams, L.J., in *Saxby v. Fulton* [1909] 2 K.B. 208 at p. 266.

⁵⁹ *Dynamit Actien-Gesellschaft v. Rio Tinto Co., Ltd.* [1918] A.C. 291.

⁶⁰ *Rousillon v. Rousillon* (1880) 14 Ch.D. 351.

⁶¹ *Grell v. Levy* (1864) 16 C.B. (N.S.) 73. See *Waters v. Campbell* (1913) 25 W.L.R. 838; *cp. Anson, Contracts*, 19th ed., p. 248.

the children. The agreement, whether valid by the law of France or not, is opposed to the moral rules upheld by English law and invalid, and this extends to an agreement for the payment of an allowance to the wife.⁶²

5. X contracts with A, a courtesan, for the price of her prostitution. The contract is lawful in the foreign country where it is made and is to be performed. It is opposed to the moral rules upheld by English law and invalid in England.⁶³

6. H, a Frenchman domiciled and resident in France, misappropriates in France moneys of A, also a Frenchman domiciled and resident in France. W, the wife of H, by an agreement made in France and intended by the parties to be wholly performed in France, agrees to pay A by instalments out of her own money the amount so misappropriated by H, upon the terms of A abstaining from prosecuting H in France. The agreement is lawful and valid under French law. It is held to be opposed to moral rules upheld by English law and therefore invalid.⁶⁴ The decision is open to criticism on two grounds: (1) There would not have been any patent injustice in applying French law, *i.e.*, in allowing a person to escape from criminal prosecution by making compensation to the sufferer whom he has damaged. (2) This was not, as a matter of English domestic law, a case of coercion or duress.⁶⁵ *Quære*: Whether it was a contract to pervert the course of justice?⁶⁶

7. X contracts in England with A to procure the carrying on in a foreign country, where lotteries are lawful, of a lottery in aid of an English charity. A carries out his part, and sues X for the consideration promised. The contract (*semble*) is opposed to the policy of English law and invalid.

8. X, a domiciled Cypriot, marries A, a Frenchwoman, in England. Later he repudiates the marriage on the ground that the forms of the law of his domicile were not observed and A agrees to treat the marriage as null, receiving a lump sum in payment. The agreement is invalid and affords no bar to a claim in England by A for maintenance.⁶⁷

9. X, a Turkish official, agrees with A to secure him government contracts in return for a secret commission. Even if the contract is valid in Turkey, it is opposed to English views of morality and policy and therefore invalid in England.⁶⁸

10. In 1927 X, Y and Z, French citizens carrying on business in France, enter in France into a partnership agreement with the object of smuggling alcoholic liquor into the United States. *Semble*: The partnership contract would be void in England as being opposed to English public policy, even if it was valid according to French law.⁶⁹

11. X, a Frenchman, contracts with A, also a Frenchman, in France for

⁶² *Hope v. Hope* (1857) 8 De G.M. & G. 731, at p. 740, *per* Knight Bruce, L.J., and *esp.* at p. 743, *per* Turner, L.J. In this case, as in the two previous cases, part of the agreement was unlawful by the law of the country where it was to be performed. Pollock, 12th ed., p. 352; Anson, *ubi supra*.

⁶³ See *Robinson v. Bland* (1760) 2 Burr. 1077, 1084, *dictum* of Wilmot, J.

⁶⁴ *Kaufman v. Gerson* [1904] 1 K.B. 591; see also *Société des Hôtels Réunis v. Hawker* (1913) 29 T.L.R. 578; (1914) 30 T.L.R. 423 (C.A.); *cp. A. M. Luther v. James Sagor & Co.* [1921] 3 K.B. 552, at pp. 558-559, *per* Scrutton, L.J.

⁶⁵ In *Thorne v. Motor Trade Association* [1937] A.C. 797, the House of Lords took a view with which *Kaufman v. Gerson* is incompatible, but the case was never mentioned. In effect the House of Lords approved the grounds on which *Kaufman v. Gerson* had been criticised by Dicey: 5th ed., Appendix, note 3.

⁶⁶ See Anson, *Law of Contract*, 19th ed., pp. 220, 249; Cheshire and Fifoot, *Law of Contract*, pp. 198, 227.

⁶⁷ *Papadopoulos v. Papadopoulos* [1930] P. 55, at p. 67, *per* Lord Merrivale.

⁶⁸ See *Oscanyan v. Arms Co.* (1880) 108 U.S. 261.

⁶⁹ This is an adaptation of *Foster v. Driscoll* [1929] 1 K.B. 470, to a situation involving a conflict of laws.

the supply of money to raise a rebellion in Crete against the Greek government, then in amity with the British Crown. The enforcement of the contract (*semble*) is opposed to British interests of State, and the contract is invalid.⁷⁰

12. X, a Swiss citizen domiciled and resident in Switzerland, has been put under guardianship by the Swiss authorities on the ground that he is a prodigal. He enters in Switzerland into a contract with A. The contract which is to be performed in Switzerland is, according to Swiss law, void as against the prodigal. *Semble*: The contract is valid in England and enforceable in an English court, on the ground that legislation for the protection of prodigals is regarded as discriminatory and incompatible with English public policy.⁷¹

13. X, a British officer, obtains in India from A, a moneylender, a loan under a contract which, if governed by English law, would be void under the Moneylenders Act, 1900. The loan is repayable in India. The contract is valid and enforceable in England, because the statute does not apply to contracts made and intended to be performed abroad.⁷²

14. X, an American firm carrying on business in England, employs in England A, an American citizen domiciled in New York. By its terms the contract is governed by the law of the State of New York. English law decides whether X may deduct national insurance contribution from A's wages.⁷³

15. X, an Australian shipowner, issues in England bills of lading to A, the owner of a cargo, for the carriage of the cargo from England to Australia. By the terms of the bills of lading the contract of carriage is to be governed by Australian law and the shipowner is not to be liable for the consequences of unseaworthiness caused by his own negligence. Despite this clause, which is void under the Carriage of Goods by Sea Act, 1924, X is liable to A for any damage caused by his failure to exercise due diligence in making the ship seaworthy.

16. X, at Calais, orally engages A to serve him as a clerk for more than a year; there is no written memorandum of the contract. The agreement, though not in writing, is valid by French law. But under the fourth section of the Statute of Frauds no action can be brought on such a contract unless there is a memorandum thereof in writing. A cannot enforce the contract in England against X.⁷⁴

17. A, a Frenchman, wins £100 from X, a Frenchman, upon bets made in France on the result of a race taking place in France. The Gaming Act, 1845, s. 18, enacts that no suit shall be brought for recovering any sum of money alleged to be won upon a wager. A cannot enforce the wager in England against X, *i.e.*, he cannot recover the £100, even if the wager be lawful and the £100 recoverable in France.⁷⁵

18. X and A visit Monte Carlo from time to time to gamble at the tables there. A advances the sum necessary for these expeditions. X keeps an

⁷⁰ See *De Wütz v. Hendricks* (1824) 2 Bing. 314, esp. *per* Best, C.J., at pp. 315–316; compare *Thompson v. Barclay* (1828) 6 L.J. (o.s.) Ch. 63; *Taylor v. Barclay* (1828) 2 Sim. 213; *Jones v. Garcia del Rio* (1823) 1 T. & R. 293; *Macnamara v. D'Eereux* (1825) 3 L.J. (o.s.) Ch. 156; *Macgregor v. Lowe* (1824) 1 C. & P. 200.

⁷¹ See *Worms v. De Valdor* (1880) 49 L.J.Ch. 261; *Re Selot's Trusts* [1902] 1 Ch. 488.

⁷² *Shrichand & Co. v. Lacon* (1906) 22 T.L.R. 245; see *per* Lord Atkin in *Shaikh Sahied v. Sockalmnam Chettiar* [1933] A.C. 342 (P.C.) at p. 346. Compare *Nihalchand Navalchand v. McMullan* [1934] 1 K.B. 171.

⁷³ National Insurance Act, 1946, s. 1 (2) (a), s. 6 (3).

⁷⁴ Compare *Leroux v. Brown* (1852) 12 C.B. 801; see also *De la Rosa v. Prieto* (1864) 16 C.B. (n.s.) 578.

⁷⁵ Compare *Browne v. Bailey* (1908) 24 T.L.R. 644, where the suit was also barred by the fact that it was based on an English cheque given in France in respect of losses in betting.

account of the financial results of the expeditions and admits that he lost money in gambling at the tables, and is indebted to A for money advanced to X for the purpose of so gambling. There is nothing in the law of Monaco which makes gambling contracts or contracts for the advance of money for gambling illegal or void. On X's death, A claims from X's executrix the amount owing to him and succeeds.⁷⁶ It would not make any difference if A were the proprietor of the casino and lent X the money.⁷⁷

19. X in France gives A a cheque, drawn by him on an English bank partly in payment of money lent by A to X to enable him to play at baccarat at a club in France, and as to the balance to be applied by A in discharging the debts incurred by X when playing baccarat in the club. The consideration for the cheque is legal according to the law of France, but under the Gaming Act, 1835, s. 1, a security given for money knowingly advanced for playing at cards is to be deemed given for an illegal consideration. An action brought upon the cheque by A in an English court fails,⁷⁸ but if A had sued on the debt owing to him, and not on the cheque, he would have recovered.⁷⁹

2. THE FORMATION AND VALIDITY OF CONTRACTS

(1) FORMATION

RULE 138.—The formation of a contract is governed by that law which would be the proper law of the contract if the contract was validly concluded.⁸⁰

Comment

This Rule is intended to cover two types of question. It is intended, in the first place, to suggest that matters such as the need for communicating an offer, the revocability of an offer, the moment when an acceptance takes effect, etc., should be governed by the system of law which would determine the validity of the contract on the assumption that an offer had been made and accepted. In the second place, this Rule is designed to deal with what is commonly referred to as the reality of the consent, *i.e.*, the question whether the contract is void or voidable by reason of mistake, fraudulent or innocent misrepresentation, or duress.

On neither type of problem does there appear to be any authority in this country, and the Rule is therefore put forward

⁷⁶ *Sarby v. Fulton* [1909] 2 K.B. 208 (C.A.), following *Quarrier v. Colston* (1842) 1 Phillips 147, decided by Lord Lyndhurst before the Gaming Act, 1845. *King v. Kemp* (1863) 8 L.T. 255, quoted in the 5th edition of this work, was said by Collins, M.R., in *Moulis v. Owen* [1907] 1 K.B. 746, at p. 758, to be inaccurately reported and of no authority.

⁷⁷ *Société Anonyme des Grands Etablissements du Touquet Paris-Plage v. Baumgart* (1927) 96 L.J.K.B. 789.

⁷⁸ *Moulis v. Owen* [1907] 1 K.B. 746 (C.A.). Compare *Wynne v. Callender* (1826) 1 Russ. 293.

⁷⁹ *Société Anonyme des Grands Etablissements du Touquet Paris-Plage v. Baumgart* (1927) 96 L.J.K.B. 789.

⁸⁰ See Wolff, ss. 421, 422; Batiffol, ss. 380-399; Restatement, §§ 392 (c), (e), 399, 347; Lorenzen, pp. 299-300; Cook, pp. 362 ff.; Falconbridge, p. 811; Hibbert, *International Private Law*, 1927 ed., pp. 158-9; Cheshire, *International Contracts*, pp. 51-59, 63-67; Rabel, pp. 519-528.

tentatively and with some hesitation. The questions here involved have been much discussed on the Continent and in the United States.⁸¹ One school of thought in America⁸² would submit all these matters to the law of the place where the contract was made, but, as has been pointed out by other American writers, this view is open to grave objections.⁸³ Apart from the fact that the place of contracting may be purely fortuitous, there is a danger that by submitting to the *lex loci contractus* the question whether a contract has been concluded at all one may involve oneself in a vicious circle. The same objections can be raised against the views of those early Continental writers who also favoured a rigid application of the *lex loci contractus* to these matters. Their theory, however, is in addition open to the objection that they split off one particular set of problems of the law of contract from the rest which they incline to submit to the law contemplated by the parties.

With regard to questions such as mistake, misrepresentation, and duress, another doctrine which used to be much favoured, especially by French writers, inclined towards the application of the personal law of the party concerned.⁸⁴ It is hardly surprising that the French and German courts have refused to adopt this view. It is indeed difficult to see why it should be for French law to decide whether a contract made in England between two domiciled Frenchmen is to be void on the ground of mistake, if the contract was to be performed in England and was intended by the parties to be governed by English law.

The solution of the problem here suggested has the advantage that it submits the formation of the contract to the same system which governs its essential validity and its interpretation. It is hardly open to the objection of illogicality. If it is once admitted that the intention of the parties to select the proper law is relevant as such and irrespective of whether or not it has found expression in a valid contract, there is no reason why an expression of such intention should not be found, say, in an exchange of letters which, according to the law intended by the parties, did not fulfil the requirements of an offer and of an acceptance. It must, however, be admitted that the view here put forward cannot be adopted in all cases without grave injustice to at least one of the parties. Thus, as Dr. Wolff⁸⁵ points out, certain matters ought to be reserved for the law of the place of residence or business of the party concerned. This applies particularly to the question whether conduct of a specified kind, such as silence,

⁸¹ For references, see Batiffol, pp. 336, 340, 341; Wolff, p. 435.

⁸² Restatement, *ubi supra*.

⁸³ Cook and also Lorenzen, *supra*.

⁸⁴ E.g., Bartin, *Principes de Droit International Privé*, I, p. 175, II, p. 60; for Germany, see Lewald, *Das Deutsche Internationale Privatrecht*, pp. 232-241.

⁸⁵ Page 446; the illustration in the text is suggested by Dr. Wolff.

amounts to the acceptance of an offer. If, *e.g.*, a person in England receives an offer to contract from Denmark containing a clause by which the contract is to be governed by Danish law, it should not be said that the Englishman's silence amounts to an acceptance, merely on the ground that, in circumstances of this kind, Danish law would have regarded the offeree's silence as equivalent to an acceptance. Moreover, where the contract is alleged to be void or voidable by reason of mistake, misrepresentation, or duress, the party seeking to avoid the contract must be able to rely on the law of his own place of residence or business, if he alleges that the defect of his consent comprises the choice of a foreign law.

The courts have, on two occasions, treated the analogous problem of the need for consideration in a way which suggests that if called upon to do so they would solve the problems of offer and acceptance and of the reality of consent in the manner here proposed. *Scott v. Pilkington*⁸⁶ and, more clearly, the decision of the Court of Appeal in *Re Bonacina*,⁸⁷ appear to show that it is for the proper law of the contract to decide whether consideration is required for its validity. The need for consideration is generally regarded as a matter belonging to the creation of the contractual obligations rather than to what has been termed their essential validity. Both the history of the doctrine of consideration⁸⁸ and its treatment in the leading textbooks⁸⁹ suggest that consideration should be classified as a matter affecting the creation of the contract. It may, therefore, be permissible to conclude that a rule adopted by the courts in connection with one element of the creation of the obligation may also find their favour in other matters of a similar kind.

In *Cood v. Cood*⁹⁰ the court acted in fact on the principle which has been submitted here, although the point was never argued.

Illustrations

1. X, an Italian subject trading in England, becomes bankrupt in England and obtains his discharge in 1901. X at the time of the discharge is indebted to A, also an Italian subject. X's debt to A was not revealed in the bankruptcy proceedings, which were unknown to A. In 1906, after the discharge, X signs in Italy a private document (*privata scrittura*) whereby X undertakes to pay the debt to A. In 1908 X dies. A claims to prove against the estate. The promise under the private document to pay the debt is under English law void for want of consideration. Under Italian law it is valid. Italian

⁸⁶ (1862) 2 B. & S. 11.

⁸⁷ [1912] 2 Ch. 394. See also *Allen v. Hay* (1922) 69 D.L.R. 193; *Joslyn v. Baxter*, 1 L.C.L.J. 117.

⁸⁸ Holdsworth, *History of English Law*, Vol. 8, pp. 1-48.

⁸⁹ See, *e.g.*, Anson, 19th ed., p. 16; Pollock, 12th ed., Chap. 4; Cheshire and Fifoot, pp. 41 ff., where consideration appears as one of the elements of the formation of the contract.

⁹⁰ (1868) 83 L.J.Ch. 278.

law is held to be the proper law of the contract, and A is entitled to prove for the debt.⁹¹

2. X, an Englishman carrying on business in England, gives in New York to N, of New York, a letter of credit by which X authorises N to draw bills of exchange upon X and promises to honour these bills. This letter is shown to A who, on the face thereof, purchases a bill drawn by N on X. X does not accept the bill. According to English law X would not be liable to A on the ground that no consideration moved from A, but he is liable according to the law of New York. The law of New York as the proper law of the contract determines the need for consideration, and X is liable to A.⁹²

3. X and A are Scotsmen domiciled in Scotland. They are sailing on Loch Katrine. The boat capsizes, and A saves X's life at the risk of his own. X soon afterwards, and without any other consideration than that of gratitude, promises A in writing to pay him £1,000. X has property both in England and in Scotland. He goes to England and refuses to pay the £1,000. If the contract is governed by Scottish law it is valid, and X is liable to pay the £1,000. If it is governed by English law, there is no contract and X is not liable to pay the £1,000. *Semble*: The law of Scotland is the proper law of the contract and X is in England, as in Scotland, liable to an action for £1,000.

4. X, a business man carrying on business in Germany, writes a letter to A, a business man carrying on business in England, offering him a contract, the offer to remain open for one week. After three days he sends a telegram purporting to revoke the offer. The revocation would be effective according to English law and ineffective according to German law.⁹³ *Semble*: The offer was validly revoked if it contained a term according to which the contract was to be governed by English law or if an intention to choose English law as the proper law of the contract can be implied from the conduct of, or imputed to, the parties.

5. X, a business man in Belgium, makes a written offer to contract to A, a business man in England, which A purports to accept by posting a letter in England. The letter gets lost in the post. According to English, but not according to Belgian law,⁹⁴ a contract would be concluded in these circumstances. *Semble*: If the offer contained a term by which the contract was to be governed by Belgian law, no contract has been concluded.

6. X, who is resident in England, and A, who is resident in France, enter in France into a contract which, according to its terms, is to be governed by English law. A maintains that he can avoid the contract by reason of innocent misrepresentation. English, and not French, law (*semble*) determines whether he is entitled to do so.

(2) CAPACITY

RULE 139.—A person's capacity to enter into a contract is governed by the law of that country with which the contract is most closely connected.⁹⁵

⁹¹ *Re Bonacina* [1912] 2 Ch. 394 (C. A.).

⁹² *Scott v. Pulkington* (1862) 2 B. & S. 11.

⁹³ Civil Code, § 145.

⁹⁴ See Poulet, *Manuel de Droit International Privé Belge*, 2nd ed., 1928, s. 310, p. 388.

⁹⁵ Cheshire, pp. 257-266, 297-8; Cheshire, *International Contracts*, pp. 45-51; Wolff, ss. 263-272, p. 286 ff.; Westlake, Chap. 3, § 2, pp. 40-42; Foote, pp. 100-102, 376 f.; Falconbridge, Chap. 4, § 8, pp. 79-80, Chap. 81, § 2, pp. 545 ff.; Johnson, Vol. 3, pp. 408-411; Batiffol, ss. 363-379, pp. 325-335; Barbey, pp. 33-38, 195-198, 211-221, 247-277, 291-298; Story, ss. 64, 81, 82, 102, 103; Restatement, § 333; Beale, pp. 1176-1181; Goodrich, § 105; Cook, Chap. 16; Nussbaum, § 18 III, pp. 180 ff.; Stumberg, pp. 215 ff.; Savigny, §§ 362-365; Rabel, Vol. 1, Chap. 6.

Comment

There is an almost complete lack of authority on the question which law determines the capacity of a person to bind himself by a contractual promise. The authoritative dicta in favour of the *lex domicilii* are prima facie strong, and purport to lay down a broad rule in reference to contractual capacity.⁹⁶ In fact, however, all these dicta occur in cases concerning the capacity to marry or to conclude a marriage settlement. A person's capacity to contract a marriage certainly depends on the law of his or her domicile at the time of the celebration of the marriage.⁹⁷ But there is every ground for distinguishing as a matter of common sense between the ordinary contracts of everyday life and the formal contract of marriage and also the promise of marriage. The capacity of a person to promise marriage should, it is submitted, be governed by the law of his or her domicile, no matter where the promise is made. If a man domiciled in England makes a promise of marriage in France (no matter whether it is made to an Englishwoman or a Frenchwoman, and no matter whether the parties intend to set up home in England or in France), his capacity to promise marriage should certainly be governed by English law. It does not follow, however, that if the same man in France buys a ring for his fiancée, the capacity to make the contract with the jeweller should also be governed by English law. It is, in fact, in accordance with such authority as there is and with principle that it should be governed by French law.

The question which law should govern a person's capacity to contract has been much debated, both in this country and abroad. It used to be formulated in terms of an alternative between the *lex domicilii* and the *lex loci contractus*. It was thus put by Lord Macnaghten in 1888: 'It has been doubted whether the personal competency or incompetency of an individual to contract depends on the law of the place where the contract is made or on the law of the place where the contracting party is domiciled. Perhaps in this country the question is not finally settled, though the preponderance of opinion here as well as abroad, seems to be in favour of the law of the domicile. It may be that all cases are not to be governed by one and the same rule'.⁹⁸ Since these words were

⁹⁶ *Sottomayor v. De Barros* (No. 1) (1877) 3 P. D. 1, 5 (C.A.) *per curiam*, *Re Cooke's Trusts* (1887) 56 L.J.Ch. 637, 639, *per Stirling, J.*; *Udny v. Udny* (1869) L.R. 1 Sc.App. 441, 457, *per Lord Westbury*; *Cooper v. Cooper* (1888) 13 App.Cas. 88, 99, 100, *per Halsbury, C.*; contrast the criticism in *Sottomayor v. De Barros* (No. 2) (1879) 5 P.D. 94, 100, 101, of Sir J. Hannen, on *Sottomayor v. De Barros* (No. 1) (1877) 3 P.D. 1 (C.A.); *Ogden v. Ogden* [1908] P. 46, 78 (C.A.); *Baindail v. Baindail* [1946] P. 122, 128, *per Lord Greene, M.R.* In *Republica de Guatemala v. Nunez* [1927] 1 K.B. 669 (C.A.), a case concerning assignment of intangible movables, Scrutton and Lawrence, L.J.J., declined to decide between the *lex domicilii* and the *lex actus*, see at pp. 689, 690 and 700, 701.

⁹⁷ See Rule 168 (1), *post*, p. 758.

⁹⁸ *Cooper v. Cooper* (1888) 13 App.Cas. 88, 108. Cp. Lord Watson, at p. 105.

spoken, the pendulum of learned opinion in this country has swung towards the *lex loci contractus*.⁹⁹ It is true that the language judicially used in *Sottomayor v. De Barros* (No. 1),¹ a case concerning the validity of a marriage, implies that a person's *lex domicilii* governs his capacity to enter into any contract whatever. On the other hand, strong arguments have been advanced for holding that capacity to enter into an ordinary mercantile contract, e.g., for a loan or for the purchase or sale of goods, is governed, not by the *lex domicilii* of the contracting party, but by the law of the place where the contract is made (*lex loci contractus*). This has been the prevalent opinion in the United States, ever since the time of Story,² although there is at least one decision of the Supreme Court in favour of the *lex domicilii*.³ On the Continent the personal law of the contracting party is generally considered as the system governing his capacity to contract, but exceptions in favour of the *lex loci contractus* had to be introduced, either, as in France,⁴ by the courts, or, as in Germany,⁵ by legislation.

The point was raised, but not decided, in one English case. In *Male v. Roberts*,⁶ Lord Eldon said, in regard to a contract made in Scotland by an infant apparently domiciled in England, that the effect of infancy, as a defence to an action on the contract, depended on the law of Scotland, because 'the contract must be . . . governed by the laws of that country where the contract arises'. The case was, however, decided against the plaintiff on the ground that he had failed to prove the law of Scotland. The report is unsatisfactory, and the authority of the decision is further

⁹⁹ 'In the case of infants where different countries have different laws, it certainly is the view of high authority here that capacity to enter in England into a commercial contract is determined not by the law of the domicile but by the *lex loci*', per Lord Greene, M.R., in *Bamdal v. Bamdal* [1946] P. 122, 128. See, e.g., Westlake, p. 48, and see for a full analysis of the development in this country, Barbey, pp 76 ff., and, for a comparative analysis, Rabel, Vol. 1, pp 182 ff.

¹ (1877) 3 P.D. (C.A.) 1, 5 *per curiam*.

² Sections 82, 103; see the references to the Restatement, to Beale and to Goodrich, in note 95, *supra*; cp., however, the criticism made by Cook, Chap. 16; most of the cases which arise in the American courts are cases of interstate, not international conflicts, and with particular regard to the importance of internal migration in the United States, it is often possible to justify the application of the *lex loci contractus* or the *lex contractus* in circumstances which would not permit so radical an elimination of the personal law if a similar case arose in Europe.

³ *Union Trust Co. v. Grosman* (1918) 245 U.S. 412, a judgment written by Holmes, J.

⁴ *De Lizardi v. Chaise*, Sirey 61.1.305 (1861, Cour de Cassation, Chambre des Requêtes), and other cases, see Batiffol, pp. 330 ff. This operates only *in favorem contractus* and only if the other party acted '*sans légèreté, sans imprudence, et avec bonne foi*'.

⁵ Introductory Law to the Civil Code, Art. 7, § 3. This operates only *in favorem contractus* and only in favour of German law. It does not apply to transactions concerning family law or foreign land. It is a 'crystallised' rule of public policy. Swiss and Italian law are similar, see Schnitzer, *Handbuch des Internationalen Privatrechts*, Vol. 1, p. 246; Rabel, p. 187.

⁶ (1799) 3 Esp. 163. Cp. *Stephens v. McFarland* (1845) 8 Ir. Eq. Rep. 444; *Re d'Orleans* (1859) 1 Sw. & Tr. 253.

weakened by the fact that, according to modern ideas, this was not a case of an action on a contract at all, but a quasi-contractual claim.

In modern times courts in Scotland,⁷ the Transvaal⁸ and Saskatchewan⁹ have held that the capacity to contract is governed by the law of the place where the contract was made.

To allow the validity of an ordinary contract made in England by a person domiciled abroad to depend upon the law of the domicile would often lead to inconvenience and injustice. It would certainly be strange if a man of the age of twenty-four, who happened to be domiciled in a country where the age of majority is fixed at twenty-five, could escape liability for the price of goods, not being necessities, bought by him from a tradesman in London by pleading that he was a minor under the law of his foreign domicile and not liable for the price of the goods. It would be equally strange if an English court allowed a person domiciled in this country to escape liability on a contract made in similar circumstances abroad merely by reason of the fact that, according to English law, he had no capacity to enter into the contract. The argument in favour of the *lex loci contractus* cannot be put in terms of English public policy.

Nor should it, it is submitted, be put as an argument *in favorem negotii*. It is not desirable that a young Indian of age eighteen, though a major in Indian law, shall be denied the advantage of the English rules for the protection of infants, if he buys goods in England. English law should govern the capacity to enter into such a contract, wherever the contracting parties are domiciled, and irrespective of the question whether a person would have had capacity according to his personal law but is a minor according to English law, or whether he is an infant according to the law of his domicile, but capable of contracting by the rules of English law.¹⁰

In recent years it has been increasingly recognised that in this matter, as in all matters concerning mercantile contracts, a rigid application of the *lex loci contractus* is open to grave objections, because the place where the contract is made is liable to be a matter of pure chance, especially if the contract is made by

⁷ *McFeetridge v. Stewarts and Lloyds, Ltd.* [1913] S.C. 773.

⁸ *Kent v. Salmon* [1919] T.F.D. 637. See also *Hulscher v. Voorschootkas voor Zuid Afrika* [1908] T.S. 542, where incapacity existed both by the *lex domicilii* and the *lex loci contractus*, and the *lex loci solutionis* could not supply the defect.

⁹ *Bondholders Securities Corp. v. Manville* [1933] 4 D.L.R. 699. The law of Quebec insists rigidly on the *lex domicilii*: *Jones v. Dickinson* (1895) Q.R. 7 S.C. 313; Johnson, Vol. 3, p. 408. The Indian Contract Act, s. 11, adopts domicile: *Ka'shiba v. Narshiv* (1894) I.L.R. 19 Bom. 697; *Rohilkhand and Kumaon Bank v. Row* (1884) I.L.R. 6 All. 468.

¹⁰ *Aliter Wolff*, s. 264; Cheshire, *International Contracts*, pp. 48-49. It is also submitted that, contrary to the view taken by the French courts, the state of mind of the other party should be regarded as irrelevant. On this point Dr. Wolff agrees.

correspondence or over the telephone. English law should govern the capacity to enter into a contract for the purchase of goods in England, even if the contract was made by correspondence and the letter of acceptance was posted from a foreign country in which the customer happened to spend his holiday.¹¹ On the other hand, however, the proper law doctrine, as applied to other aspects of the law of contract, cannot be extended without modification to the question of capacity. This would lead to the result that an infant could confer upon himself capacity to contract by agreeing to the selection of a system of law which gives him such capacity. For this reason it is submitted that the proper law doctrine should be applied in this case in a different form and so as to eliminate any possibility of a person's obtaining capacity merely through an act of his own volition. As Lord Macnaghten said in *Cooper v. Cooper*,¹² 'It is difficult to suppose that Mrs. Cooper could confer capacity on herself by contemplating a different country as the place where the contract was to be fulfilled'. The criterion should, in this case, be the connection of the contract with a given system of law. This would provide for the case of a contract entered into in one country where the person contracting had not capacity, but to be carried out in another where he had such capacity. It would make it possible to apply the *lex situs* which is normally the proper law in such cases to transactions concerning land,¹³ and to resort to the *lex loci contractus* whenever, as is usual with mercantile contracts made *inter præsentes*, the place of contracting has a real connection with the contract. It is believed that this tentative suggestion is in keeping with the spirit of the dicta of Lord Eldon and of Lord Macnaghten, quoted above.¹⁴

Illustrations

1. X, an infant according to the law of England where he is domiciled, is arrested in a foreign country for a debt there incurred. A pays for him. A brings an action against X in England for the money so paid. *Semble*, X's capacity to incur the debt to A is governed by the law of the foreign country.¹⁵

¹¹ For criticism of the rigid *lex loci contractus* theory, see Cheshire and Cook, *supra*. The case for the *lex domicilii* would be stronger if the contract was made by correspondence from the country of the infant's domicile, but, even in that case, it is submitted, the *lex domicilii* should only apply if there are additional facts to connect the contract with that country.

¹² (1888) 13 App.Cas. 88, 99.

¹³ See below, Chap. 25, Rule 144, p. 657.

¹⁴ In practice the doctrine of *renvoi* may influence the decision, e.g., if the foreign *lex contractus* refers back to the law of the nationality.

¹⁵ Compare *Male v. Roberts* (1799) 3 Esp. 163, where the domicile of the infant is not stated, but it was, apparently, English. S. 1 of the Infants Relief Act, 1874, cannot be assumed to have extra-territorial operation and does not deal with procedure. It appears to apply only to contracts governed by English law. The section expressly saves the validity of any contract into which an infant might by the rules of common law or equity enter. S. 2, however, appears to be procedural.

2. X, an infant according to the law of England where he is domiciled, enters into a contract to serve A, who carries on business in Scotland, for six months. X's capacity to enter into the contract is (*semble*) governed by the law of Scotland, whether the contract was made in England or in Scotland. *Quare*, whether the result would be the same, if X had undertaken to serve A as a commercial traveller in England.

3. A, an Irishman domiciled in Eire, is an infant under twenty-one. He takes service as a labourer in Scotland with X. He is injured by an accident in the course of his employment. He agrees, without consulting anyone, to accept compensation under the Workmen's Compensation Acts. After compensation has been paid, A brings an action in Scotland claiming damages at common law, and alleges that, as an infant, he is not bound by the agreement. A's capacity must be determined not by Irish, but by Scottish law.¹⁶

4. X, a man of twenty-one, is domiciled in a country where minority lasts till the age of twenty-two. While in England he incurs a debt to a tradesman carrying on business here, being incapable of incurring it under the law of his domicile. His capacity to contract, and therefore his liability for the debt, is (*semble*) determined by English law, even if the tradesman knows that X is domiciled abroad and that according to the law of his domicile he lacks contractual capacity.

5. X, a man of eighteen, domiciled in a country in which majority is reached at that age, accepts in England a bill of exchange. X's capacity to accept the bill (*semble*) is governed by the law of England, and he is not liable on the bill.¹⁷

6. H and W are resident and domiciled in Saskatchewan. They enter in Florida into an agreement with a corporation incorporated in Florida by which they purchase land in Florida. They sign in Florida promissory notes for the purchase price. W's capacity to make the notes is governed by the law of Florida and not by the law of Saskatchewan, and she is not liable to subsequent holders of the notes.¹⁸

7. W, a married woman domiciled in England, agrees to buy goods in Transvaal. She has capacity to contract according to the law of Transvaal, but no capacity according to English law. The contract is valid.¹⁹

(3) FORMALITIES

RULE 140.—The formal validity of a contract is governed by the law of the country where the contract is made (*lex loci contractus*) or by the proper law of the contract.

(1) Any contract is formally valid which is made in accordance with any form recognised by the law of the country where the contract is made (which form is, in this Digest, called the local form), whether or not it is made in accordance with the form prescribed by the proper law of the contract.

¹⁶ *McFeetridge v. Stewarts and Lloyds, Ltd.* [1913] S.C. 773.

¹⁷ Suggested by *Re Soltykoff* [1891] 1 Q.B. 413 (C.A.). The case is very briefly reported, and the infant's domicile is not stated. But it seems to have been assumed that his liability in any case depended on the law of England. The Bills of Exchange Act is silent on the point. For the Geneva Conventions of 1930 and 1931 on conflict of laws with reference to negotiable instruments, see *Gutteridge*, 12 B.Y.B.I.L. (1981) 22-25, and *post*, Rule 152.

¹⁸ *Bondholders Securities Corp. v. Manville* [1938] 4 D.L.R. 699.

¹⁹ *Kent v. Salmon* [1919] T.P.D. 687.

(2) Any contract is formally valid which is made in accordance with any form required, or allowed, by the proper law of the contract, even though not made in accordance with the local form.²⁰

Comment

The one principle clearly recognised by English law with regard to the law regulating the form of a contract, or the formalities in accordance with which a contract is made, is that the form depends upon the law of the country where the contract is made (*lex loci contractus*).²¹ 'The formalities required for a contract by the law of the place where it was made, the *lex loci contractus celebrati*, are sufficient for its external validity in England.'²²

This principle, generally referred to as the rule *locus regit actum*, has been universally recognised since the Middle Ages. It can be justified not only on grounds of tradition and authority, but also by reason of its obvious justice and convenience. In making their contract, the parties must be able to rely on such legal advice as is available in the place where they are and such advice (and assistance) is not necessarily obtainable with regard to any formalities except those of the local law.²³

Observance of the local form is thus sufficient to make the contract valid. Is it also necessary? Does the principle *locus regit actum* apply as a permission to use the local form, or as an imperative? Does the form depend on the *lex loci contractus* not only affirmatively, but also negatively? Does it mean that the parties *may*, or does it mean that they *must* observe the local form?

There is no clear authority on this point.²⁴ With regard to marriage, English law clearly applies the rule *locus regit actum* imperatively: no marriage is valid, unless it has been celebrated in accordance with the local form.²⁵ On the other hand, it is

²⁰ Cheshire, Chap. 9, No. 1, pp. 301-307; Cheshire, *International Contracts*, pp. 60-63; Wolff, ss. 426-431, pp. 453-458; Westlake, Chap. 12, §§ 207-210, pp. 294-297; Foote, pp. 388-397; Falconbridge, p. 275; Johnson, Vol. 3, p. 412; Batiffol, ss. 422-435, pp. 362-372; Barbey, pp. 85-109, 198-199, 222-229, 278-281, 299-303; Savigny, ss. 381-382; Story, ss. 260-262a; Restatement, § 334; Goodrich, s. 106; Lorenzen, Chap. 9, pp. 228-260; Cook, pp. 404 ff.; Nussbaum, § 15, pp. 148-156; Rabel, Chap. 31.

²¹ For Canada, see *Scandinavian American National Bank of Minneapolis v. Kneeland* (1918) 24 W.L.R. 587.

²² Westlake, s. 207.

²³ This argument was already developed by Savigny, see s. 381. The reasons why it applies to form but not to substance have been convincingly stated by Batiffol, s. 425, p. 364.

²⁴ The Scottish case, *Valery v. Scott* (1876) 3 R. 965, and the Indian case *In the Goods of McAdam* (1895) I.L.R. 28 Calc. 187, are authorities in favour of the permissive interpretation of the principle.

²⁵ *Scrimshire v. Scrimshire* (1752) 2 Hag.Con. 395; *Berthiaume v. Dastous* [1930] A.C. 79 (P.C.). See Rules 168, 169, *post*, pp. 756, 779.

equally clear from the decision in *Van Grutten v. Digby*²⁶ that a marriage settlement is valid if its form is in accordance with the provisions of its proper law, although, as was held in *Guépratte v. Young*,²⁷ compliance with the local form is sufficient. It is submitted that, if the question ever came up for decision in an English court in connection with a mercantile contract, the court would be more likely to follow the analogy of the authorities on marriage settlements than that supplied by the cases on marriage.^{27a}

This would also be in accordance with the rationale of the principle, which is designed to protect the parties, not to compel them to observe formalities of a law which may have no intrinsic connection with the subject-matter of the transaction and may not be intended by the parties to govern the substance of the contract. The splitting off of a particular aspect of the contract from the remainder should, if possible, be avoided. Why should two Englishmen be compelled to resort to the notarial form if they happen to be in Switzerland when entering into a contract for the sale of English land?²⁸ Why, on the other hand, should two Swiss citizens resident in Switzerland be compelled to comply with English formalities when entering in England into a similar contract with regard to land in Switzerland?

In connection with mercantile contracts the place of contracting is often uncertain, and, moreover, fortuitous. If one applies the maxim *locus regit actum* to such transactions in its imperative sense, one is apt to create doubts as to the validity of the contract arising from the uncertainty of the *locus contractus*, i.e., of the place where the contract was completed. If X, living in England, enters into a contract with A, living in Germany, by letters sent through the post or by a conversation over the telephone, there would be the gravest doubt whether the contract was made in England or in Germany.²⁹ It could easily happen that according to German law the contract was made in England, and according to English law it was made in Germany, if, e.g., a letter of acceptance was posted in Germany and received in England.³⁰ It would hardly be in the best interests of international trade to make the formal validity of a contract depend on the solution of subtle problems arising from a situation of this kind. If, on the other hand, the maxim *locus regit actum* is applied in its permissive sense, these intricacies can be disregarded and the contract can

²⁶ (1862) 31 Beav. 561, esp. *per* Romilly, M.R., at p. 567; see also *Re Bankes* [1902] 2 Ch. 333; *Viditz v. O'Hagan* [1899] 2 Ch. 569 (reversed on another point [1900] 2 Ch. 87).

²⁷ (1851) 4 De G. & Sm. 217; see Rule 170, Sub-Rule 1, *post*, p. 789.

^{27a} Section 34 of the Companies Act, 1948, appears to assume that a company incorporated in the United Kingdom may conclude a contract abroad in the form prescribed by the law of the United Kingdom.

²⁸ Law of Obligations, Art. 216.

²⁹ See Cook, Chap. 14.

³⁰ *Henthorn v. Fraser* [1892] 2 Ch. 27, compared with §§ 180, 181 German Civil Code.

be treated as formally valid if it complies with the formalities prescribed by the law intended or deemed to have been intended to govern the substance of the contract. In a situation like the one envisaged above this will often be the *lex loci solutionis*.³¹

It is true that there are a number of dicta contained in decisions rendered between 1797 and 1850 to the effect that a 'contract must be available by the law of the place where it was entered into, or it is void all the world over'.³² The most important of these cases has nothing to do with the general question of the formal validity of contracts, but is concerned with the effect of the indorsement of a negotiable instrument.³³ Others concern the question whether an unstamped document can be received in evidence if the stamp was required by the *lex loci actus*, a question answered in the affirmative in the most recent of these cases, but hardly germane to the problem here under discussion.³⁴ It has never been decided that a contract formally valid under its proper law must be held void by reason of non-observance of the local form. The verbal adherence of the courts, during the first half of the nineteenth century, to the imperative sense of the maxim *locus regit actum* was due partly to the fact that the earliest English decisions on the subject had reference to marriage, and partly to the habit of speaking about the *lex loci contractus* as if it were always the proper law of the contract.³⁵

It is easy to exaggerate the practical importance of the problem. Nowadays formal solemnities are not usually required for commercial transactions, and where they are required, as with the written form of certain insurance policies, of guarantees, and of bills of exchange, there is not, as a rule, any major divergence between the important legal systems of the world. This may

³¹ The majority of modern authors are in favour of the view here put forward, among them Cheshire, Wolff, Falconbridge, Johnson, Batiffol, Lorenzen, Cook, and Nussbaum. The Restatement adheres to the imperative theory. The case for the permissive theory was stated by Savigny. As Lorenzen, p. 289, note 147, points out, it is impossible to say that Story approved of the imperative theory. All that he says about the *lex loci contractus* is qualified by his statement in s. 280, see above, p. 597. The decisions in *Scudder v. Union National Bank of Chicago* (1875) 91 U.S. 406, and in *Hall v. Cordell* (1891) 142 U.S. 116, seem to show that the United States Supreme Court has adopted the maxim *locus regit actum* in its permissive sense.

³² *Per* Lord Ellenborough in *Clegg v. Levy* (1812) 3 Camp. 166; the other cases are: *Alves v. Hodgson* (1797) 7 T.R. 241; *Trimbey v. Vignier* (1834) 1 Bing.N.C. 151; *Bristow v. Sequeville* (1850) 5 Ex. 275. For a discussion of these cases, see Cheshire, pp. 303 ff.; Wolff, s. 427. *Benham v. Mornington* (1846) 3 C.B. 133, quoted in this connection in previous editions of this work, was a decision on the method of pleading foreign law under the system of special pleading; *Kent v. Burgess* (1840) 11 Sim. 361, also mentioned in earlier editions, was a marriage case. See, further, the Irish case *Re Estate of M' Loughlin* (1878) 1 L.R.Ir. (Ch.) 421, the Quebec case *Furniss v. Larocque*, M.L.R. 2 S.C. 205, and the dictum of Hart, L.C., in *Richards v. Gould* (1827) 1 Molloy 22, 24.

³³ *Trimbey v. Vignier* (1834) 1 Bing.N.C. 151.

³⁴ *Bristow v. Sequeville* (1850) 5 Ex. 275.

³⁵ See *ante*, p. 596.

explain the absence of relevant decisions in England and their paucity abroad.³⁶

The questions whether observance of the local form is sufficient and whether it is necessary, are chiefly of importance in connection with contracts for the transfer of property. The formal validity of a contract with regard to land depends upon the proper law of the contract, which is in general, though not necessarily, the law of the country where the land is situate (*lex situs*). It is, however, pretty certain that a contract, as contrasted with the conveyance, with regard to immovables, may be valid even if it does not comply with the forms required by the proper law, provided it complies with the local form.³⁷

A contract made in one country in respect of a movable situate in another country, *e.g.*, an agreement to transfer registered shares in a foreign company, to assign a foreign patent, or to sell goods situated abroad, is probably valid if it complies either with the local form or with the form prescribed by the proper law, which, in some of these cases, may be that of the *situs*. The consideration of this subject is complicated by the fact that a contract with regard to a movable (*e.g.*, an agreement to sell a patent) is often outwardly connected with the assignment of the movable itself (*e.g.*, the transfer of the patent) which may have to comply with the special formalities required by the *lex situs*, such as registration or notarial authentication. The two transactions, the contract and the transfer are, however, distinguishable, though they may appear in one document. It may well be that, *e.g.*, a purported transfer in England of shares in a foreign company is void as a transfer for want of compliance with the formalities prescribed by the foreign law, but valid as an agreement to transfer if it complies with the English form. This is clearly the case where the subject-matter of the transaction is foreign land,³⁸ and the increasing tendency of English decisions is to diminish the distinction between the rules governing rights over immovables and the rules governing rights over movables when situate in a foreign country.³⁹

The question of formalities in the conflict of laws has further, in the past, been of some practical importance in connection with bills of exchange and promissory notes. These have now been for

³⁶ Note, that the two decisions of the United States Supreme Court, quoted in note 31 above, were rendered in connection with the now obsolete phenomenon of the oral acceptance of a bill of exchange.

³⁷ See below, Chap. 25, Rule 144. The conveyance itself must, of course, comply with the formalities prescribed by the *lex situs*. The maxim *locus regit actum* does not apply in any sense to the conveyance of land: *Adams v. Clutterbuck* (1888) 10 Q.B.D. 408; *Bank of Africa v. Cohen* [1909] 2 Ch. 129 (C.A.).

³⁸ See *post*, p. 657.

³⁹ *Cp. The Byzantion* (1922) 38 T.L.R. 744 (agreement to mortgage ship, invalid under the law of the flag, valid under the proper law). See also p. 560 *ante*, and *Carver, Carriage by Sea*, s. 213.

many years subject to statutory regulation. The proper law of a contract embodied in a negotiable instrument is frequently the *lex loci contractus*, and it is difficult, if not impossible, to draw any general conclusions with regard to the law of contracts from the fact that, in the law of negotiable instruments, *locus regit actum* is usually a compulsory principle.⁴⁰ Even a bill of exchange may, in certain cases, be treated as valid, though it does not comply with the requirements as to form of the law of the country where the contract was made.⁴¹

The English courts have a strong tendency to characterise as matters of procedure, especially as questions of evidence, many issues which abroad are characterised as matters of form. The Statute of Frauds is perhaps the most notable example.⁴² In other cases it is hard to determine whether a given formality, e.g., the necessity for a stamp, belongs to the form of a transaction or to the evidence. In the latter case it is a matter of procedure and as such governed by the *lex fori*. In any event, the extended interpretation given by the English courts to the term 'procedural' has further diminished the importance, from the point of view of the English conflict of laws, of the rule *locus regit actum* in the law of contract.

Illustrations

1. A Frenchman domiciled in France marries an Englishwoman resident in France, but domiciled in England. The marriage takes place in France. Before the marriage a settlement is executed in France of movable property of the woman in England. The settlement is made according to the form and in the manner required by the law of England, but not in conformity with the formalities required by the law of France. If governed by the law of France the settlement would be void; if governed by the law of England it would be valid. The settlement is valid.⁴³

2. X, a Frenchman resident in France, promises by deed made in England to make a gift to a French charity. The promise is valid although it does not comply with the notarial form required by Art. 931 of the French Civil Code.

3. X, a British subject resident in England, promises by a deed made in France to make a gift to an English charity. *Semble*: The promise is valid although it does not comply with the notarial form required by French law.

4. X, a Frenchman resident in France, promises by a notarial contract made in England to make a gift to a French charity. *Semble*: The promise is valid, because it complies, as to form, with the proper law of the contract, and consideration is not required by the proper law.

5. X, a British subject resident in England, promises by a notarial act made in France to make a gift to an English charity. *Semble*: There is no valid promise in the absence of consideration. Consideration cannot be classified as a matter of form.⁴⁴

⁴⁰ Bills of Exchange Act, 1882, s. 72 (1).

⁴¹ *Ibid.*, proviso (b).

⁴² *Leroux v. Brown* (1852) 12 C.B. 801; see *ante*, p. 617.

⁴³ *Van Grutten v. Digby* (1862) 81 Beav. 561.

⁴⁴ See *ante*, Rule 138, p. 616; it is not a question of 'form' whether, e.g., consideration must move from the promisee.

(4) MATERIAL OR ESSENTIAL VALIDITY

RULE 141.—The material or essential validity of a contract is (subject to the Exception hereinafter mentioned and to the very wide effect of Rule 137) governed by the proper law of the contract.⁴⁵

Comment

A contract, though made by persons competent to contract,⁴⁶ and though formally valid,⁴⁷ may nevertheless, on account of something in the nature of the contract itself, be wholly or partially invalid. It then lacks 'material' or 'essential' validity.

Thus, under the law of England a contract to commit a criminal offence, a contract partaking of champerty, a contract in restraint of trade, a wagering contract, a contract for the purchase of foreign exchange without the necessary permission, and a contract to pay the wages of a manual worker otherwise than in the current coin of the realm, are all materially or essentially invalid. Such invalidity may involve illegality, but some contracts, *e.g.*, wagering contracts, are simply void.

The laws of different countries differ as to the contracts which they render invalid. Thus, a contract by a solicitor to conduct an action on the terms of sharing the damages (if any) which are recovered, though illegal under the law of England, is valid under the law of some foreign countries, while a contract for the sale of a medical practice was, until recently, valid under the law of England, but illegal in many countries abroad.

Whenever a contract contains any foreign element, *e.g.*, is made in England, and is to be performed in France or *vice versa* and

⁴⁵ *Robinson v Bland* (1760) 2 Burr. 1077; *Heriz v. Riera* (1840) 11 Sim. 318; *Santos v. Illidge* (1860) 8 C.B. (n.s.) 861 (Exch.Ch.); *Lloyd v. Guibert* (1865) L.R. 1 Q.B. 115; *The Gaetano* (1882) 7 P.D. 137 (C.A.); *Chartered Bank of India v. Netherlands Co.* (1882) 9 Q.B.D. 118; (1883) 10 Q.B.D. 521 (C.A.); *Jacobs v. Crédit Lyonnais* (1884) 12 Q.B.D. 589 (C.A.); *Re Missouri Steamship Co.* (1889) 42 Ch.D. 321 (C.A.); *The August* [1891] P. 328; *Hamlyn v. Tallisier Distillery* [1894] A.C. 202; *Spurrier v. LaClosche* [1902] A.C. 446 (P.C.); *Royal Exchange Assurance Corporation v. Vega* [1902] 2 K.B. 384 (C.A.); *Shrichand v. Lacon* (1906) 22 T.L.R. 245; *British South Africa Co. v. De Beers Consolidated Mines, Ltd.* [1910] 2 Ch. 502; [1912] A.C. 52; *Trinidad Shipping Co. v. Alston* [1920] A.C. 888 (P.C.); *Jones v. Oceanic Steamship Co.* [1924] 2 K.B. 730; *Norske Atlas Insurance Co., Ltd. v. London General Insurance Co., Ltd.* (1927) 28 Ll.L.R. 104; *The Torni* [1932] P. 27, 78 (C.A.); *De Beche v. South American Stores, Ltd.* [1935] A.C. 148; *Maritime Insurance Co., Ltd. v. Assekuranz Union* (1935) 52 Ll.L.R. 16; *Re Anchor Line (Henderson Bros.), Ltd.* [1937] Ch. 483; *St. Pierre v. South American Stores, Ltd.* [1937] 1 All E.R. 206; 3 All E.R. 349 (C.A.); *R. v. International Trustee* [1937] A.C. 500; *Vita Food Products Inc. v. Unus Shipping Co., Ltd.* [1939] A.C. 277 (P.C.); *Kleinwort Sons & Co. v. Ungarische Baumwollen Industrie Aktien-Gesellschaft* [1939] 2 K.B. 678. See also (on R. S. C., Ord. XI): *Strauss v. Goldschmid* (1892) 8 T.L.R. 309, 512 (C.A.).

⁴⁶ See Rule 139, p. 619, *ante*.

⁴⁷ See Rule 140, p. 624, *ante*.

is materially valid under the law of one country, but materially invalid under the law of another, by the law of which country is an English court to determine its material validity?

The answer to be drawn from the reported decisions of the English courts is that, subject to very wide exceptions, the material validity of the contract is determined by the proper law of the contract, as defined above in Rule 136. If the contract is an 'English contract', *i.e.*, if it is a contract which the parties intended, or are deemed to have intended, to be governed by English law, its validity is in general determined by the law of England. If it is a 'French contract', the English courts hold that in general its validity is governed by the law of France. The result, startling at first sight, is that it is in the power of the parties to decide which law is to govern the validity of their agreement.⁴⁸

Historically, the oldest view is that the material validity of a contract depends upon the law of the country where the contract was made, a view which still finds favour with one influential school of American legal thought.⁴⁹ In this country the tendency to take this view was increased by the fact that questions of the conflict of laws first became pressing after the union in 1707 between England and Scotland, and concerned the validity of marriages which was held to be governed by the *lex loci celebrationis*. This encouraged the view that contracts should also be governed by the law of the place where they were made, and the objection that in the case of contracts there would often be doubts about the location of that place had not then been effectively raised. Moreover, the tendency to make the validity of a contract dependent upon the *lex loci contractus* was supported by the ambiguity of this term which, as we have seen,⁵⁰ came to be interpreted not merely as the law of the country where the

⁴⁸ Rule 141 agrees in substance with the view of Westlake, pp. 299-307, and with that of Cheshire, p. 307, pp. 325-336. Cheshire takes the view that a contract is invalid if it is contrary to the public policy of the 'indigenous proper law' (*i.e.*, the law with which the contract is most closely connected), or illegal according to that law (which is not necessarily the *lex loci contractus*). This formula for which there is some judicial authority (see *Boissevain v. Weil* [1948] 1 All E.R. 146, and *Mynott v. Barnard* (1939) 62 C.L.R. 68, at p. 80) is reasonable, but not sufficiently supported by English authority to be embodied in this Digest. In practice the difference between Rule 141 as explained below and Cheshire's doctrine is insubstantial, although Cheshire takes a view of the *Torm* and *Vita Food Cases* which is contrary to the submission made in the text. The problem is discussed in Story, §§ 242 f., 280 ff., 299 ff., esp. §§ 301a and 305; see also Wolff, ss. 423-425; Falconbridge, Chap. 16, §§ 1, 2; Johnson, Vol. 3, pp. 422, 427, 433; Barbey, pp. 190-192; Batiffol, pp. 349-362; Savigny, s. 374; Cheshire, *International Contracts*, pp. 7-44; Rabel, Chap. 29. For a thorough discussion of the Exceptions stated in the earlier editions, see Mann, 18 B.Y.B.I.L. (1937) 97-113.

⁴⁹ Restatement, § 332, Beale, pp. 1079 ff.; Goodrich, p. 278; *contra*, Cook, Chap. 15; Lorenzen, Chap. 10, pp. 278-299; Nussbaum, pp. 176-180; Rabel, pp. 397 ff.

⁵⁰ Rule 136, Sub-Rule 3, p. 593, *ante*, p. 46.

contract was entered into, but as the law of the country to which, in Lord Mansfield's words, the parties had 'a view',⁵¹ which, in practice, would often be the *lex loci solutionis*. When the increasing complexity of business relations resulted in the courts devoting more consideration to the law governing the validity of a contract, the transition was therefore easy to the theory that the validity of a contract was governed by the law of the place of performance or to the view, which eventually prevailed, that the guiding principle was the intention of the parties.

Nevertheless the older approach to the problem was not abandoned without leaving its traces in modern English law. It is true that nobody maintains today in this country that the *lex loci contractus* holds exclusive sway over the essential validity of a contract. A contract which is void under its proper law will be regarded as void by an English court though it may be valid under the law of the place where it was made.⁵² But is the opposite proposition also correct? Is a contract, valid under the law which the parties intended to apply, to be upheld, if it is void, and, in particular if it is illegal, according to the *lex loci contractus*? Must, in other words, a contract, in order to be enforced in an English court, be essentially valid both according to its proper law and according to the law of the place where it was made? In the present state of our authorities, it is impossible to give a dogmatic answer to this much debated question.

In the previous editions of this work it was tentatively suggested⁵³ that a contract, whether lawful by its proper law or not, is invalid if the making thereof is unlawful by the *lex loci contractus*. This proposition, which has been effectively criticised by learned writers,⁵⁴ rested mainly on a dictum of Lord Halsbury in 1889.⁵⁵ There was not, prior to 1932, any English case in which the principle was the *ratio decidendi*. In that year, however, the Court of Appeal, or, at any rate, two of three Lord Justices, made it the basis of their decision in *The Torni*.⁵⁶ In 1939 the Judicial Committee, speaking through Lord Wright, disapproved of the

⁵¹ *Robinson v. Bland* (1760) 2 Burr. 1077.

⁵² See, e.g., *Royal Exchange Assurance Corporation v. Vega* [1902] 2 K.B. 384 (C.A.).

⁵³ See Exception 2 to Rule 160 in the previous editions. This Exception was stated (5th ed., p. 656) to be 'sound in principle', but not to 'rest on an unassailable foundation of authority'.

⁵⁴ Cheshire, pp. 350-351; Cheshire, *International Contracts*, pp. 70 f.; Wolff, s. 425; Mann, 18 B.Y. B.I.L. (1937) pp. 108-107.

⁵⁵ *Re Missouri Steamship Co.* (1889) 42 Ch.D. 321 (C.A.), at p. 336. The case was not decided on this point. A bill of lading issued in the United States and governed by English law was held not to have been invalidated by an American statute which, in the view of the court, treated the exemption clause in dispute merely as void without prohibiting it. Followed in *Jones v. Oceanic Steam Navigation Co.* [1924] 2 K.B. 780.

⁵⁶ [1932] P. 27, 78 (C.A.), *per* Greer, L.J., at p. 88, and *per* Slessor, L.J., at p. 91. Scrutton, L.J., agreed, but on different grounds (at p. 84). See Rule 136; Sub-Rule 1, note 30, *ante*, p. 587.

principle and expressed the 'opinion that the decision (in *The Torni*) . . . cannot be supported'. The Privy Council held that, in allowing the *lex loci contractus* (which was not the proper law) to invalidate the contract, the Court of Appeal had contravened 'the fundamental principle of the English rule of conflict of laws—namely, that intention is the general test of what law is to apply'. This, it should be noted, is not a mere *obiter dictum*. It is the foundation of the decision in *Vita Food Products Inc. v. Unus Shipping Co., Ltd.*⁵⁷

It is, of course, elementary, that the Judicial Committee cannot overrule a decision of the Court of Appeal. Technically, an English court of first instance is bound by a decision of the Court of Appeal and not bound by a decision of the Privy Council. Nevertheless, it is submitted that the authority of Lord Halsbury's dictum and also that of the decision in *The Torni* has been shaken by the decision in the *Vita Food Case* to such a degree that Dicey's proposition can no longer be maintained. Not only is it contrary to the opinion of no less an authority than Lord Wright, it is also at variance with the trend of learned opinion generally.⁵⁸ It is submitted that it is unsound on its merits. As has been pointed out above, it is inadvisable, in modern conditions of commerce, to apply the *lex loci contractus* in a rigid manner to any problem affecting the existence, validity, or interpretation of a contract.⁵⁹ *The Torni* was a case concerned with a contract of affreightment evidenced by bills of lading. The place of issue of a bill of lading is not usually in doubt and, being the port of loading, is not, as a rule, purely fortuitous. The arbitrary nature of the *lex loci contractus* was not, therefore, perhaps as obvious in this case, as it would have been if the contract before the court had been an international sale or loan.⁶⁰

The theory that the parties, by choosing a proper law other than the *lex loci contractus*, can contract out of the peremptory provisions of that law, meets with the objection that it opens the door to law evasion and to the frustration of attempts to create

⁵⁷ [1939] A.C. 277 (P.C.).

⁵⁸ See above note 54. Cheshire, while critical of Dicey's Exception 2 to Rule 160, is no less critical of Lord Wright's reasoning in the *Vita Food Case* and especially of Lord Wright's disapproval of *The Torni* (p. 335). In Cheshire's view the decision in *The Torni* was correct, not because the law of Palestine was the *lex loci contractus*, but because it was the 'indigenous proper law' which the parties sought to evade. In effect, Cheshire says that Lord Wright should have approved of *The Torni* on the ground that the choice of English law in that case was not bona fide within the meaning of Lord Wright's own dictum. The reasoning of Langton, J., [1932] P., at p. 37, which Cheshire quotes at p. 333, and which supports his view, was not, however, adopted by any of the members of the Court of Appeal. Rabel, p. 426, approves of *The Torni* on another ground.

⁵⁹ See Rule 186, Sub-Rule 1, p. 584; Rule 189, p. 619; Rule 140, p. 624, *ante*.

⁶⁰ Mann, 18 B.Y.B.I.L. (1937), p. 104; Cook, Chap. 14.

uniformity in commercial law.⁶¹ These objections are formidable. They can, however, be countered by a bold and judicious application of the doctrine of evasion, indicated by Lord Wright,⁶² and also by the recognised limitations of the proper law doctrine stated in Rule 137 above and in the Exception below.

In the past, the view has also been advanced that, irrespective of the intention of the parties, the material validity of a contract is to be tested by the *lex loci solutionis*.⁶³ In many cases the law of the place of performance will be the proper law of the contract, and this view will therefore often coincide with that adopted by the English courts, according to which this matter is governed by the proper law. As a general theory, however, the view that the validity of a contract is governed by the law of the place of performance is inconsistent with authoritative decisions of the English courts and opposed to the whole course of thought pursued by English judges when determining the question which is now under consideration.⁶⁴ They first try to decide what is the country by the law of which a contract is substantially governed, and ask themselves whether a given agreement is an 'English contract' or a foreign, e.g., a 'French contract'. In determining this point they take into account both the terms of the contract itself and all the circumstances of the transaction, such as the character of the parties, the place where the contract is made, the place where it is to be performed, and so forth. When, from this general survey of the facts, they have made up their minds as to the country to which the contract belongs, (they then hold that not only the interpretation of the contract, but also its validity, is governed by the law of such country.) In doing so they avoid the separation from one another of questions as to the validity and questions as to the effect of the contract. When, for example, the proper law of a contract for the sale of land is the law of the place where the land is situated, the validity of the entire contract will be judged according to that law. The obligation of the vendor as well as that of the purchaser must be valid according to the proper law, even if the purchaser has to pay the price in a different country.^{64a} This practice has the merit of avoiding the 'scission' of the contract which is liable to ensue if the validity of either

⁶¹ *Cheshire, l.c.*; *Falconbridge, l.c.*; *Cook*, pp. 427 ff.; *Gutteridge*, 55 L.Q.R. 323 (1939); *Morris and Cheshire*, 56 L.Q.R. 320 (1940); see also 21 B.Y.B.I.L. 212-214, and *Scrutton, Charterparties and Bills of Lading*, 14th ed., p. vi.

⁶² See *ante*, Rule 136, Sub-Rule 1, p. 584. *Rabel*, pp. 400 ff., appears to be opposed to this, but (p. 428) accepts it in its application to contracts connected with only one legal system.

⁶³ This is the view taken by *Foote*, pp. 396-413, who says that the legality of the making of the agreement also depends on the *lex loci contractus*.

⁶⁴ See the decisions quoted in note 45, *ante*, p. 630, and, in addition, for *Quebec*, *Joslyn v. Baxter*, 1 L.C.L.J. 117.

^{64a} The purchaser's obligation must, however, also be valid according to the law of the latter country, at any rate if English law is the proper law of the contract. See the Exception to Rule 141, *post*, p. 637.

party's obligation is judged in accordance with the law of the country in which he has undertaken to perform.⁶⁵

In order to do justice to the proper law doctrine, however, we must bear in mind its limitations, or, in other words, the extent of the real or apparent exceptions to the rule that the validity of a contract depends on its proper law. These exceptions flow from the two principles that an English court will not enforce a contract which is opposed to fundamental principles of English public policy, or, in certain cases, to an English statute, and that nobody will be considered as liable to perform a contract, at any rate an English contract, in so far as the performance would be illegal by the law of the country in which it is to take place.⁶⁶ Moreover, as stated above,⁶⁷ a verbal declaration, or as Cheshire⁶⁸ calls it, a 'simple incantation' by which a given system of law is to govern the contract can have no force if the parties in fact intended to contract under another law. The intention which determines the proper law, and therefore in general the validity, of a contract, is the intention of the parties (exhibited usually by their conduct and by the nature of their agreement) actually and in fact to contract with reference to the law of a given country. This intention is quite a different thing from the intention which, in the absence of fraud and the like, must always exist, that a contract shall be valid; it is a different thing also from the intention that a contract made in fact under the law of one country shall, as to its validity, be governed by the law of some other country. This is clearly a result which cannot be effected by the will of the parties. If this is borne in mind, the objection that under the proper law doctrine, the legality of an agreement depends upon the arbitrary will or choice of the parties is removed.

Illustrations

1. X enters into a contract of employment with A & Co. The law of the Transvaal is the proper law of the contract. The contract contains a provision which, though valid according to English law, is illegal according to the law of the Transvaal. This provision cannot be enforced in an English court.⁶⁹

2. A bond is made by X, the master of a foreign ship, hypothecating cargo laden on board the ship. The bond is valid according to its proper law, i.e., the law of the country to which the ship belongs, but is not valid according to

⁶⁵ See Wolff, s. 436. Wolff's criticism of the 'scission' principle, adopted from Savigny by the German and Swiss courts, applies with equal force to Foote's doctrine. If the parties clearly exhibit an intention to this effect a contract may be governed as to some of its terms by the law of one country, and as to others by the law of another country: *Hamlyn v. Talisker Distillery* [1894] A.C. 202. This, however, should not be presumed.

⁶⁶ See Rule 137, *ante*, p. 604, and Exception to Rule 141, *post*, p. 637.

⁶⁷ Rule 136, Sub-Rule 1, note 28, p. 587, *ante*.

⁶⁸ Page 335. The difference between the 'indigenous proper law' doctrine and the view propounded in the text does not appear to be more than verbal. Unlike the question of capacity, the problem here under discussion is covered by authority so that a formulation similar to the one adopted in Rule 139 could not have been embodied in the text.

⁶⁹ *South African Breweries v. King* [1899] 2 Ch. 173; [1900] 1 Ch. 273 (C.A.).

English law. The bond is valid in England, *i.e.*, its validity is determined in accordance with its proper law.⁷⁰

3. A lends money to X at Monte Carlo to gamble at the public tables. Gambling is permitted by the law of Monaco. The law of Monaco is the proper law of the contract. The contract is valid.⁷¹

4. By a charterparty entered into at Boston, Mass., by X & Co., a company incorporated in England, with A for the shipment of cattle in an English ship to England, it is provided, *inter alia*, that 'X & Co. shall not be liable for negligence of master and crew'. Such provision is valid by English law, but is invalid by the law of Massachusetts. Cattle are injured on the coast of Wales through negligence of master or crew. English law is the proper law of the contract. The provision is valid, and X & Co. are not liable for the damage.⁷²

5. In 1892 X, residing in Scotland, enters in England into a contract with A, which is to be performed, as to most of its terms, in Scotland. The contract contains this clause: 'Should any dispute arise out of this contract, the same to be settled by arbitration by two members of the London Corn Exchange or their umpire in the usual way'. The clause is then void under the law of Scotland, but valid under the law of England. The law of England is the proper law of the contract, and the arbitration clause is valid in Scotland.⁷³

6. X enters in Jersey into a contract for the insurance of his stamp collection with the Jersey agent of an English insurance company. The premiums and insurance moneys are payable in Jersey. The contract contains a provision for arbitration in England. The arbitration clause is void under the domestic law of Jersey. English law is the proper law of the contract. The arbitration clause is therefore valid in Jersey as well as in England.⁷⁴

7. X & Co., an English firm having chartered an Estonian ship, issue through their agents, a Palestinian company, bills of lading for the carriage of oranges from Jaffa to England. The bills of lading which are issued at Jaffa, contain the following clause: 'This bill of lading wherever signed is to be construed in accordance with English law.' According to the Palestine Carriage of Goods by Sea Ordinance, 1926, which embodies the Hague Rules, every bill of lading issued in Palestine must contain a statement that it takes effect subject to these Rules, and is deemed to take effect subject thereto notwithstanding the omission of such statement. An exceptions clause contained in the bill of lading which would have been valid in accordance with English domestic law, but which is void under the Ordinance, is held to be void as being contrary to the law of the place where the bills of lading were issued.⁷⁵

8. X & Co., a company incorporated and carrying on business in Nova Scotia, issue in Newfoundland bills of lading for the carriage of a cargo of herrings from Newfoundland to New York. The bills of lading contain a

⁷⁰ *The Gaetano* (1882) 7 P.D. 137 (C.A.). See further, Chap. 25, Rule 147, p. 665, *post*.

⁷¹ *Quarrier v. Colston* (1842) 1 Phil. 147; *Saxby v. Fulton* [1909] 2 K.B. 208 (C.A.); *Société Anonyme des Grands Etablissements du Touquet Paris-Plage v. Baumgart* (1927) 96 L.J.K.B. 789. See Rule 137, p. 604, *ante*.

⁷² *Re Missouri Steamship Co.* (1889) 42 Ch.D. 821, 830 (C.A.).

⁷³ *Hamlyn v. Talisker Distillery* [1894] A.C. 202, a particularly strong case, as it was decided by the House of Lords sitting as a Scottish court of appeal. See also *N. V. Kwik Hoo Tong Handel Maatschappij v. James Finlay & Co.* [1927] A.C. 604; *National Trust Co. v. Hughes* (1902) 14 Man.L.R. 41; *Albion Fire and Life Ins. Co. v. Mills* (1828) 8 W. & S. 218; *St. Patrick Ass. Co. v. Brebner* (1829) 8 S. 51; *Parken v. Royal Exchange Ass. Co.* (1846) 8 D. 865.

⁷⁴ *Spurrier v. LaCloche* [1902] A.C. 448 (P.C.).

⁷⁵ So decided in *The Torni* [1932] P. 27, 78 (C.A.), but this case was dissented from in *Vita Food Products Inc. v. Unus Shipping Co.* [1939] A.C. 277 (P.C.).

or indirectly violate the law of England, an English court will not enforce it, *e.g.*, if a foreign contract involves the violation of the English customs or exchange control laws.⁸¹ The application of English law in these cases can be justified by the principle of public policy stated in Rule 137 above, but it may also be possible to explain it by way of an exception to the general rule that the legality of a contract is governed by the proper law. In all these cases the contract will involve the doing in England of something which, whilst possibly lawful according to the proper law, will certainly be unlawful according to English law. English law will govern the legality of the performance in its capacity as the *lex fori* the public policy of which must be enforced in this country, but its application may also be justifiable on the broader ground that, whatever be the proper law, a contract the performance of which is illegal according to the *lex loci solutionis* will not be enforced by an English court, not, at any rate, if the place of performance is in England.

The situation is similar in the converse case, *i.e.*, if an English contract is to be performed abroad and is, or has become, illegal according to the *lex loci solutionis*. An English court will refuse to enforce an English contract the performance of which would directly or indirectly violate the law of the place of performance. Hence an agreement governed by English law for the payment in Spain of chartered freight beyond the maximum permitted by Spanish law will not support an action in England.⁸² Where such a contract was illegal according to the foreign law *ab initio* and was made by the parties with the object of defying the foreign law, its invalidity will often follow from the general principle of English domestic public policy stated above in Rule 137. We are here mainly concerned with contracts which are not against the public policy of this country by reason of their interference with the friendly relations towards a foreign government, but which nevertheless involve the doing of something unlawful according to the law of the country in which the contractual obligation is to be performed, *e.g.*, because performance was rendered illegal by the *lex loci solutionis* after the making of the contract. If English law is the proper law of the contract, the consequences of illegality, whether initial or supervening, according to the law of the place of performance will be identical with those which arise from the initial or supervening illegality according to English domestic law of a contract to be performed in England.

Up to this point the question of the consequences of illegality according to the *lex loci solutionis* is covered by authority. It is, however, doubtful and highly controversial whether, according to

⁸¹ See Rule 137, *ante*, p. 604, and see *Biggs v. Lawrence* (1789) 3 T.R. 454; *Clugas v. Penaluna* (1791) 4 T.R. 466; *Waymell v. Read* (1794) 5 T.R. 599; *Lightfoot v. Tenant* (1796) 1 B. & P. 552.

⁸² *Ralli Bros. v. Compania Naviera Sota y Aznar*, [1920] 2 K.B. 287 (C.A.).

the English rules of the conflict of laws, illegality according to the *lex loci solutionis* as such has any effect on the validity or operation of a contract governed by foreign law and to be performed in a third country, *i.e.*, in a foreign country other than that of the proper law. Would an English court enforce a French contract for the payment in Spain of chartered freight beyond the maximum permitted by Spanish law? Would it hold that the consequences of such illegality are governed by Spanish law, the *lex loci solutionis*, or would it leave it to French law, the proper law of the contract, to determine whether illegality according to the *lex loci solutionis* has any, and if so what, effect upon the validity and operation of the contract? Would the English court make a distinction between initial and supervening illegality? Would it hold that, on grounds of English public policy, the contract is void if it was illegal according to Spanish law at the time of its making and both parties knew that they were acting in defiance of Spanish law, but that French law must control the consequences upon a French contract of a change in the *lex loci solutionis* introduced subsequent to the making of the contract? Would it also be a matter for French law to determine the consequences of the initial illegality of the contract according to Spanish law in a case in which, at the time of the making of the contract, either party or both parties were unaware of the prohibition imposed by Spanish law?

It has been argued that supervening illegality according to the law of the place of performance does not as such prevent an English court from enforcing the contract, unless it is governed by English law. The principle stated in the Exception, it has been said, is not a principle of the conflict of laws at all, but merely an application of the English domestic rules with regard to the frustration of contracts, and hence no true exception to Rule 141. If this view is correct, a prohibition to perform the contract imposed by the *lex loci solutionis* after the making of the contract is no more than a fact to be taken into account by an English court in judging whether performance has become impossible. Whether an English court would enforce a French contract for the doing in Spain of something which Spanish law had forbidden after the making of the contract would depend on French law, and, in particular, on the French law of frustration of contracts.⁸³ There is no direct authority on the point. In *Ralli Brothers v. Compania Naviera*

⁸³ This is the view taken by Mann, 18 B.Y.B.I.L. (1937), pp. 107-113, by Falconbridge, p. 333, by Cheshire, p. 347, note 2, p. 349; Cheshire, *International Contracts*, pp. 71-74, and by Rabel, pp. 535 ff. Cheshire, *l.c.*, following Wolff, pp. 451-452, also points out that the term 'invalid' may be an over-simplification and that it is ambiguous. These criticisms deserve the closest attention, but it has been felt not to be convenient to alter the wording of a Rule which has been judicially approved on so many occasions. See, in addition to the quotations above, p. 637, note 80, Lord Wright in the Court of Appeal in *R. v. International Trustee, etc.* [1937] A.C. 500, at p. 519, and Lord Sterndale, *M.R.*, and Scrutton, *L.J.*, in *Ralli v. Sota y Aznar* [1920] 2 K.B. 287 at pp. 291, 300.

*Sota y Aznar*⁸⁴ Scrutton, L.J., was inclined to treat the principle of the Exception as an 'implied term', while Lord Sterndale, M.R., and Warrington, L.J., applied it as a rule of the conflict of laws, a view shared by du Parcq, L.J. (as he then was) in *Kleinwort Sons & Co. v. Ungarische Baumwolle Industrie Aktien-Gesellschaft*.⁸⁵ But English law was the proper law of the contract in both cases, and, in the *Kleinwort Case*, London was the place of performance. The question under discussion did not, therefore, call for a decision in either case, and it is still open to the courts to treat this Exception as a rule of English domestic law, a view which, both on practical and on theoretical grounds, has much to commend itself.

Whatever be its nature and scope, the Exception to Rule 141 does not apply, unless the country the law of which makes performance illegal is the *locus solutionis*, i.e., the country in which, according to its express or implied terms, the contract is to be performed. It does not matter whether the person liable to perform would, by doing so, infringe the laws of the country in which he is resident or carries on business, or of which he is a national, if the law of that country is neither the proper law of the contract nor the *lex loci solutionis*. The decision of the Court of Appeal in *Kleinwort Sons & Co. v. Ungarische Baumwolle Industrie Aktien-Gesellschaft*⁸⁶ has removed certain doubts and difficulties which had been created by a number of dicta in the earlier House of Lords case *De Beêche v. South American Stores Ltd.*⁸⁷ An English court will not allow a contracting party to refuse performance on the ground that by performing he would be infringing the law of the country in which he resides, if he has promised to perform elsewhere, unless the law of his residence is the proper law of the contract, or the enforcement of the contract would be against English public policy. Thus, currency restrictions cannot be successfully pleaded as a defence to an action for the performance of a monetary obligation, unless the relevant exchange control legislation forms part either of the proper law of the contract or of the *lex loci solutionis*. A foreign debtor who, under an English contract, has promised payment in London cannot take shelter behind the exchange control law of his own country, and the creditor may thus be able to enforce his claim against the assets of his debtor

⁸⁴ [1920] 2 K.B. 287.

⁸⁵ [1939] 2 K.B. 678, at pp. 697-698. It is true that, as pointed out by du Parcq, L.J., the English law of frustration of contracts rests on the basis of an implied term which can be negated by an express term. But this applies only to supervening, not to initial illegality of the contract. Hence, the 'domestic' view of the rule in *Ralli's Case* does not lead to the absurd result that the parties to an English contract to be performed abroad can contract out of the consequences of initial illegality according to the law of the place of performance.

⁸⁶ [1939] 2 K.B. 678; to the same effect *Trinidad Shipping Co. v. Alston* [1920] A.C. 888 (P.C.).

⁸⁷ [1935] A.C. 148, at p. 158 (*per* Lord Sankey), also at p. 162 (*per* Lord Russell of Killowen). The true explanation of the *De Beêche Case* appears to be that Chilean law was the proper law of the contract.

situated in England, although the debtor himself would have acted contrary to the law of his residence if he had attempted to utilise these assets for the payment of the debt.⁸⁸

It must be further noted that, at any rate if the contract is an English contract, it will only be held invalid or inoperative on account of illegality if it actually necessitates the performance in a foreign and friendly country of some act which is illegal by the law of such country, if, in the words of Lord Wright, 'the act in question is prohibited by the foreign law'.⁸⁹ The validity or operation of an English contract will not be affected solely because the *lex loci solutionis* dispenses one party or both parties to the contract from the necessity of performing it in full.⁹⁰ The debtor of a monetary obligation governed by English law is not entitled to deduct from his payment income tax payable at the source under the *lex loci solutionis*, though that law may permit such deduction.⁹¹ Moreover, if performance need not take place actually in the *locus solutionis*, the contract is not rendered invalid merely by reason of illegality under the law of the place of performance.⁹² But if it is the essential purpose of the contract to perform an illegal act in a foreign country, it will be invalid, although the parties might have carried out their share in

⁸⁸ See *post*, Rule 166, p. 750.

⁸⁹ *International Trustee, etc. v. R.* [1936] 3 All E.R. 407 (C.A.), at p. 430 (*per curiam*). The decision was reversed by the House of Lords on another point [1937] A.C. 500; on the assumption that English law was the proper law the abrogation of the gold value clause by the American *lex loci solutionis* would not have made payment in dollars on a gold basis illegal.

⁹⁰ This is the true explanation of *Jacobs v. Crédit Lyonnais* (1884) 12 Q.B.D. 589 (C.A.), the headnote of which is misleading. Performance of the contract, the proper law of which was English, had not become illegal under the Algerian *lex loci solutionis*, which merely gave the seller an excuse for non-performance by reason of impossibility in circumstances in which English domestic law did not recognise frustration as a defence. For a similar situation, see *Blackburn Bobbin Co. v. Allen & Sons* [1918] 1 K.B. 540; [1918] 2 K.B. 467; contrast *Kursell v. Timber Operators and Contractors, Ltd.* (1926) 95 L.J.K.B. 569 (C.A.). In all these cases the question was whether an English contract was frustrated owing to events abroad, obviously a question of English domestic law, at any rate if the alleged frustration does not originate in a legal prohibition, as it did in *Cunningham v. Dunn* (1878) 3 C.D.P. 443 (C.A.), and in *Ford v. Cotesworth* (1870) L.R. 5 Q.B. 544 (Exch.Ch.). The view of *Jacobs v. Crédit Lyonnais* taken above is approved in *Ralli Bros. v. Sota y Aznar* [1920] 1 K.B. 614, at pp. 631-633; [1920] 2 K.B. 287, at pp. 292, 297, 301.

⁹¹ *Spiller v. Turner* [1897] 1 Ch. 911; *Indian and General Investment Trust, Ltd. v. Borax Consolidated, Ltd.* [1920] 1 K.B. 539; see also *London and South American Investment Trust, Ltd. v. British Tobacco Co. (Australia), Ltd.* [1927] 1 Ch. 107.

⁹² *Furness Withy & Co. v. Rederi-Aktiebolaget Banco* [1917] 2 K.B. 873, at p. 876, *per* Bailhache, J. On a similar doctrine Scrutton, L.J., would have upheld the contract in *Foster v. Driscoll* [1929] 1 K.B. 470, at p. 497, but Lawrence and Sankey, L.J.J., held that the intention was to violate the United States prohibition legislation and that the contract was therefore against public policy. See also *Waugh v. Morris* (1873) L.R. 3 Q.B. 202, and *Smith v. Benton* (1890) 20 O.R. 344.

the contract without themselves performing in that country an act in contravention of its laws.⁹³

In the previous editions of this book it was suggested, with some hesitation, that the Exception did not apply to contracts made in violation, or with a view to the violation, of the revenue or trade laws of a foreign country not forming part of British territory. There is no direct authority on this point. Lord Mansfield's dictum: 'No country ever takes notice of the revenue laws of another'⁹⁴ is not supported by any 'trustworthy authority'.⁹⁵ The cases cited in support of the doctrine that an English court would enforce a contract to break the revenue or trade laws of the *lex loci solutionis* are mostly not of a recent date.⁹⁶ Nor would it seem to be relevant in the present context whether and to what extent an English insurance policy is invalidated by reason of the fact that the insured adventure violates the revenue or trade laws of a foreign State,⁹⁷ whether the assured must be identified with the acts of his own government and precluded from being indemnified for its consequences under an English policy,⁹⁸ or whether an English underwriter is entitled to avoid the policy by reason of the non-disclosure of a foreign embargo.⁹⁹ All these are matters of the English domestic law of marine insurance and to some extent matters of English domestic public policy. In all these and similar cases no question arises concerning the performance of a contractual obligation in the country the laws of which prohibit such performance. The contracts involved are insurance contracts which are entirely to be performed in England. The doctrine that the law of England does not pay any regard to the revenue laws of a foreign State does not, it is submitted, extend beyond the recognised principle that an English court will not directly enforce foreign tax claims or judgments for the payment of foreign taxes. This principle applies not only to countries which are politically foreign, but also to countries which form part of British territory.¹ The principle tentatively stated in the previous editions of this work would therefore lead to the inevitable result that an English contract involving, e.g., the smuggling of dutiable goods into Australia would be valid. The absurdity of the conclusion demonstrates the

⁹³ See *Foster v. Driscoll* [1929] 1 K.B. 470.

⁹⁴ *Holman v. Johnson* (1775) 1 Cowp. 341.

⁹⁵ *Anson on Contracts*, 19th ed., p. 218; see also *per* Sankey, L.J., in *Foster v. Driscoll* [1929] 1 K.B. 470, at pp. 516-519. In the 5th (1932) edition of this work the learned editor stated that the doctrine was now out of favour (p. 658, note (g)).

⁹⁶ See notes 97 to 99, *post*.

⁹⁷ *Planché v. Fletcher* (1779) 1 Doug. 238; *Lever v. Fletcher* (1780) 1 Park Ins. 507; also *Boucher v. Lawson* (1785) Cas.temp.Hardwicke 85, 89, 195.

⁹⁸ *Simeon v. Bazett* (1813) 2 M. & S. 94; *Bazett v. Meyer* (1814) 5 Taunt. 824.

⁹⁹ *Francois v. Sea Insurance Co.* (1898) 3 Com.Cas. 229. Cp. also *Sharp v. Taylor* (1848) 2 Phil. 801, 816, and the Scottish cases *Clements v. Macaulay* (1866) 4 M. 588, and *Gelot v. Stewart* (1871) 9 M. 105.

¹ *Municipal Council of Sydney v. Bull* [1909] 1 K.B. 7.

falseness of the principle. In recent years this principle has come in for criticism from the Bench² and the decisions on exchange control legislation would appear implicitly to contradict it.³ There is no valid reason why an English court should regard as void a contract to pay money in violation of foreign currency legislation which forms part of the proper law or of the *lex loci solutionis*, but should enforce the contract if the legislation involved regulated the export or import of commodities and not of currency. Revenue and trade laws cannot nowadays be viewed in isolation from the remainder of the legislation of a country. They often serve economic as well as financial purposes. Abuses can always be checked by the doctrine of public policy.

There are a number of cases, decided between 1789 and 1796,⁴ concerning the validity of a contract involving the smuggling of goods into England or other parts of British territory. These cases, it is submitted, rest entirely on principles of domestic English law, and do not seem to yield a general proposition that a contract is invalid in so far as it forms part of a transaction which is unlawful by the law of the country where the transaction is to take place. The second branch of the Exception as stated in previous editions does not seem to be of practical significance in any case not covered by the first branch and has, therefore, been omitted.

Illustrations

1. A, a Spanish shipowner, contracts in London with a British charterer, X, to carry goods on board his ship from Calcutta to be delivered to a Spaniard carrying on business in Spain, at Barcelona. X agrees to pay freight to A at the rate of £50 per ton of the cargo to be carried for X on delivery at Barcelona. The contract is an English contract. The goods duly arrive at Barcelona. Before the arrival of the goods a Spanish law has been passed that such goods, *viz.*, a cargo of jute, should not be delivered, sold, or paid for in Spain at a rate higher than in English money £10 per ton. X is willing to pay £10 per ton, but refuses to pay more than £10 on the ground that he cannot do so without breaking the law of Spain. A has no right of action.⁵

2. X & Co., a shipping firm, contract with A to carry goods from Trinidad to the United States on terms which involve the payment of a rebate on the freight by the shipping firm. The proper law of the contract is the law of Trinidad. The rebates are payable in Trinidad. The payment of the rebates is made illegal by an Act of Congress. A sues X & Co. in the Trinidad court for repayment of the rebates. X & Co., who are an English company with their head office in London, but who have branch offices in Trinidad and in

² See above, note 95, and *per* Scrutton, L.J., in *Ralli Bros. v. Sota y Aznar* [1920] 2 K.B. 287, 300. See on the other hand *Indian and General Investment Trust, Ltd. v. Borax Consolidated, Ltd.* [1920] 1 K.B. 539, at p. 550, *per* Sankey, J.; *Trinidad Shipping Co. v. Alston* [1920] A.C. 888.

³ *E.g.*, *De Beêche v. South American Stores, Ltd.* [1935] A.C. 148; *St. Pierre v. South American Stores, Ltd.* [1937] 3 All E.R. 349 (C.A.). See also *Kleinwort, Sons & Co. v. Ungarische Baumwolle Industrie Aktien-Gesellschaft* [1939] 2 K.B. 678, where, *e.g.*, MacKinnon, L.J., left no doubt that the defendants would have succeeded if the debt had been payable in Budapest.

⁴ See *ante*, note 81, p. 638. For a full discussion, see *Benjamin on Sale*, 7th ed. (1981), p. 521, pp. 526–527.

⁵ *Ralli Bros. v. Compania Naviera Sota y Aznar* [1920] 2 K.B. 287 (C.A.).

New York, plead that payment will expose them to prosecution in the United States. The United States law, which does not form part either of the proper law of the contract or of the law of the place of performance, is no excuse for non-payment of the rebates.⁶

3. A & Co., an English bank, open an acceptance credit to X, a Hungarian firm. When the credit expires X refuse to pay in London on the ground that, by Hungarian legislation, it is illegal for them to remit money abroad, to acquire British currency, or to dispose of any assets outside Hungary. This is no defence to A & Co.'s claim. English law is the proper law of the contract, the money is payable in London, and Hungarian law cannot affect the legality of a contractual promise neither governed by Hungarian law nor to be performed in Hungary.⁷

4. By a charterparty made in English language and form X & Co., an English firm of shipowners, undertake to load deadweight at Malta, to proceed to a Spanish port, and there, after discharge of the deadweight, to load a cargo of fruit for carriage to England. X & Co. and A, the charterer, knew that the 'deadweight' was to consist of military stores. X & Co. are prevented by Spanish Government regulations from discharging the 'deadweight' and the ship proceeds to Gibraltar. An action by A for damages for breach of contract is dismissed in England.⁸

5. A United States company issue to A & Co., an English company, 5 per cent. gold bonds, capital and interest payable in London, under a contract to be governed by English law. X & Co. guarantee to A & Co. the payment of interest. A tax of 2 per cent. is imposed by Congress on income derived by foreign corporations from interest on bonds of companies resident in the United States. This law is no answer in England in an action by A & Co. against X & Co. on the guarantee, claiming payment in full of the 5 per cent. interest without deduction in respect of the tax.⁹

6. X contracts with A in England to smuggle goods into France. The contract is (*semble*) invalid, and an action for the breach thereof cannot be maintained in England, not at any rate if both parties were actively engaged in smuggling the goods into France.¹⁰

7. X contracts to purchase from A in England 3,600 tons of coal to be shipped in New South Wales at 17s. 9d. a ton delivered on board ship, the price to be paid in London. After the contract is made, the price of coal in New South Wales is raised by governmental order 4s. a ton. A claims payment from X at the rate of 21s. 9d. a ton. A cannot (*semble*) recover more than 17s. 9d.¹¹

⁶ *Trinidad Shipping and Trading Co., Ltd. v. Alston* [1920] A.C. 888 (P.C.). Lord Parmoor who delivered the judgment of the Board said (at p. 891) that the contract was governed by 'British' law, but he must have meant the law of Trinidad, which is, of course, a 'British' law.

⁷ *Kleinwort, Sons & Co. v. Ungarische Baumwolle Aktien-Gesellschaft* [1899] 2 K.B. 678 (C.A.).

⁸ *Cunningham v. Dunn* (1878) 3 C.P.D. 443 (C.A.), following *Ford v. Cotesworth* (1870) L.R. 5 Q.B. 544 (Exch.Ch.); contrast *Cantiere Navale Triestina v. Russian Soviet Naphtha Export Agency* [1925] 2 K.B. 172 (C.A.), esp. per Atkin, L.J., at pp. 208-211. *Barker v. Hodgson* (1814) 3 M. & S. 267, and *Spence v. Chadwick* (1847) 10 Q.B. 517, are of uncertain authority.

⁹ *Indian and General Investment Trust, Ltd. v. Borax Consolidated, Ltd.* [1920] 1 K.B. 539, following *Spiller v. Turner* [1897] 1 Ch. 911. Cf. *London and South American Investment Trust v. British Tobacco Co. (Australia), Ltd.* [1927] 1 Ch. 107, and contrast *Delage v. Nugget Polish Co.* (1905) 92 L.T. 682, where the Revenue Act was British.

¹⁰ See the cases mentioned in note 81, ante, p. 638, and, in addition, *Smith v. Marconnay* (1796) Peake Add.Cas. 81, and see per Sankey, L.J., in *Foster v. Driscoll* [1929] 1 K.B. 470, at p. 518.

¹¹ Suggested by *Mann, George & Co., Ltd. v. Brown, The Times*, July 1, 1921.

8. A makes in England a promissory note, payable in New York at a rate of interest usurious under New York law. A is sued in England by X. The claim cannot be enforced.¹²

3. THE INTERPRETATION AND EFFECT OF CONTRACTS

RULE 142.—The interpretation of a contract and the effect, i.e., the rights and obligations under it of the parties thereto, are to be determined in accordance with the proper law of the contract.¹³

Comment

The laws of different countries differ as to the incidents which they attach to a given contract. The true meaning and the effect,

- ¹² *Alter Cloyes v. Chapman* (1876) 27 U.C.P. 22. This question has been much discussed in America ever since Story dealt with it at length ss 291 ff.
- ¹³ *Lloyd v. Gubert* (1866) L.R. 1 Q.B. 115; *The Gaetano* (1882) 7 P.D. 137 (C.A.); *Chartered Bank of India v. Netherlands Co.* (1882) 9 Q.B.D. 118; (1889) 10 Q.B.D. 521 (C.A.); *Jacobs v. Crédit Lyonnais* (1884) 12 Q.B.D. 589 (C.A.); *Re Missouri Steamship Co.* (1889) 42 Ch.D. 321 (C.A.); *The August* [1891] P. 328, 340; *Gibbs v. Société Industrielle, etc.* (1890) 25 Q.B.D. 399, 405-7 (C.A.); *Chatenay v. Brazilian, etc., Telegraph Co.* [1891] 1 Q.B. 79 (C.A.); *Hamlyn v. Tallisier Distillery* [1894] A.C. 202; *South African Breweries, Ltd. v. King* [1899] 2 Ch. 173; [1900] 1 Ch. 273 (C.A.); *Royal Exchange Assurance Corp. v. Vega* [1901] 2 K.B. 567, [1902] 2 K.B. 384 (C.A.); *British South Africa Co. v. De Beers Consolidated Mines* [1910] 2 Ch. 502, 512; [1912] A.C. 52; *Trinidad Shipping Co. v. Alston* [1920] A.C. 888 (P.C.); *Spurrer v. La Cloche* [1902] A.C. 446; *Jones v. Oceanic Steam Navigation Co.* [1924] 2 K.B. 780; *The Industrie* [1894] P. 58, 73 (C.A.); *Rowett Leakey & Co. v. Scottish Provident Institution* [1927] 1 Ch. 55 (C.A.); *Perry v. Equitable Life Assurance Society, etc.* (1929) 45 T.L.R. 468; *The Adriatic* [1931] P. 241; *Ruby Steamship Corp. v. Commercial Union Assurance Co., Ltd.* (1933) 39 Com.Cas. 48 (C.A.); *Adelaide Electricity Supply Co., Ltd. v. Prudential Assurance Co., Ltd.* [1934] A.C. 122; *Assicurazioni Generali v. Cotran* [1932] A.C. 268 (P.C.); *De Beche v. South American Stores, Ltd.* [1935] A.C. 148; *The Njegos* [1936] P. 90; *St. Pierre v. South American Stores, Ltd.* [1937] 3 All E.R. 349 (C.A.); *Re Anchor Lane, Ltd.* [1937] Ch. 483; *Auckland Corporation v. Alliance Assurance Co., Ltd.* [1937] A.C. 587 (P.C.); *R. v. International Trustee, etc.* [1937] A.C. 500; *Mount Albert Borough Council v. General Mutual, etc., Ltd.* [1938] A.C. 224 (P.C.); *De Bueger v. Ballantyne & Co.* [1938] A.C. 452 (P.C.); *Vita Food Products Inc. v. Unus Shipping Co., Ltd.* [1939] A.C. 277 (P.C.); *Ocean Steamship Co., Ltd. v. Queensland State Wheat Board* [1941] 1 K.B. 402 (C.A.); *Kadel Chaykin, etc., Ltd. v. Mitchell Cotts & Co. (Middle East), Ltd.* (1948) 64 T.L.R. 89; *British Controlled Oilfields v. Stagg* [1921] W.N. 319; *Municipal Council of Johannesburg v. D. Steward & Co.* (1902) [1912] S.C. 53 (H.L.); *James Howden & Co. v. Powell Duffryn Steam Coal Co., Ltd.* [1912] S.C. 920; *German Savings Bank v. Tétrault* (1904) Q.R.27, S.C. 447; *John Morrow, etc. Co. v. Hankin* (1919) 58 S.C.R. 74; *Re Naubert* (1920) 46 O.L.R. 210; *Barcelo v. Electrolytic Zinc Co.* (1932) 48 C.L.R. 391; *Merwin, etc., Ltd. v. Moolpa, etc., Ltd.* (1932) 48 C.L.R. 565; *Wanganui, etc., Board v. Australian Mutual Provident Society* (1934) 50 C.L.R. 581; *McClelland v. Trustees Executors, etc., Ltd.* (1936) 55 C.L.R. 482; *Berman v. Winrow* [1943] T.P.D. 213; see *Cheshire*, p. 307; *Cheshire, International Contracts*, pp. 74-81; *Wolf*, ss. 214, 432-437; *Westlake*, pp. 297-299; *Foot*, p. 415-423; *Falconbridge, Chap. 14*, § 5; *Batiffol*, ss. 480-561; *Lorenzen, Chap. 10*; *Rabel*, pp. 592 ff.; pp. 539 ff. The difference between Story, §§ 263-268a, §§ 270-272, §§ 280 ff.; and Savigny, § 374, is not as great as it appears to be at first sight.

i.e., the rights or obligations of the parties, cannot be determined until we have ascertained the law by which the contract is to be governed.

The one general principle which the law of England supplies for the answer to this inquiry is, 'that the rights of the parties to a contract are to be judged of by that law by which they intended (to bind), or rather by which they may be justly be presumed to have bound themselves'.¹⁴ 'You must have regard to the law of the contract, by which I mean the law which the contract itself imports is to be the law governing the contract'.¹⁵ In other words, the meaning and effect of every contract depends upon the law by which the parties intended it to be governed, *i.e.*, upon its proper law.

This general principle applies both to the interpretation or explanation of a contract and to the effects of a contract, *i.e.*, the rights and obligations of the parties under it.

Interpretation.—That a contract must be explained in accordance with its proper law, in so far as its meaning depends on technical, legal or commercial terms or upon rules of law or usages of trade, is almost self-evident. The aim of a court, when called upon to interpret a contract, must be to give to it the sense which was affixed to it by the parties when entering into it. But if the law and the usage to which the parties looked be disregarded, a sense may be given to the terms of their agreement totally different from the sense which they were intended to bear. Thus, the term 'to ship' means in England, 'to place on board', while in America it frequently denotes, 'to load on a train'.¹⁶ Which of these two meanings was intended by the parties must be ascertained in accordance with the canons of construction which form part of the proper law. This does not mean that in an English contract the words 'to ship' must always be given their English in preference to their American meaning. What it does mean is that whether they bear one meaning or the other is a question which must be decided in accordance with the methods of interpretation which form part of English law. If, on the other hand, the contract before the court is governed by the law of the State of New York, the law of that State will have to determine which of the two meanings of the words the parties must be held to have had in mind. Again, if there is a reference to a payment in gold in a contract imposing a monetary obligation, it will be for the proper law to say whether this is to be interpreted as a simple reiteration of a statutory definition of the currency unit,¹⁷ or as a gold coin clause, or as a

¹⁴ *Lloyd v. Guibert* (1865) L.R. 1 Q.B. 115, 123, *per* Willes, J.

¹⁵ *Re Missouri Steamship Co.* (1889) 42 Ch.D. 321, 336, *per* Halsbury, C.

¹⁶ See *Mowbray and Robinson v. Rosser* (1922) 91 L.J.K.B. 524 (C.A.); compare also *Rowett Leakey & Co. v. Scottish Provident Institution* [1927] 1 Ch. 55 (C.A.), and, for Canada, *Sanitary Packing Co. v. Nicholson and Bain* (1916) 33 W.L.R. 594.

¹⁷ *St. Pierre v. South American Stores, Ltd.* [1937] 3 All E.R. 349.

gold value clause.¹⁸ If an English contract provides for the payment of 'pounds' in Australia, English law will be applied by the court in deciding how the term 'pound' is to be construed, *i.e.*, whether the amount owing by the debtor to the creditor must be measured in English or in Australian currency. By virtue of a rule of interpretation which forms part of English domestic law the meaning to be attached to a term connoting a currency unit is that which it bears at the place of payment, unless a contrary interpretation can be shown to have been in the minds of the parties. Thus, in the example given, Australian currency will be owed by virtue of English law.¹⁹

To construe a contract in accordance with its proper law means to apply the rules of construction which form part of that law. 'If the law applicable to the case has ascribed a peculiar meaning to particular words, the parties using them must be bound by that meaning'.²⁰ If, on the other hand, the proper law attaches no specific meaning to the words used, the intention of the parties must be ascertained, and it must be ascertained in accordance with 'any established principle of construction of the particular instrument' which forms part of the proper law.²¹ Thus the proper law will have to decide how far trade usages must be deemed to be incorporated in the contract for the purposes of its construction, how far words used in a contract must be interpreted in the light of negotiations which preceded or accompanied or followed the conclusion of the contract, how far the correspondence between the parties may be used in order to ascertain the meaning they attached to the words used in the instrument, etc. 'When an action is brought in London on a contract which is a Chilean contract, to be interpreted by Chilean law, the Chilean law in relation to matters which may be taken into account in interpreting the contract applies just as much as it would apply if it were to be determined in Chile'.²² To exclude from application those parts of the foreign law of contract which in English domestic law are classified as belonging to the law of evidence would be tantamount to distorting the foreign law

¹⁸ *Feist v. Société Intercommunale Belge d'Electricité* [1934] A.C. 161.

¹⁹ *Adelaide Electricity Supply Co., Ltd. v. Prudential Assurance Co., Ltd.* [1934] A.C. 122, overruling *Broken Hill Proprietary Co., Ltd. v. Latham* [1933] Ch. 373 (C.A.), as explained by Lord Wright in *Auckland Corporation v. Alliance Assurance Co., Ltd.* [1937] A.C. 587, at pp. 603 ff. See also *King Line, Ltd. v. Westralian Farmers, Ltd.* (1932) 48 T.L.R. 598 (H.L.) and *De Bueger v. Ballantyne & Co.* [1938] A.C. 452 (P.C.). This interpretation is based on the view taken in the *Adelaide Case* by Lord Wright at p. 155, that the two currencies were different currencies, a view not shared by Lord Warrington, Lord Tomlin, and Lord Russell of Killowen. See Mann, *Legal Aspect of Money*, Chap. 6, see esp. p. 179.

²⁰ *Di Sora v. Phillips* (1863) 10 H.L.C. 624, per Lord Chelmsford, at p. 638.

²¹ *Ibid.*, per Lord Chelmsford, at p. 639; see also, at p. 633, per Lord Cranworth: The court must obtain, *inter alia*, 'evidence of any peculiar rules of construction, if any such rules exist by the foreign law'.

²² *St. Pierre v. South American Stores, Ltd.* [1937] 3 All E.R. 349, at p. 351, per Greer, L.J.

and to refusing to give effect to the intention of the parties. How these matters are to be proved is a question to be answered by the *lex fori*, but what facts should be allowed to throw light on the intention of the parties is to be determined by the *lex causae*, i.e., the proper law of the contract. In this case the characterisation used by the English system of the conflict of laws does not coincide with that used in English domestic law.²³

The principle that a contract must be construed in accordance with its proper law is subject to an important exception in the case of foreign money obligations. If, e.g., a sum expressed in Spanish pesetas is owed under a contract governed by the law of Gibraltar,²⁴ the meaning of the term 'pesetas' has to be ascertained in accordance with the law of Spain and not in accordance with the law of Gibraltar. 'The currency in any particular country must be ascertained in accordance with the law of that country'.²⁵ As soon as a contract refers to a currency other than that of the proper law, it is for the *lex monetae* and not for the proper law to define what are and what are not units of that currency. But it is for the proper law, and not for the *lex monetae*, to determine whether a creditor has a right to 'revalorisation', i.e., whether, in view of the depreciation of the currency in which the debt is expressed, he can claim a payment in addition to that of a sum nominally equal to the sum agreed upon.²⁶

Effect.—The rights and obligations under a contract of the parties thereto, no less than the meaning of the terms employed therein, must be determined with reference to the law which the parties had in view when they came to an agreement. For, if a contract made with a view to the law of one country be given effect in accordance with the law of some other country, it is all but certain that the end of the contract will not be attained, but that one or each of the parties will acquire rights or incur liabilities different from those which the agreement was intended to confer or impose.

²³ See *ante*, p. 62.

²⁴ *Pyrmont, Ltd. v. Schott* [1939] A.C. 145. See also *Perry v. Equitable Life Assurance Society* (1929) 45 T.L.R. 468; *Re Chesterman's Trusts* [1923] 2 Ch. 466 (C.A.); *Ottoman Bank v. Chakarian* [1938] A.C. 260 (P.C.); and see Mann, l.c., Chap. 7, where further cases are cited at pp. 196–197, note 8. Two relevant decisions, *Hopkins v. Compagnie Internationale des Wagon-Lits*, and *Franklin v. Westminster Bank*, are printed *ibid.* pp. 312 ff. See *post*, Rule 160.

²⁵ *Per* Lord Wright in *Ottoman Bank v. Chakarian* [1938] A.C. 260, at p. 278. 'The obligation . . . (is) to pay in whatever at the date of repayment . . . (is) legal tender and legal currency in the foreign country whose money . . . (is) lent. . . . The form in which . . . payment is to be made must be regulated by the municipal law of the country whose unit of account is in question . . .', *per* Lord Porter, delivering the judgment of the Privy Council in *Pyrmont, Ltd. v. Schott* [1939] A.C. 145, at pp. 157–158.

²⁶ *Anderson v. Equitable Life Insurance Society* (1926) 134 L.T. 557 (C.A.); contrast *Kornatzki v. Oppenheimer* [1937] 4 All E.R. 183. See *post*, Rule 161.

The application of this principle in practice meets with difficulties in those cases in which a contractual obligation is, according to the contract, to be performed in a country other than that of its proper law. As pointed out above, the method and manner in which a contractual obligation is to be performed is governed by the law of the place of performance.²⁷ It is therefore for the *lex loci solutionis* and not for the proper law of the contract to decide in what units of currency an obligation is to be discharged, *i.e.*, tokens of what currency have to be handed by the debtor to the creditor or in what units a remittance by the debtor to the creditor has to be expressed.²⁸ But, in spite of a number of dicta which appear to imply a different view, this does not mean that the effect of a contract is determined by the law of the place of performance as such. The substance of the obligations, wherever they are to be performed, is governed by the proper law. The difference between a question concerning the effect of the contract and a question concerning the mode of its performance can be illustrated by the case mentioned above of an obligation arising from an English contract to pay 'pounds' in Australia. Australian law will decide in the units of what currency the debt must be paid, but English law will decide in the units of what currency the debt must be measured, *i.e.*, how many Australian pounds must be paid. English domestic law is to the effect that in the absence of evidence to the contrary the parties are deemed to have intended to measure the obligation in terms of the currency unit as understood at the place where the contract is to be performed. It is for this reason and for this reason alone that, if the rate of exchange between the English and the Australian pound is unfavourable to the latter, the creditor cannot claim an amount of Australian currency units equal in value to the same amount of English currency units, but must be satisfied with a payment of a number of Australian 'pounds' equal to that in which the debt was nominally expressed. It is believed that this line of reasoning opens a way towards a solution of the problems raised by the case of *Adelaide Electricity Supply Co., Ltd. v. Prudential Assurance Co., Ltd.*,²⁹ and by the apparent contradiction between that decision and a number of subsequent cases.³⁰

A further difficulty is created by the problem of how to distinguish between the effect of the contract and the remedies which are available for its enforcement. Whether a contract gives rise to a

²⁷ Rule 136, Sub-Rule 3, *ante*, p. 593.

²⁸ See on this Mann, *l.c.*, Chap. 8.

²⁹ [1934] A.C. 122; see note 19, *ante*, p. 647, and see *Goldsbrough Mort and Co., Ltd. v. Hall* [1948] V.L.R. 145, 152.

³⁰ Especially *Mount Albert Borough Council v. Australasian, etc., Assurance Society, Ltd.* [1938] A.C. 224. See, however, *per* Greer, L.J., in *New Brunswick Ry. v. British and French Trust Corp., Ltd.* [1937] 4 All E.R. 516, at pp. 522, 525, *per* Scott, L.J., *ibid.*, at pp. 539, 543, and, in the House of Lords *per* Lord Romer [1939] A.C. 1, at p. 44. The case was decided on another ground unconnected with the conflict of laws.

claim for performance or to a claim for damages, whether, in the event of a breach of contract, the other party has a right to rescind it, whether interest is payable on a debt—all these are matters which, on a proper analysis, should be regarded as affecting the rights and obligations to which the contract gives rise. While it is clear that, in the view of the English courts, the liability to pay contractual interest and the rate of such interest are determined by the proper law,³¹ it appears to be a generally accepted view that the measure of damages is, in an English court, governed by English law, whatever be the proper law of the contract.³² This principle is apt to deprive a party of rights he would have enjoyed under the proper law or to confer upon him an uncovenanted benefit merely owing to the fact that he happened to be able to invoke the jurisdiction of an English court.³³ Its rigour could be mitigated if, following Cheshire's suggestion, the courts could separate from the question of the measure of damages that known as the 'remoteness of damage' and hold that it was one of the effects of a contract to determine what events may and must be taken into account in assessing the damage for which a party is liable.³⁴ One cannot, on the other hand, expect that English courts will ever enforce foreign created contractual rights for the enforcement of which no machinery is available in this country, such as a right to the specific performance of a contract not so enforceable according to English domestic law.

Illustrations

1. A, a British subject domiciled and resident in England, effects a life assurance policy with X & Co., an insurance company incorporated in the State of New York. The policy is taken out for the benefit of A's wife and contains a clause that the money is payable to her 'for her sole use in conformity with the statute'. This is a reference to an American statute, but, since the proper law of the contract is English, it is for English law to decide how much of the American statute is incorporated in the contract.³⁵

2. A & Co., a company incorporated and carrying on business in England, insure the life of L, their debtor, with X & Co., an insurance company incorporated in Scotland with its head office at Edinburgh. The policy is taken out in London and issued by the London branch office of X & Co. It contains a warranty against suicide within six months which 'shall not affect the interests of bona fide onerous holders'. The proper law of the contract is English, and the term 'bona fide onerous holders', a technical term of Scottish law, is to be given the primary meaning it bears in accordance with

³¹ See *post*, Rule 157, p. 708.

³² See *post*, Chap. 32.

³³ See, for an enumeration of some of the questions which, under this Rule, are governed by the *lex fori*, Wolff, s. 226. See also Schmitthoff, pp. 366 ff. According to the Restatement, the *lex loci solutionis* determines the measure of damages for breach of contract, § 372. The English practice to apply the *lex fori* is not generally adopted in the United States, see Beale, s. 413.1, p. 1333, Goodrich, s. 88.

³⁴ Pp. 850 ff; cf. Cheshire, *International Contracts*, pp. 88–90.

³⁵ *Ex p. Dever* (1887) 18 Q.B.D. 660 (C.A.). Cf. *Crosland v. Wrigley* (1895) 73 L.T. 60, 327 (C.A.).

English canons of construction. If this interpretation had yielded no meaning at all, the technical construction of Scottish law might have been relevant.³⁷

3. X, a Frenchman resident in Paris, agrees to pay to A, a Belgian resident in Brussels, 100,000 'francs'. If the proper law of the contract is English the parties will be deemed to have intended the debt to be expressed in the 'francs' current at the place of payment which, according to English law, would be Brussels.³⁸

4. By a contract made in Paris A, a citizen of Chile domiciled in France, leases a house at Santiago de Chile to X & Co, a company incorporated in England and carrying on business in Chile. For the purpose of the contract both parties 'choose a domicile' in Chile, *i.e.*, they agree that the contract is to be governed by the law of Chile. The rent is fixed at '93,500 pesos of 183,057 millionths of a gramme of fine gold' per month, to be paid at the option of A either in Chile or by remittance to Europe. The meaning of the reference to gold in the contract must be ascertained in accordance with the law of Chile, wherever the money is payable, and, in the absence of any collateral verbal agreement (which would be relevant according to the law of Chile), it must be interpreted as a mere repetition of the statutory definition of the Chilean currency unit, and not, as it might have to be interpreted according to English domestic law,³⁹ as an undertaking to pay as many Chilean paper pesos as would enable the creditor to acquire an equivalent amount in gold.⁴⁰

5. In 1935 X borrows 500,000 Spanish pesetas from A in Gibraltar. Pesetas are not legal tender in Gibraltar, but are in frequent use there. In 1936 the Spanish Government prohibits the export and import of peseta notes unless they are accompanied by an authorisation called a 'guia'. Notes circulating outside Spain without a 'guia' cease to be legal tender according to Spanish law. Since it is for Spanish law to define the meaning of the unit of account of its currency, and as peseta notes without guias are not units of account according to Spanish law, X cannot perform his contractual obligation by tendering peseta notes unaccompanied by guias.⁴¹

4. THE DISCHARGE OF CONTRACTS

RULE 143.—The validity of the discharge of a contract (otherwise than by bankruptcy⁴²) depends upon the proper law of the contract.⁴³

³⁷ *Rowett Leakey & Co. v. Scottish Provident Institution* [1927] 1 Ch. 55 (C.A.).

³⁸ Suggested by Lord Wright in *Adelaide Electricity Supply Co., Ltd. v. Prudential Assurance Co., Ltd.* [1934] A.C. 122, at p. 156. *Quære*, what would be the position if French or Belgian or Swiss law was the proper law of the contract? Or if English law was the proper law and, according to Belgian law, Paris was the place of payment? See for these and similar questions, Mann, *l.c.*, Chap. 6.

³⁹ *Feist v. Société Intercommunale Belge d'Électricité* [1934] A.C. 161, the leading case on the construction of gold clauses in English domestic law; *Syndic in Bankruptcy of Khoury v. Khayat* [1943] A.C. 507 (P.C.).

⁴⁰ *St. Pierre v. South American Stores, Ltd.* [1937] 3 All E.R. 349 (C.A.).

⁴¹ *Pymont, Ltd. v. Schott* [1939] A.C. 145 (P.C.).

⁴² See Rules 101, 102, 103, pp. 444, 447, 448, *ante*.

⁴³ *Warrender v. Warrender* (1894) 9 Bli. 89, 125, *per* Brougham, C.; *Ralli v. Dennistoun* (1851) 6 Ex. 483; 20 L.J.Ex. 278; *Ellis v. M'Henry* (1871) L.R. 6 C.P. 228, 234; *Gibbs v. Société Industrielle et Commerciale des Métaux* (1890) 25 Q.B.D. 399 (C.A.); *Swiss Bank Corporation v. Boehmische Industrialbank* [1923] 1 K.B. 678, 681-683 (C.A.); *Mount Albert Borough Council v. Australasian, etc., Ltd.* [1938] A.C. 224 (P.C.); *Barcelo v. Electrolytic Zinc Co. of Australasia, Ltd.* (1932) 48 C.L.R. 391; *Wanganui-Rangitikei Electric Power Board v. Australasian Mutual Provident Society* (1934) 50 C.L.R. 483; *Re a Mortgage J. to A.* [1933] N.Z.L.R. 1512.

(1) A discharge in accordance with the proper law of the contract is valid.⁴⁴

(2) A discharge not in accordance with the proper law of the contract is not valid.⁴⁵

Comment

The validity or invalidity of the discharge of a contractual obligation ought to depend upon the proper law of the contract. The proper law ought to determine whether a contractual obligation has been extinguished by performance or whether performance is excused as a result, *e.g.*, of the frustration of the contract.⁴⁶ Whether or not an act on the part of the promisor or debtor constitutes performance, is a matter to be decided by the proper law. If X and A enter into a contract which is subject to French law, the question whether an act on the part of X, *e.g.*, some act which X alleges amounts to payment, does or does not discharge X from liability, must on principle be determined by reference to French law.^{46a} This appears to be the view maintained by English courts and also by the authors who have written on the subject.

When a contractual obligation is to be performed in the country the law of which governs the contract, *i.e.*, when the *lex loci solutionis* is the proper law of the contract, anything which discharges the liability under the law of that country will be held a good discharge by our courts.⁴⁷ This Rule is generally accepted. It is well illustrated by an old case⁴⁸ in which Parke, B., laid down that 'inasmuch as it appeared that the accord and satisfaction was sufficient according to the law of the country where the bill was negotiated and the payment was made, the bill being then due and payable and in the hands of the true holder, the defence (of accord and satisfaction according to that law) was good'.

When the place of performance is outside the country the law of which is the proper law, the situation is more difficult. The courts generally apply the proper law of the contract to the question of discharge. In *Jacobs v. Crédit Lyonnais*⁴⁹ English

⁴⁴ Unless the foreign law under which the contract is discharged is of a penal or discriminatory character. *Wolff v. Osholm* (1817) 6 M. & S. 92; *Re Friedrich Krupp Actiengesellschaft* [1917] 2 Ch. 188. Contrast *Perry v. Equitable Life Assurance Society of the United States of America* (1929) 45 T.L.R. 468; *Employers' Liability Assurance Corporation v. Sedgwick, Collins & Co.* [1927] A.C. 95.

⁴⁵ *Gibbs v. Société Industrielle, etc.* (1890) 25 Q.B.D. 399, *per* Lord Esher, M.R., at pp. 405, 407, *per* Lindley, L.J., at p. 410; see Cheshire, Chap. 9, pp. 353-356; Wolff, ss. 438-440; Foote, pp. 432-490; Johnson, Vol. 3, pp. 587-545; Restatement, §§ 358, 373-376.

⁴⁶ As in *Jacobs v. Crédit Lyonnais* (1884) 12 Q.B.D. 589 (C.A.).

^{46a} See *The Baarn* (No. 1) [1933] P. 261 (C.A.); (No. 2) [1934] P. 171 (C.A.).

⁴⁷ See Story, s. 331.

⁴⁸ *Ralli v. Dennistoun* (1851) 6 Ex. 483, at p. 493.

⁴⁹ (1884) 12 Q.B.D. 589.

law was the proper law, but French law was the *lex loci solutionis*, and the question of impossibility of performance was held to be governed by English law. In *Mount Albert Borough Council v. Australasian, etc. Assurance Society, Ltd.*,⁵⁰ the proper law of the contract was the law of New Zealand, but the debt was payable in the State of Victoria. The question whether the debt was discharged by the payment of interest at a particular rate was governed by the law of New Zealand. 'There is no doubt that a debt or liability arising in any country may be discharged by the laws of that country, and that such a discharge, if it extinguishes the debt or liability and does not merely interfere with the remedies or course of procedure⁵¹ to enforce it, will be an effectual answer to the claim, not only in the courts of that country, but in every other country. This is the law of England, and is a principle of private international law adopted in other countries.'⁵² We may therefore conclude that a contractual obligation which has been discharged by the proper law, will not be enforced in England, whether or not it has been discharged according to the law of the place where it was to be performed. We may also conclude that a contractual obligation which has not been extinguished by the proper law may be enforced in England, even though by the *lex loci solutionis* it would have been extinguished. Under modern conditions this leads to the important result that the proper law of the contract and not the law of the place of payment has to answer the question whether the debtor of a monetary obligation expressed in a depreciated currency is able to discharge his debt by a payment in depreciated currency units or whether he must make an additional payment by way of 'revalorisation'.⁵³

The mode or manner of performance, on the other hand, is governed by the law of the place of performance as such. It is this rule which gives rise to such doubts and difficulties as still attach to the question whether the discharge of an obligation is governed by the proper law of the contract in a situation in which the obligation is to be performed in a country other than that of the proper law. These difficulties are illustrated by the problems which arise when legislation is passed in the country of performance by which the time for the discharge of monetary obligations is postponed. Does such a moratorium enure for the benefit of a debtor whose debt is governed by a law other than that of the country of payment whose legislature has granted the moratorium?

⁵⁰ [1938] A.C. 224.

⁵¹ Anything of this nature depends wholly on the *lex fori*. See Rule 193, *post*, p. 859.

⁵² *Ellis v. M'Henry* (1871) L.R. 6 C.P. 228, 234, *per curiam*. The reference to the country in which a debt or liability arises is, in modern parlance, a reference to the proper law of the contract. See also for recognition of the principle in the early nineteenth century: *Smith v. Buchanan* (1800) 4 East 6, 11; *Lewis v. Owen* (1821) 4 B. & Ald. 654; *Phillips v. Allen* (1828) 8 B. & C. 477.

⁵³ See the cases cited in note 26, *ante*, p. 648, and see *post*, Rule 161.

Which law governs the time of payment, the proper law or the *lex loci solutionis*? If the debt arises from a bill of exchange, 'the due date thereof is determined according to the law of the place where it is payable'.⁵⁴ This may or may not be the *lex loci contractus* which, in the case of obligations created by negotiable instruments, is frequently the proper law of the contract.⁵⁵ English courts will apply this principle to moratoria such as those enacted in France during the war of 1870-1871⁵⁶ and in Germany during the war of 1914-1918.⁵⁷ Outside the law of negotiable instruments, however, the situation is far from clear, and the decisions of the Australian courts concerning the application of the New South Wales Moratorium Act, 1931, appear to show that it is the proper law of the contract rather than the law of the place of performance which governs this matter.⁵⁸

Discharge by bankruptcy and similar proceedings is governed by special rules, at any rate where the debt is discharged under Imperial bankruptcy legislation.⁵⁹

Garnishment. A situation requiring special consideration also arises if a judgment creditor seeks to attach by way of garnishee proceedings a debt payable in England by a debtor resident here, but subject to a foreign legal system under which payment by the garnishee to the judgment creditor under an English garnishee order absolute does not discharge the debt owing by the garnishee to the judgment debtor. The court would have jurisdiction to make such an order, because the test of jurisdiction is not whether the debt is governed by English law, but whether it is situated in England, *i.e.*, owed by a debtor resident here. It is therefore not impossible for a debtor to discharge his debt under the rules of English law, *i.e.*, by obeying an English garnishee order absolute, while remaining liable under the proper law. Yet this situation, while possible, is unlikely to arise. It appears to be the view of the courts that they should refuse to exercise their discretionary power of issuing garnishee orders if, by doing so, they would expose the garnishee to the risk of having to pay twice over.⁶⁰ Hence, provided the attention of the court is drawn

⁵⁴ Bills of Exchange Act, 1882, s. 72 (5).

⁵⁵ Bills of Exchange Act, 1882, s. 72 (2). See Rule 153, *post*, p. 684.

⁵⁶ *Rouquette v. Overmann* (1875) L.R. 10 Q.B. 525.

⁵⁷ *Re Francke and Rasch* [1918] 1 Ch. 470.

⁵⁸ *Merwin Pastoral Co. Proprietary Ltd. v. Moolpa Pastoral Co. Proprietary Ltd.* (1932), 48 C.L.R. 565; *McClelland v. Trustees Executors and Agency Co. Ltd.* (1936) 55 C.L.R. 483; *Dennys Lascelles Ltd. v. Borchard* [1933] V.L.R. 46.

⁵⁹ *Ellis v. M'Henry* (1871) L.R. 6 C.P. 228; see Rules 101-108, *ante*, pp. 444-450.

⁶⁰ See *per* Scrutton, L.J., in *Swiss Bank Corporation v. Boehmische Industriabank* [1923] 1 K.B. 678, at p. 681. The language used by Scrutton, L.J., might suggest that he regarded the jurisdiction of the court as limited to cases in which English law was the proper law of the contract from which the debt to be garnished arose. The case did not call for a decision of this question because the debt owing by the National Provincial Bank was clearly not only situated in England, but also governed by English law.

to the proper law governing the debt, it will presumably, though it need not, decline to issue the order unless it is satisfied that compliance with its terms will discharge the debt under the proper law.⁶¹

Illustrations

1. X, a Frenchman, incurs in France a debt to A, also a Frenchman. French law is the proper law of the contract. Under French law X is absolutely discharged from all liability to A, *e.g.*, by a statute which after the lapse of a given time extinguishes not only the remedy for the recovery of the debt, but the debt itself. *Semble*: The discharge is valid in England.⁶²

2. X in Austria becomes liable to A on a bill of exchange drawn by A and accepted by X in Austria and there payable. X, on the bill becoming due, owes A a sum equivalent to £100. He satisfies A's claim by the payment of £90, which A accepts in satisfaction of the debt. This would not be accord and satisfaction under English law, but it is accord and satisfaction under Austrian law. The accord and satisfaction is a valid discharge of X's debt to A. This is also a further illustration of the principle that the need for consideration is governed by the proper law.⁶³

3. A bill for £100 is drawn and issued in Demerara, but is accepted and payable in England. At the time when the bill matures the holder owes the acceptor £100. According to the law of Demerara, the proper law of the contract, this operates as a discharge of the bill (by *compensatio*). The drawer is discharged in England. *Compensatio* or set-off is not necessarily a question of procedure to be decided by the *lex fori*.⁶⁴

4. A, who is domiciled and resident in England, holds cumulative preference shares in X & Co., a company incorporated in England and carrying on business in Queensland, where the dividends are payable. By a statute passed in Queensland companies carrying on business there are given the right and placed under the duty of deducting from dividends payable to shareholders an amount equivalent to the local income tax payable on these dividends. This statute does not operate as a partial discharge of X & Co.'s liability to pay to A the full dividend declared by a proper resolution and owing under an English contract, and no deduction in respect of the Queensland income tax may be made.⁶⁵

5. In 1887 H takes out a life insurance policy with the St. Petersburg sub-agent of the Hamburg branch of X & Co., an American insurance company. The insurance sum is expressed in German marks and expressly made subject to English law. In 1926, after H's death, his widow W claims from X & Co. in an English court revalorisation of the depreciated mark debt in accordance with the rules of German law. She fails because X & Co. have discharged the debt in accordance with English law which is the proper law of the contract

⁶¹ The relevant cases are *Martin v. Nadel* [1906] 2 K.B. 26 (C.A.); *Swiss Bank Corporation v. Boehmische Industriebank* [1923] 1 K.B. 673 (C.A.); *Richardson v. Richardson* [1927] P. 228; see also *Gould v. Webb* (1855) 4 E. & B. 933. See in particular the judgment of Vaughan Williams, L.J., in *Martin v. Nadel*, at p. 29, and Rule 136, *ante*, p. 577.

⁶² Compare *Huber v. Steiner* (1835) 2 Bing.N.C. 202; see Falconbridge, Chap. 12.

⁶³ See *Ralli v. Dennistoun* (1851) 6 Ex. 483, 493; compare *Burrows v. Jemino* (1726) 2 Strange 783; see Rule 138, p. 616, *ante*.

⁶⁴ *Allen v. Kemble* (1848) 6 Moore P.C. 814.

⁶⁵ *Spiller v. Turner* [1897] 1 Ch. 911. Would the deduction operate as a discharge if the shareholder was domiciled and resident in Queensland? See also *Indian and General Investment Trust, Ltd. v. Borax Consolidated, Ltd.* [1920] 1 K.B. 539; *London and South American Investment Trust v. British Tobacco (Australia) Co., Ltd.* [1927] 1 Ch. 107; and see above Rule 141, Exception, p. 637.

and which does not compel the debtor to revalorise a debt expressed in a depreciated currency. *Semble*: It is immaterial where the debt is payable.⁶⁶

6. Under an English contract A, who carries on business in England, agrees to sell copper to X & Co., a French company carrying on business in France. X & Co. refuse to accept, and to pay for, the copper tendered by A. Subsequently X & Co. are placed under judicial liquidation in France, and, as a result, their liability to A is deemed to be discharged by French domestic law. They are still liable to A in England because the discharge did not operate under the proper law of the contract.⁶⁷

7. X, who is resident in the State of Victoria, owns land situated in New South Wales. He mortgages the land to A & Co., a company incorporated and carrying on business in Victoria where the debt is payable. The law of New South Wales is the proper law of the contract, and the New South Wales Moratorium Act, 1931, applies to it.⁶⁸

8. A bill of exchange is drawn and issued in England upon a drawee resident in France, where the bill is payable. After the date of issue and before the maturity of the bill a moratorium is granted to debtors by a French statute. The maturity of the bill is thereby postponed.⁶⁹

9. A & Co., an English company, obtain in England a judgment against B & Co., a company incorporated and carrying on business in Czechoslovakia, who keep an account with X & Co., an English bank. A & Co. can by way of garnishee proceedings in England, attach the balance owing by X & Co. to B & Co. *Quære*: what would the situation be if the contract between X & Co. and B & Co. was governed by Czechoslovak law and that law refused to recognise as a discharge payments made by X & Co. to A & Co.? ⁷⁰

10. A enters in Russia into a contract with the branch office of an American insurance company. The contract is to be governed by Russian law. Under that law the contract is cancelled in 1919 by legislation. A sues the company in England. The cancellation of the contract is a valid discharge.⁷¹

11. Under a contract governed by English law X, a resident of the State of Virginia, owes money to W, the wife of H. H and W are domiciled and resident in England. The debt is payable in Virginia. X pays the money in Virginia to H and thereby discharges the debt to W under the domestic law of Virginia. *Semble*: The discharge would not be recognised as such by an English court.⁷²

⁶⁶ *Anderson v. Equitable Assurance Society of the United States* (1926) 134 L.T. 557 (C.A.); compare *Kornatzki v. Oppenheimer* [1937] 4 All E.R. 139, where German law was the proper law of the contract and the English court applied the principles of 'revalorisation' developed by the German courts.

⁶⁷ *Gibbs v. Société Industrielle et Commerciale des Métaux* (1890) 25 Q.B.D. 399 (C.A.).

⁶⁸ *McLelland v. Trustees Executors and Agency Co., Ltd.* (1936) 55 C.L.R. 488.

⁶⁹ *Rouquette v. Overmann* (1875) L.R. 10 Q.B. 525.

⁷⁰ *Swiss Bank Corporation v. Boehmische Industriebank*, [1923] 1 K.B. 673 (C.A.).

⁷¹ *Perry v. Equitable Life Assurance of the United States of America* (1929) 45 T.L.R. 468.

⁷² Suggested by the facts of *Graham v. First National Bank* (1881) 84 N.Y. 899; in the Canadian case *Equitable Life Assurance Co. v. Perrault* (1892) 26 L.C.J. 882, payment to an administrator in New York was held to discharge a life assurance policy and to bar a claim in Quebec.

PARTICULAR CONTRACTS

1. CONTRACTS WITH REGARD TO IMMOVABLES ¹

RULE 144.—The formal and material validity, interpretation and effect of a contract with regard to an immovable are governed by the proper law of the contract.²

The proper law of such contract is, in general, though not necessarily, the law of the country where the immovable is situate (*lex situs*).³

Comment

It is clearly established by judicial authority and no longer controversial among learned writers that a contract with regard to land is governed by its proper law as defined in the preceding chapter. A conveyance or transfer of an interest in land, on the other hand, is always governed by the *lex situs*. If, by a contract made in England, X, a British subject resident in England, agrees to sell French land to A, another British subject resident in England,

¹ Cheshire, pp. 746-760; Wolff, ss. 415, 435, 499, 505, 506; Westlake, §§ 163, 165, 170, 172-175, 216, Foote, p. 230; Falconbridge, Chap. 4, § 7, Chap. 21, § 2, Chap. 30; Batiffol, ss. 122-130, 205, 216-217; Restatement, §§ 340-341; Beale, pp. 1190-1192; 1216-1219; Goodrich, s. 145; Lorenzen, Chap. 18; Story, ss. 363-373, 424, 428, 430, 431, 435, 463.

² *Penn v. Lord Baltimore* (1750) 1 Ves. 444; *Campbell v. Dent* (1838) 2 Moore P.C. 292; *Ex p. Pollard* (1840) Mont. & C. 239; *Waterhouse v. Stansfield* (1851) 9 Hare 234; (1852) 10 Hare 254; *Norris v. Chambres* (1861) 29 Beav. 246; (1861) 3 De G.F. and J. 583; *Cood v. Cood* (1863) 33 L.J.Ch. 273; *Hicks v. Powell* (1869) L.R. 4 Ch. 741; *Norton v. Florence Land Co.* (1877) 7 Ch.D. 332; *Re De Nicols* [1900] 2 Ch. 410; *Ex p. Holthausen* (1874) L.R. 9 Ch.App. 722; *Duder v. Amsterdamsch Trustees Kantoor* [1902] 2 Ch. 132; *British South Africa Co. v. De Beers Consolidated Mines, Ltd.* [1910] 2 Ch. 502 (C.A.); [1912] A.C. 52; *Halford v. Clark* (1915) 112 L.T. 68; *Re Smith* [1916] 2 Ch. 206 (C.A.); *British Controlled Oilfields v. Stag* [1921] W.N. 319; 66 S.J. 18; *Re Anchor Line (Henderson Bros.), Ltd.* [1937] Ch. 483; *Mackintosh v. May* (1895) 22 R. 345; *Higgins v. Ewing's Trustees* [1925] S.C. 440; *Bradburn v. Edinburgh Insurance Co.* [1903] 5 O.L.R. 657; *Barcelo v. Electrolytic Zinc Co. of Australasia, Ltd.* (1932) 48 C.L.R. 391; *Merwin, etc., Ltd. v. Moolpa, etc., Ltd.* (1932) 43 C.L.R. 565; *Wanganui-Rangitikei, etc., Board v. Australian Mutual Provident Society* (1934) 50 C.L.R. 581; *McGlelland v. Trustees Executors and Agency, Co., Ltd.* (1936) 55 C.L.R. 488; *Dennys Lascelles, Ltd. v. Borchard* [1933] V.L.R. 46; *Re a Mortgage J to A* [1933] N.Z.L.R. 1512; *St. Pierre v. South American Stores* [1937] 3 All E.R. 349 (C.A.).

³ Compare *Lloyd v. Guibert* (1865) L.R. 1 Q.B. 115, 122 (*per* Willes, J.) and *R. v. International Trustee* [1937] A.C. 500, 529 (*per* Lord Atkin). For further discussion of these principles, see *ante*, Rule 136, p. 579.

the contractual relationship between X and A may, and probably will, be governed by English law, but French law will govern the conveyance of the land. Similarly if X had undertaken to mortgage the land for a loan to be granted to him by A, the contract to create the mortgage would be an English contract, but the mortgage itself, including its actual creation, would be governed by French law.⁴

Story was of the opinion that, irrespective of the intention of the parties or other factors connecting the contract with a country other than that of the *situs* of the land, such contracts must be wholly governed by the law of the place where the land is situate.⁵ This view is intelligible and simple and avoids the necessity for nicely distinguishing between a contract and a conveyance, but it may be at variance with the intentions of the parties, and it is inconsistent with the doctrines accepted by the English courts.

The doctrine of the *lex situs* and the doctrine of the proper law differ in their practical application far less than would at first sight appear. The parties to a contract with regard to land do, as a matter of fact, generally intend the contract to be governed by the *lex situs*; the proper law, therefore, of the contract is in most instances the same as the *lex situs*. In the absence of an express selection of another law or of clear indications pointing to a contrary intention the courts will presumably in most instances hold that the parties must be deemed to have intended that the law of the *situs* should apply to the contract.

Moreover, no contract with regard to land, *e.g.*, in France, can be carried out if its performance be opposed to French law, and no English court will ever attempt to compel any man to perform in France an English contract which French law forbids. If, in the example given above, X has undertaken to do something which, whilst not illegal according to the law of France, cannot be done there, *e.g.*, to create a usufruct beyond the lifetime of a natural person by entailing the land upon A's eldest son and his heirs (Art. 617 C.C.), an action may perhaps be maintained in England for breach of the contract, *i.e.*, in certain circumstances X may be forced to pay damages for his inability to perform his promise, though this is doubtful.⁶ If, on the other hand, X has contracted with A to deal

⁴ *British South Africa Co. v. De Beers Consolidated Mines, Ltd.* [1910] 2 Ch. 502, 512, 515 (*per* Cozens-Hardy, M.R.), 522-524 (*per* Kennedy, L.J.). The decision of the Court of Appeal was reversed by the House of Lords [1912] A.C. 52, on a point of English domestic law.

⁵ Sections 363-365, 424, 428. On the Continent the tendency towards the application of the *lex situs* is, on the whole, stronger than in England and in America. This is especially true of France, and to a lesser extent, of Germany. A law other than that of the *situs* will only be applied in circumstances '*assez exceptionnelles*'. See Batiffol, *ss.* 122 ff.

⁶ Compare *Ex p. Pollard* (1840) Mont. & C. 239, and *Re Anchor Line (Henderson Bros.), Ltd.* [1937] Ch. 488, with *Waterhouse v. Stansfield* (1851) 9 Hare 234; (1852) 10 Hare 254. For a criticism of *Ex p. Pollard*, much of which is also relevant to *Re Anchor Line*, see Falconbridge, p. 531, *cf. ante*, p. 146.

specific sense defined in Rule 139.¹⁰ With respect to form, there is no reason why the principle *locus regit actum* should not apply to contracts concerning land as it applies to other contracts. The parties should be regarded as entitled to choose either the form prescribed by the law of the place at which they enter into the contract or that prescribed by the proper law.¹¹ In the majority of those exceptional cases in which a law other than the *lex situs* is the proper law of the contract, the proper law will in fact be the *lex loci contractus*.¹²

That the principles of English law, and in particular the principles of English equity, can and must be applied to contractual relations concerning foreign land, has been a rule of the English conflict of laws ever since 1750, the year in which Lord Hardwicke decided the case of *Penn v. Lord Baltimore*.¹³ The rule in *Penn v. Baltimore* and its limitations as well as the numerous cases in which it has been applied have been discussed elsewhere.¹⁴ Its application has led to the result that English courts have recognised and enforced equitable mortgages of foreign land, which under the *lex situs* had no legal effect,¹⁵ and that they even went so far as to decree the foreclosure of mortgages of foreign lands on the principles of English law.¹⁶ Nor has this rule only operated in favour of the application of the *lex fori*. Thus it has been held that the rights of husband and wife to land in England are governed not by the *lex situs* but by the terms of a marriage contract into which under French law they were deemed to have entered upon their marriage in France.¹⁷

Illustrations

I. X, a British subject domiciled in England and resident in Chile, and A and B, his brothers, British subjects domiciled and resident in England, have each of them an interest in certain lands in Chile. X enters into negotiations with A and B, which are carried on by correspondence, for the purchase by X of A's and B's shares in the land. The question whether these negotiations have resulted in a contract is to be determined in accordance with English law which would be the proper law on the assumption that the contract had been concluded. 'The right to land in Chile must, no doubt, be determined by their laws; but a contract between three English gentlemen, two of them domiciled and residing in England, and the third residing in Chile, but not

¹⁰ *Ante*, p. 619. In practice this will normally, though not necessarily, mean that capacity is governed by the *lex situs*, i.e., capacity to contract will normally be governed by the same law which applies to the capacity to convey. See *Bank of Africa v. Cohen* [1909] 2 Ch. 129 (C.A.), criticised, *ante*, p. 538.

¹¹ See *ante*, Rule 140, p. 624.

¹² For a situation in which, as a result of an express selection of the proper law, a third system governed the contract, see *British Controlled Oilfields v. Stagg* [1921] W.N. 819.

¹³ 1 Ves. 444.

¹⁴ Rule 20, Exception 1, *ante*, p. 145.

¹⁵ *Ex p. Pollard* (1840) Mont. and C. 289; *Re Smith* [1916] 2 Ch. 206; see also *Re Anchor Line (Henderson Bros.), Ltd.* [1937] Ch. 488. For an exhaustive and critical discussion, see Falconbridge, Chap. 30.

¹⁶ *Paget v. Ede* (1874) L.R. 18 Eq. 118.

¹⁷ *Re De Nicola* [1900] 2 Ch. 410; see *ante*, p. 543.

having acquired a foreign domicile must, I think, be governed and construed by the rules of English law'.¹⁸

2. X & Co., a Canadian company, and A, a citizen of Ecuador carrying on business there, enter in New York into a contract regarding the exploitation of mineral rights in Ecuador. The contract contains the following clause: 'It is agreed that while for convenience this agreement is signed by the parties in the City of New York, U.S.A., it shall be considered and held to be one duly signed and made in London, England'. The proper law of the contract is English and the contract is governed neither by the *lex situs* (Ecuador) nor by the *lex loci contractus* (New York).¹⁹

3. By a contract made in England A & Co, an English company, agrees to grant X & Co., another English company, a loan on the security of a floating charge to be created by debentures issued by X & Co. to A & Co. It is further provided that A & Co. should receive from X & Co. an exclusive licence to work all the diamondiferous mines owned by X & Co in South Africa. The question whether this undertaking is void as being a clog on the equity of redemption must be decided in accordance with the proper law of the contract, *ie*, with English law, and not in accordance with the *lex situs*.²⁰

4. In 1907 X, a British subject domiciled and resident in England, makes a deed charging, in consideration of £1,000 received, all his share and interest in an estate in Dominica in favour of his sisters and covenants to execute a legal mortgage. In 1913 he dies without having done so. Although the law of Dominica, the *lex situs*, does not know the institution of an equitable mortgage, an equitable mortgage has been created by the contract the proper law of which is English.²¹

5. X & Co., a company incorporated in England, has its head offices in Glasgow. It creates in Glasgow a floating charge over all its assets in England and Scotland in favour of a Scottish bank, and the charge is registered in London under the provisions of the Companies Act. A floating charge is unknown to the law of Scotland. English law is the proper law of the contract with the result that, *inter alia*, in the liquidation of the company, the proceeds of Scottish land owned by X & Co. are subject to the equitable charge created by the company in favour of the bank.²²

6. A loan is made through an agent in Ontario by a Scottish company on the security of a mortgage on land in Ontario, payment of the principal and interest to be made by bank draft on London, England. The effect of the contract is governed by the law of Ontario, as the proper law of the contract.²³

7. X and A make an agreement in Scotland for the discharge of a mortgage of lands in Demerara by bills payable in Scotland. This is a Scottish contract, since, though referring to lands in Demerara, it is made and to be performed in Scotland.²⁴

8. By an agreement made in the State of Victoria X, a resident of a part of New South Wales which is geographically and economically very closely

¹⁸ *Cood v. Cood* (1863) 33 L.J.Ch. 273, 278, *per* Romilly, M.R.

¹⁹ *British Controlled Oilfields v. Stagg* [1921] W.N. 31. This case anticipates the decision of the Privy Council in *Vita Food Products Inc. v. Unus Shipping Co., Ltd.* [1939] A.C. 277, in that it shows the validity of the choice of a proper law not directly connected with the contract. It is, however, true that the plaintiff company had a branch office in London. The case is discussed in great detail by Batiffol, ss. 48, 60, 82, 387, and elsewhere.

²⁰ *British South Africa Co. v. De Beers Consolidated Gold Mines, Ltd.* [1910] 2 Ch. 502 (C.A.); [1912] A.C. 52.

²¹ *Re Smith* [1916] 2 Ch. 206 (C.A.). For the opposite situation: security void by the proper law, valid by the *lex situs*, see *Richards v. Goad* (1827) 1 Molloy 22.

²² *Re Anchor Line (Henderson Bros.), Ltd.* [1937] Ch. 433.

²³ *Bradburn v. Edinburgh Insurance Co.* (1903) 5 O.L.R. 657. See Falconbridge, p. 538.

²⁴ *Campbell v. Dent* (1838) 2 Moore P.C. 292.

connected with Victoria,²⁵ agrees to repay moneys due to A & Co, a company incorporated and carrying on business in Victoria, and to execute a charge over his farm in the above-mentioned part of New South Wales. The law of Victoria is the proper law of the contract.²⁶

9. A company incorporated in Victoria, by a contract made there, agrees to sell a sheep farm in New South Wales to X, who is resident in New South Wales and acts as agent for a company to be formed in Victoria. The law of New South Wales is the proper law of the contract.²⁷

10. A New Zealand local authority borrows in Victoria money from a company incorporated and carrying on business in Victoria, where the capital is repayable and interest is payable. The loan is charged on the local rates in New Zealand. The law of New Zealand is the proper law of the contract.²⁸

2. CONTRACTS WITH REGARD TO MOVABLES ²⁹

RULE 145.—The formal and material validity, interpretation and effect of a contract with regard to a movable are governed by the proper law of the contract.³⁰

Comment

Here again it is necessary to distinguish between a contract and a transfer or an assignment. An agreement to sell or to pledge or mortgage a movable (whether tangible or intangible^{30a}) is governed by the proper law of the contract, *i.e.*, by the law to which the parties must be taken to have intended, when contracting, to submit themselves. Whether the transfer or the assignment of a movable is valid, and therefore whether a contract to sell operates as a sale,³¹ depends, generally, at any rate, on the law of the country where the movable is situate (*lex situs*).³² If X, who carries on business in England, agrees to transfer an American patent to A, who carries

²⁵ See Paton, 14 Can.Bar Rev. 832 (1936).

²⁶ *Dennys Lascelles, Ltd. v. Borchard* [1933] V.L.R. 46

²⁷ *Merwin Pastoral Company Proprietary, Ltd. v. Moolpa Pastoral Company Proprietary, Ltd.* (1932) 48 C.L.R. 565. See also *McClelland v. Trustees Executors and Agency Co., Ltd.* (1936) 55 C.L.R. 483.

²⁸ *Mount Albert Borough Council v. Australasian, etc., Society, Ltd.* [1938] A.C. 224 (P.C.). See also *Wanganui-Rangitikei Electric Power Board v. Australian Mutual Provident Society* (1934) 50 C.L.R. 581.

²⁹ Cheshire, pp. 576-580; Wolff, ss. 404, 436; Falconbridge, Chap. 19; Johnson, Vol. 3, pp. 217 ff., 576-583; Batifol, ss. 131 f., 182-198, 206-213, 218 f.; Restatement, § 332, §§ 255 ff.; Beale, pp. 1215 f.; Goodrich, pp. 406 ff.; Stumberg, pp. 367-375; *Benjamin on Sale*, 7th ed., pp. 598 f.; Chalmers' *Sale of Goods Act*, 12th ed., pp. 14 f.

³⁰ *Jacobs v. Crédit Lyonnais* (1884) 12 Q.B.D. 589 (C.A.); *Sanderson and Sons v. Armour and Co., Ltd.* (1922) 91 L.J.P.C. 167; *Kwik Hoo Tong v. Finlay and Co.* [1927] A.C. 804; *Benaim v. Debono* [1924] A.C. 514 (P.C.); *Clarke v. Harper and Robinson* [1938] N.Ir. 162; *Frankman v. Anglo-Prague Credit Bank* [1948] 2 All E.R. 1025 (C.A.).

^{30a} See Rule 128, *ante*, p. 557.

³¹ *Sale of Goods Act*, 1893, s. 1 (3), (4).

³² Sections 16, 17, 18, *ibid.* If, under an English contract, goods are sold which lie in a country under whose law property passes only by delivery, s. 17 of the *Sale of Goods Act* cannot apply so as to make property pass before delivery, and consequently the risk will not pass to the buyer before delivery (s. 20). See *ante*, Rule 130, p. 560.

on business in England, their contract is very likely to be governed by English law, but the question whether A has acquired the patent is to be answered by the law of the United States. The same is true if X agrees to sell goods situated in New York to A. This may be an English contract, but the law of New York applies to the questions at what time, in what form, etc., property passed to A. The fact that the English Sale of Goods Act deals with both problems must not be allowed to obscure this essential difference. The principle of English domestic law that, in certain limits, the time and mode of the transfer of property in movables are determined by the intention of the parties is a rule which belongs to the law of property, not to the law of contract, and applies only to goods situated in England, irrespective of the proper law.³³

Where, as in *Jacobs v. Crédit Lyonnais*,³⁴ a contract for the sale of goods is made between two firms carrying on business in the same country, the law of that country is likely to be regarded as the proper law of the contract, although the goods may have to be delivered in another country. Where, however, as in *Benaim v. Debono*,³⁵ goods are sold by a firm in one country to a firm carrying on business elsewhere, the law of the place of delivery must, in the absence of evidence of a contrary intention, always have a strong claim to be considered as the proper law. In many instances, especially of contracts f.o.b., the place of delivery will be in the country in which the seller carries on his business. According to English law (and to many other systems of law) this is also the *locus solutionis* for the buyer, so that much is to be said for the selection of the law of the country of delivery as a subsidiary proper law in the absence of a choice of law by the parties. The absence of decisions on conflicts of laws with regard to c.i.f. sales³⁶ appears to indicate that commercial practice has brought about an international unification of the law going sufficiently far to make conflicts improbable. Should a conflicts situation arise, much might be said in favour of the practice adopted by the Privy Council in *Benaim v. Debono*³⁵ in the case of an f.o.b. contract, i.e., to apply the law of the port of shipment, from which presumably the documents will be forwarded by the seller. This appears to be the view taken by the French *Cour de Cassation*.³⁷

³³ See *ante*, Rules 129-131, as to transfer and assignment of movables, and cases quoted there. For detailed discussion of border-line situations and of the priority of the *lex situs* in the event of a conflict with the proper law, see Falconbridge, pp. 385-389.

³⁴ (1884) 12 Q.B.D. 589 (C.A.); see *ante*, p. 600.

³⁵ [1924] A.C. 514 (P.C.), see *ante*, p. 604; for further discussion of the English cases, see Batiffol, s. 186 f.

³⁶ *Kwik Hoo Tong v. Finlay* [1927] A.C. 604, was a c.i.f. case, but there was an arbitration clause which determined the issue. It is impossible to agree with Batiffol's interpretation of this case (p. 167, note 2).

³⁷ Batiffol, s. 187 *bis*, quoting Cass.Req., March 3, 1924, *Sirey* 1924, I, 252.

3. CONTRACTS OF AFFREIGHTMENT ³⁸

RULE 146.—The term 'law of the flag' means the law of the country ³⁹ whereof the ship wears the flag.

When the flag worn by a ship is that of a State ⁴⁰ including more than one country, the law of the flag means (*semble*) the law of the country where the ship is registered. ⁴¹

Comment

'The law of the flag' is a short expression for the law of the country under the flag of which a ship sails, and to which, therefore, she presumably belongs. This will usually be the personal law of her owner, *i.e.*, the law of his nationality. ⁴² Where the ship belongs to the national of a country of which she does not wear the flag, the 'law of the flag' will still be the law of the country to which the ship, from the flag she wears, may be seen, or at any rate, may be presumed, to belong. ⁴³

If the ship wears the flag of a State such as the United Kingdom, Canada, Australia or the United States which consists of several countries governed by different laws (England, Scotland and Northern Ireland, the Canadian Provinces, the States of Australia and of the United States), the law of the flag is apparently the law of the country where the ship is registered. ⁴⁴

³⁸ Cheshire, pp. 321-324; Wolff, s. 416; Westlake, § 219; Foote, pp. 428 ff., 439 ff., Falconbridge, Chap. 16, Johnson, Vol. 3, pp. 475 ff.; Batiffol, ss. 275-287; Restatement, §§ 337 f., 415; Beale, pp. 1187-1190, 1219-1221; Scrutton, *Charterparties and Bills of Lading*, 14th ed., Sect. I, Art. 7, pp. 19-24; Carver, *Carriage by Sea*, 8th ed., Chap. 7, ss. 201-217; MacLachlan, *Law of Merchant Shipping*, 7th ed., pp. 49, 123 ff.; Rabel, Vol. 2, pp. 415-427.

³⁹ For the meaning of the term 'country', see *ante*, pp. 39, 41-42.

⁴⁰ For the meaning of the term 'State', see *ante*, pp. 39, 42.

⁴¹ Wharton, s. 441 and s. 357; *Canadian National S.S. Co. v. Watson* [1939] 1 D.L.R. 275.

⁴² See Oppenheim, *International Law*, 6th ed., Vol. I, s. 261; Temperley's *Merchant Shipping Acts*, 3rd ed., p. 2.

⁴³ See *The Gaetano* (1882) 7 P.D. 137 (C.A.), at pp. 149-150, *per* Cotton, L.J., and, on the other hand, *Chartered Mercantile Bank of India v. Netherlands India Steam Navigation Co.* (1883) 10 Q.B.D. 521 (C.A.), at pp. 534, 537, *per* Brett, L.J. For purposes of public international law the term 'law of the flag' may have a different meaning. If there is evidence that the parties intended their contract to be governed by the personal law of the shipowner, the court will give effect to this intention by virtue of the principle stated below in Rule 147, but such an intention cannot be presumed if the ship does not show the flag of that country. *Aliter* Westlake, s. 219.

⁴⁴ *Canadian National S.S. Co. v. Watson* [1939] 1 D.L.R. 275. The matter is of little importance as regards affreightment, as the law of the flag is usually federal shipping law. The old rule that English law is the law of the flag throughout British territory may perhaps still apply to ships registered in the Crown colonies, but it has no application to the self-governing Dominions. The Merchant Shipping Act, 1894, is an Imperial statute. The question might have arisen in *New Zealand Shipping Co. v. Tyree* (1912) 81 N.Z.L.R. 825, had English law not been provided for.

RULE 147.—The validity, interpretation and effect of a contract of affreightment are governed by the proper law of the contract.

If, from the terms or objects of the contract, or from the circumstances under which it was made, no inference can be drawn as to the law which the parties intended to apply, the law of the flag is the proper law of the contract.⁴⁵

Comment

A contract of affreightment is an agreement 'to carry goods by water or to furnish a ship for the purpose of so carrying goods'.⁴⁶ As a rule it is either embodied in a charterparty or evidenced by a bill of lading. The law to be applied to charterparties and to contracts evidenced by bills of lading is determined by the courts in accordance with the principles set out above in Rule 136, and Sub-Rules 1 and 2 thereto. In the absence of an express selection of a proper law or of an implied selection, e.g., by an arbitration clause, circumstances such as the language and the technical expressions used in the document,⁴⁷ the place at which the cargo has to be delivered and the freight to be paid, the place at which the parties carry on their business,⁴⁸ the connection between, e.g., a bill of lading and a charterparty for which the proper law has been chosen by the parties,⁴⁹ may all be factors guiding the court in ascertaining the presumable intention of the parties. The law of the flag is generally said to be the proper law in the absence of an ascertainable intention to the contrary, but there does not appear to be a modern decision in which it was applied to any contract made

⁴⁵ *Lloyd v. Guibert* (1865) L.R. 1 Q.B. 115 (Ex.Ch.); *The Patria* (1871) L.R. 3 A. & E. 436, 461; *The Karnak* (1869) L.R. 2 P.C. 505; *The Express* (1872) L.R. 3 A. & E. 597; *Moore v. Harris* (1876) 1 App.Cas. 318; *The Gaetano* (1882) 7 P.D. 137 (C.A.); *Chartered Mercantile Bank of India v. Netherlands, etc., Co.* (1883) 10 Q.B.D. 521 (C.A.); *Re Missouri Steamship Co.* (1889) 42 Ch.D. 321 (C.A.), at p. 327; *The Stettin* (1889) 14 P.D. 142; *The August* [1891] P. 328, 340; *The Industrie* [1894] P. 58 (C.A.); *Mitchell Cotts and Co. v. Railways Comr.* [1909] T.S. 349; *Aktieselskab August Freuchen v. Steen Hansen* (1919) 1 Ll.L.R. 393; *Tudor Accumulator Co., Ltd. v. Oceanic Steam Navigation Co., Ltd.* (1924) 41 T.L.R. 81; *The Adriatic* [1931] P. 241; *Anselm Dewaorin Fils v. Wilson* (1931) 39 Ll.L.R. 289; *Macnamara v. S.S. Hatteras (Owners)* [1931] Ir.R. 73, 337; [1933] Ir. R. 675; *The Tornio* [1932] P. 27, 78 (C.A.); *The St. Joseph* [1933] P. 119; *The Njegos* [1936] P. 90; *Vita Food Products Inc. v. Unus Shipping Co., Ltd.* [1939] A.C. 277 (P.C.); *Ocean Steamship Co., Ltd. v. Queensland State Wheat Board* [1941] 1 K.B. 402 (C.A.); *Kadel Chajkin, Ltd. v. Mitchell Cotts and Co., Ltd.* (1948) 64 T.L.R. 89.

⁴⁶ Scrutton, *Charterparties and Bills of Lading*, 14th ed., p. 1.

⁴⁷ See *The Industrie* [1894] P. 58; compare, however, *The Adriatic* [1931] P. 241, at p. 250, per Langton, J., and *Kadel Chajkin, Ltd. v. Mitchell Cotts and Co., Ltd.* (1948) 64 T.L.R. 89.

⁴⁸ See for a discussion of these points *The Adriatic*, *supra*.

⁴⁹ *The Njegos* [1936] P. 90.

before the commencement of the voyage, while it has repeatedly been held to be the law governing contracts made by the master by virtue of his inherent authority, such as bottomry bonds.⁵⁰ In modern commercial conditions the nationality of the vessel is often a matter of indifference, or even unknown to the cargo owner. It is submitted that an English court is unlikely to apply the law of the flag as such, unless the circumstances are exceptional and it is completely impossible to infer the intention of the parties from the circumstances of the case.⁵¹

The great majority of the maritime States have adopted the Hague Rules,⁵² which regulate the liabilities and rights of a carrier by sea under contracts evidenced by bills of lading. The Carriage of Goods by Sea Act, 1924, which embodies the Hague Rules, applies to all shipments from a port in Great Britain or Northern Ireland, irrespective of the proper law of the contract or of the nationality of the vessel.⁵³ If a cargo is shipped from a port of another country which has adopted the Hague Rules, *e.g.*, from Newfoundland,⁵⁴ from Palestine,⁵⁵ from Australia,⁵⁶ or from Belgium,⁵⁷ the question arises whether the parties can contract out of the Rules by selecting as the proper law of the contract a legal system other than that of the port of shipment, *e.g.*, English law. The Privy Council has held that they can.⁵⁸ The Court of Appeal took the opposite view in a decision of 1932,⁵⁹ but a decision of the court of

⁵⁰ The dicta in favour of the law of the flag are mostly to be found in cases concerning the authority of the master, *e.g.*, *per* Brett, L.J., in *The Gaetano* (1882) 7 P.D. 137, at p. 148. The principal authorities which demonstrate the eclipse of the law of the flag are *Chartered Mercantile Bank of India v. Netherlands, etc., Co.* (1883) 10 Q.B.D. 521; *The Industrie* [1894] P. 58; *The Adriatic* [1931] P. 241; *The Njegos* [1936] P. 90.

⁵¹ *Per* Merriman, P., in *The Njegos*, *supra*, at p. 107; Cheshire, p. 323; Wolff, s. 416. The courts of the United States and the courts of France favour the *lex loci contractus*, those of Germany the law of the place of destination. See Batiffol, ss. 276 ff.

⁵² Formulated by the International Law Association at its meeting at The Hague in 1921, and partly based on the United States Harter Act, 1893, adopted by the International Conference on Maritime Law at Brussels in 1922, and revised by the same Conference in 1923. For a list of countries which have ratified the Rules, see Scrutton, *L.c.* p. 470, p. 576 f., and (more up to date) Wuestendorfer, *Neuzeitliches Seehandelsrecht*, Hamburg (1947), p. 28. For the International Convention, see Cmd. 3806; the relevant statutes of the United States (1936), Australia (1924) and Canada (1936), are printed in Scrutton, *L.c.*, pp. 560 ff.

⁵³ See *ante*, Rule 137, p. 604.

⁵⁴ *Vita Food Products Incorporated v. Unus Shipping Co., Ltd.* [1939] A.C. 277.

⁵⁵ Cf. *The Torni* [1932] P. 78.

⁵⁶ Cf. *Ocean Steamship Co., Ltd. v. Queensland State Wheat Board* [1941] 1 K.B. 402.

⁵⁷ Cf. *The St. Joseph* [1933] P. 119. The application of the provisions of the Belgian *Code de Commerce* of 1928 which embodies the Hague Rules was refused on the ground that, in the very peculiar circumstances of the case, the bill of lading did not operate as a document of title, but as a mere receipt. Belgian law was not the proper law of the contract.

⁵⁸ *Vita Food Inc. v. Unus Shipping Co.* [1939] A.C. 277.

⁵⁹ *The Torni* [1932] P. 78.

1941⁶⁰ suggests, without deciding it, that by using appropriate words in the bill of lading the parties may avoid the application of a foreign statute embodying the Rules. It appears that the Court of Appeal would uphold the selection of a proper law other than that of the port of shipment, even if the statute in force in that port and embodying the Hague Rules contains a conflict of laws clause by which the parties are 'deemed to have intended to contract according to the laws in force at the place of shipment, and any . . . agreement to the contrary . . . [is] . . . illegal, null and void and of no effect'.⁶¹ The logic of the conflict of laws is here at variance with the need for the unification of commercial law.⁶² Should not a contract designed to frustrate this unification be regarded as contrary to English public policy?

Illustrations

1. A charterparty is entered into in London between A, a German shipowner domiciled in Germany, and X & Co., London merchants, for the carriage, on board A's German ship, of a cargo of rice from India to England. The contract is on an ordinary English printed form, and the terms are the terms of an ordinary English charterparty. It contains special provisions as to the payment of freight on right delivery. On the voyage home the ship is driven into a port of refuge, where part of the cargo is sold. If the contract is governed by the law of the flag (German law), then A is entitled to the payment of full freight; if the contract is governed by English law, then A is not entitled to the payment of freight for the cargo sold. The circumstances of the case, and especially the provisions as to the payment of freight, show an intention to contract under English law. The law of the flag is excluded, the contract is governed by English law, and A is not entitled to full freight.⁶³

2. A and B, Danish and Norwegian merchants, are indorsees and holders of bills of lading issued in Argentina by X & Co., a Yugoslav firm, for the carriage of grain from the River Plate to European ports in their Yugoslav ship which has been chartered by the Argentinian exporters through their agents, the London branch of a French firm. The charterparty, entered into in London, is in English language and form and contains an English arbitration clause. The bills of lading are also in English language and form and incorporate all the terms, conditions, and exceptions of the charterparty, but they contain no arbitration clause.⁶⁴ The proper law of the contracts evidenced by the bills of lading is English law as a result of the close legal and commercial connection between the bills of lading and the charterparty.⁶⁵

SUB-RULE 1.—The mode of performing particular acts under a contract of affreightment (*e.g.*, the loading or

⁶⁰ *Ocean Steamship Co. v. Queensland State Wheat Board* [1941] 1 K.B. 402.

⁶¹ *Australian Carriage of Goods by Sea Act*, 1924, s. 9; see *Falconbridge*, pp. 358 ff.

⁶² *Falconbridge*, Chap. 16; *Cook*, pp. 419 ff.; *Gutteridge* (1939) 55 L.Q.R. 323; *Morris and Cheshire* (1940) 56 L.Q.R. 320; *Morris* (1946) 62 L.Q.R. 170, 176 ff.

⁶³ *The Industrie* [1894] P. 58 (C.A.).

⁶⁴ A reference in a bill of lading to the terms of a charterparty does not extend to an arbitration clause unless the latter is expressly mentioned: *T. W. Thomas & Co. v. Portsea S.S. Co.* [1912] A.C. 1.

⁶⁵ *The Nijegos* [1936] P. 90.

unloading or delivery of goods) may be governed by the law of the country where such acts take place.⁶⁶

Comment

This is an outcome of the general principle that the mode of performance (as distinguished from the substance of the obligation) is governed by the law of the place of performance as such.⁶⁷ It is of special significance in connection with such matters as the time and place of loading and unloading,⁶⁸ and also with the production of the bills of lading by the consignee claiming delivery.⁶⁹

SUB-RULE 2.—The authority of the master of a ship to deal with the cargo during the voyage, and the manner in which he should execute it, are governed by the law of the flag.⁷⁰

Comment

The cases which are usually quoted for the rule that a contract of affreightment is governed by the law of the flag are mostly decisions having reference to the master's authority during the voyage to deal with the cargo. The extent of his authority and the conditions under which it may be exercised differ somewhat under the laws of different countries, and are not normally expressed in the contracts of affreightment. When a conflict arises on this point, the law of the flag prevails, both on grounds of convenience (for the master may have to act as an agent of necessity for a multitude of cargo owners whose contracts may be governed by different laws) and as a result of the principles applicable to agency in the conflict of laws.⁷¹ The practical importance of the master's authority to pledge the credit of the cargo owners has been greatly reduced by the development of wireless and of modern banking facilities.⁷²

Illustrations

1. A chartered a French ship belonging to X and Y, French owners, at a Danish West India port, for a voyage from Hayti to Havre, London, or

⁶⁶ See *ante*, Rule 136, Sub-Rule 3, p. 593. *Norden S.S. Co. v. Dempsey* (1876) 1 C.P.D. 654; *The Stettin* (1889) 14 P.D. 142; *Aktieselskab August Freuchen v. Steen Hansen* (1919) 1 Ll.L.R. 393.

⁶⁷ See *ante*, Rule 136, Sub-Rule 3, p. 593.

⁶⁸ *Norden S.S. Co. v. Dempsey* (1876) 1 C.P.D. 654.

⁶⁹ See *The Stettin* (1889) 14 P.D. 142.

⁷⁰ *Lloyd v. Guibert* (1866) 11 L.R. 1 Q.B. 115 (Ex.Ch.); *The Karnak* (1869) L.R. 2 P.C. 505, esp. at pp. 511-513, *per* Sir W. Erle; *The Gaetano* (1882) 7 P.D. 137 (C.A.); *The August* [1891] P. 328 (C.A.). In *The Express* (1872) L.R. 3 A. & E. 597, the law of the flag was applied to the interpretation of bills of lading. *Quære* whether the case would be decided in the same way today? On the other hand, older cases such as *The San Roman* (1872) L.R. 3 A. & E. 583; L.R. 5 P.C. 801; *The Hamburg* (1864) E. & L. 258, are 'of very doubtful authority' in so far as they throw doubt on the principle that the master's authority is governed by the law of the flag. (See Scrutton, *l.c.*, p. 24).

⁷¹ See *post*, Rules 158, 159, pp. 710, 712.

⁷² See *Smith's Mercantile Law*, 18th ed. (1931) by Gutteridge, p. 538, note (a).

Liverpool, at A's option. The charterparty is entered into by N, the master, in pursuance of his general authority as master. A ships a cargo at Hayti for Liverpool, with which the ship sails. On her voyage she sustains damage and puts into Fayal, a Portuguese port, for repair. N there borrows money from B on bottomry of the ship, freight and cargo, and repairs the ship. She completes her voyage to Liverpool. B, the bondholder, proceeds in the English Court of Admiralty against the ship, freight and cargo, which are insufficient to satisfy the bond. The deficiency is paid by A. X and Y give up the ship and cargo to A, and are thereby, according to French law, freed from all liability on the contract of N, *i.e.*, on the bottomry bond. A claims indemnity against X and Y for money paid to B. The rights of A and the liabilities of X and Y are governed by the law of France, *i.e.*, law of the flag.⁷³

2. X, who carries on business in England, ships a cargo at New York on board an Italian ship for carriage to London. The ship is at the island of Fayal (Portuguese territory) in distress. N, the master, there borrows £2,000 on bottomry of the ship, cargo, and freight, to enable her to proceed on her voyage to London. N has the means of communicating with X, but does not do so. The bond, under the circumstances, is valid according to Italian law (law of the flag), but would not be valid according to English law. The bond is valid and binds the cargo (*i.e.*, the authority of the master and the validity of the bond are to be determined, as against X, by the law of the flag).⁷⁴

3. A German ship, sailing under the German flag, is loading at Singapore for London. She there takes on board a cargo shipped by British subjects under English bills of lading in the usual form. In the course of the voyage the ship is driven into a port of distress, and the master there sells part of the cargo. The master's authority to make the sale is governed, not by the law of England, but by the law of Germany (law of the flag).⁷⁵

4. CONTRACTS FOR THROUGH CARRIAGE OF PERSONS OR GOODS⁷⁶

RULE 148.⁷⁷—A contract for the carriage of persons or goods from a place in one country to a place in another is presumably governed by the law of the place where it is made; but this does not apply to contracts of affreightment.

Provided that a contract for the international carriage by air of persons, luggage or goods is governed by the

⁷³ *Lloyd v. Guibert* (1865) L.R. 1 Q.B. 115 (Ex.Ch.).

⁷⁴ *The Gaetano* (1882) 7 P.D. 137 (C.A.).

⁷⁵ *The August* [1891] P. 328 (C.A.).

⁷⁶ Cheshire, pp. 12-13; Westlake, § 222; Foote, pp. 454 ff.; Batiffol, ss. 260-274; Restatement, §§ 337, 338, 415; Cook, pp. 407 ff.; Shawcross and Beaumont, *Air Law*, pp. 10 ff.; Moller, *Law of Civil Aviation*, pp. 293 ff.

⁷⁷ *Branley v. S. E. Ry.* (1862) 12 C.B. (n.s.) 63; *Peninsular and Oriental Co. v. Shand* (1865) 3 Moore P.C. (n.s.) 272; *Cohen v. S. E. Ry.* (1877) 2 Ex.D. 253 (C.A.); *De Clermont v. Brasch* (1885) 1 T.L.R. 370; *Jones v. Oceanic Steam Navigation Co.* [1924] 2 K.B. 730; *Westminster Bank, Ltd. v. Imperial Airways, Ltd.* [1936] 2 All E.R. 890; *Grein v. Imperial Airways, Ltd.* [1937] 1 K.B. 50 (C.A.); *Phillipson v. Imperial Airways Ltd.* [1939] A.C. 352; *Goodman v. L. N. W. Ry.* (1877) 14 S.L.R. 449; *Horn v. North British Ry.* (1878) 5 B. 1055; *Naftalin v. L. M. S. Ry.* [1939] S.C. 259; *Scott v. American Airlines Inc.* [1944] 3 D.L.R. 27; *Ginsberg v. Canadian Pacific Co.* (1940) 66 Ll.L.R. 20.

provisions of the Carriage of Goods by Air Act, 1932, and that the parties to such a contract cannot select as the proper law of the contract any system of law other than that of the Warsaw Convention.

Comment

There is great uncertainty as to what is the proper law of a contract for the carriage of persons or goods from one country to another. Practically all our authorities are concerned with one particular species of the contract of carriage, *viz.*, the contract of affreightment contained in a charterparty or evidenced by a bill of lading. To this type of contract the principles set out above in Rule 147 apply, and the *lex loci contractus* is not, as a rule, as such the proper law of the contract. There are very few decisions on the law governing contracts for the carriage by land of persons or goods from one country (*e.g.*, England) to another (*e.g.*, Scotland), for the carriage of passengers by sea, for the carriage of passengers or goods partly by land and partly by water from a place in one country (*e.g.*, London) to a place in another (*e.g.*, Paris), or for the carriage by air or partly by air and partly by land or sea of passengers or goods. Here, as elsewhere, the only ultimate test for determining the law by which a contract is governed is the presumed intention of the parties; but, in the kind of contracts with which we are dealing, it constantly happens that no one salient consideration presents itself from which the intention of the parties may be inferred. All that can be strictly laid down is that English⁷⁸ and Scottish⁷⁹ courts, while giving weight to the particular circumstances of each case, still lean, on the whole, to the doctrine that a contract for through carriage is *prima facie* governed by the law of the country where it is made (*lex loci contractus*), at any rate if, as will frequently be the case, the journey commences in that country.⁸⁰ In this case the place of contracting is unlikely to be purely accidental. The courts

⁷⁸ *Branley v. S. E. Ry.* (1862) 12 C.B. (n.s.) 63, at p. 72, *per* Erle, C.J.; *Cohen v. S. E. Ry.* (1877) 2 Ex.D. 253, at pp. 261 f., *per* Baggallay, L.J., at p. 262 f., *per* Brett, L.J. (contrast, however, the dictum of Mellish, L.J., at pp. 257 f.); *P. and O. Co. v. Shand* (1865) 3 Moore P.C. (n.s.) 272; *Jones v. Oceanic Steam Navigation Co.* [1924] 2 K.B. 730, at p. 732, *per* Lord Hewart, C.J. With the exception of the *P. and O. Case* these are all *obiter dicta*.

⁷⁹ *Horn v. North British Ry.* (1878) 5 R. 1055 (this case was doubted in *Naftalin v. L. M. S.*, *infra*, but not on this point); *Naftalin v. L. M. S.* [1933] S.C. 259, at p. 261, *per* the Lord Ordinary (Moncrieff).

⁸⁰ For cases in which the *lex loci contractus* did not coincide with the law of the place at which the journey was intended to commence, see *Ginsberg v. Canadian Pacific Co.* (1940) 66 Ll.L.R. 20, where, however, the *lex loci contractus* applied as a result of selection, and the much debated American case *Oceanic Steam Navigation Co. v. Corcoran* (1925) 9 F. (2nd) 724 (C.C.A., 2nd Circuit), convincingly criticised by Cook, p. 407. This case shows by contrast the merits of the doctrine of the *lex expeditionis* (law of the place of dispatch) adopted by many American decisions and by the French *Cour de Cassation*; see Batiffol, *ss.* 267 ff., who is himself in favour of this solution.

have also exhibited a marked tendency to apply the *lex fori* whenever possible.⁸¹ A contract for the carriage of passengers by sea will, in the absence of a selection of another law, presumably be governed by the law of the flag. It is, however, very doubtful whether the law of the flag can be applied if the journey is a mixed journey by land and by sea.

The duties and liabilities of the carrier are primarily governed by the proper law of the contract, but he must, in each country through which the journey passes, comply with the safety and other similar regulations which form part of the law of that country. Moreover, as has been pointed out above,⁸² the manner of performance is governed by the *lex loci solutionis*, i.e., by the laws of the countries across which the passengers or goods are carried. The courts are inclined to characterise the liability of a carrier for the safety of his passengers as delictual and not as contractual, and, therefore, to apply, in an action for damages for personal injuries, the principles of the conflict of laws with regard to torts.⁸³ In effect this means that it is the law of the country in which the accident occurs (in conjunction with the *lex fori*) which governs this matter, and not the proper law of the contract. This explains the suggestion which has been made occasionally that a contract may be governed, as to incidents arising in a given country, by the law of the particular country where they take place.⁸⁴ Owing to the similarity between English and Scottish law in most of the relevant respects, the only issue which, in Great Britain, has given rise to a need for deciding this question, was the claim for *solatium* made under a Scottish contract by a relative of a passenger killed in an accident which occurred in England. The Scottish courts characterise this issue as one of delict and, applying English law, refuse the claim for *solatium*.⁸⁵ On the Continent the Convention of Berne has largely

⁸¹ Occasionally there is a tendency to apply that law which would make the contract valid. See *ante*, Rule 136, Sub-Rule 2, note 48, p. 591. See also *Jones v. Oceanic Steam Navigation Co.* [1924] 2 K.B. 730, and the dictum of Cozens-Hardy, M.R., in *British South Africa Co. v. De Beers Consolidated Mines, Ltd.* [1910] 2 Ch. 502, at p. 513.

⁸² See *ante*, Rule 136, Sub-Rule 3, p. 593.

⁸³ See Rules 173, 174, pp. 799, 800. *Goodman v. L. N. W. Ry.* (1877) 14 S.L.R. 449, *per* Lord Shand; *Naftalm v. L. M. S. Ry.* [1933] S.C. 259, at p. 261, *per* Lord Moncrieff, at p. 264, *per* Lord Hunter, at p. 269, *per* Lord Anderson, at p. 272, *per* Lord Murray. Contrast the Canadian case, *Scott v. American Airlines Inc.* [1944] 3 D.L.R. 27, where the *lex loci contractus* was applied.

⁸⁴ See *Cohen v. S. E. Ry.* (1877) 2 Ex.D. 253, at p. 262, *per* Brett, L.J. Batifol, p. 236, suggests that the application of a number of successive *leges locorum solutionis* might in fact be a case of 'incorporation'.

⁸⁵ *Naftalm v. L. M. S. Ry.* [1933] S.C. 259, where, however, Lords Hunter, Anderson and Murray indicated that the case might have had to be regarded as contractual if the passenger had survived and sued for damages. *Quare*, whether an English court would take the same view which would of necessity lead to the result that a claim for damages made by the personal representative under the Law Reform (Miscellaneous Provisions) Act, 1934, would, for purposes of the conflict of laws, be contractual, while a claim made by or on behalf of the deceased passenger's dependants under the Fatal Accidents Acts would be delictual.

unified the law of carriage of passengers by railway and thus removed most of the conflicts situations.⁸⁶

Contracts for the carriage by air, whether of passengers or of goods, are potentially a rich source of conflicts situations.⁸⁷ With a view to eliminating such conflicts, an International Convention was concluded at Warsaw in 1929, and this was made part of the law of the United Kingdom by the Carriage by Air Act, 1932. A contract for the 'international' carriage by air of persons, luggage and goods, as defined in Article 2 of the First Schedule to the Act,⁸⁸ is exclusively governed by the Act, in substitution for the domestic law of any other country which might otherwise have applied on the general principles of the English or Scottish conflict of laws. The Convention includes a number of choice of law clauses,⁸⁹ the most important of which excludes the operation of the proper law doctrine by declaring null and void any clause in the contract 'by which the parties purport to infringe the rules laid down in this Convention, whether by deciding the law to be applied or by altering the rules as to jurisdiction'.⁹⁰

Not all contracts for through carriage by air are 'international' contracts as defined by the Warsaw Convention. If the Convention does not apply and if the parties have failed to determine the proper law either expressly or by implication, an English court will perhaps be inclined to apply the law of the country from which the aircraft took off for the first portion of its flight. This will often be the *lex loci contractus*. There does not appear to be any English or Scottish authority on the point.⁹¹

Illustrations

1. A is a passenger travelling by a British vessel belonging to X & Co., an English company, from England to Mauritius *via* Alexandria and Suez. He has taken a ticket in England containing conditions exempting X & Co. from liability for loss of luggage. A's luggage is lost on the journey. The condition is valid by English law, but is not valid by the law of Mauritius. The contract is governed by English law (*lex loci contractus*) and the condition is valid.⁹²

2. The British Transport Commission is authorised by statute to maintain packets between Folkestone and Boulogne. A, at Boulogne, delivers parcels

⁸⁶ Conventions of 1890-1924, ratified by most Continental countries.

⁸⁷ See the illustration given by Shawcross and Beaumont, *Air Law*, p. 10.

⁸⁸ For its interpretation see *Grein v. Imperial Airways, Ltd.* [1937] 1 K.B. 50 (C.A.), and *Phillipson v. Imperial Airways, Ltd.* [1939] A.C. 332.

⁸⁹ *E.g.*, Art. 25 (1), Art. 21, Art. 32.

⁹⁰ Art. 32.

⁹¹ This was the view taken in Ontario in *Scott v. American Airlines Inc.* [1944] 3 D.L.R. 27. Moller, *l.c.*, p. 294, regards the law of the nationality of the aircraft as irrelevant, but on the Continent that law is frequently regarded as the proper law of the contract. It is conceivable that an English court might be induced to apply that law on grounds analogous to those which suggest the law of the flag as the proper law for sea voyages. See Batiffol, p. 261. Foreign law has never been pleaded in any English case on carriage by air.

⁹² *Peninsular and Oriental Co. v. Shand* (1865) 3 Moore P.C. 272.

to the British Railway Executive which acts as agent for the Transport Commission, to be carried to London. The contract of carriage contains conditions which may be invalid according to the law of England, but are valid according to the law of France. The contract (*semble*) is governed by the law of France (*lex loci contractus*).⁹³ *Quære*: what would be the proper law of a contract for the carriage of parcels from Boulogne to London made in England?

3 The British Railway Executive issues at Boulogne to A a ticket for the carriage of himself and his luggage from Boulogne to London. On the ticket there is a condition exempting the Executive from liability for loss of luggage of greater value than £6. A's box containing articles of greater value than £6 is lost, as a result of the negligence of the Executive's servants, during transfer from the ship to the train at Folkestone. Is the liability of the Executive governed by French or by English law?⁹⁴

4. A contracts at a railway station in Paris for the carriage of himself and luggage from Paris to London. He is to be carried from Paris to Calais by the French State Railways, from Calais to Dover by a British ship belonging to the British Railway Executive and from Dover to London by a train belonging to the British Railway Executive. If he is injured at Amiens in consequence of an accident arising from the negligence of the railway servants, (*semble*) no claim could be made in an English court which would not be in accordance with French law, but if the accident happened in England, English law would apply.⁹⁵

5. A, a British subject resident in England, makes in Detroit a contract with X & Co., an English company, for the carriage of himself and his luggage in one of X & Co.'s ships from New York to Southampton. The contract contains a clause limiting the liability of the carrier for the consequences of accidents. *Semble*: In the absence of an express choice of law, the validity of the clause should be judged in accordance with English law.⁹⁶

6. X, a Swiss citizen, takes at Geneva from the agents of an American shipping company a ticket for a voyage in an American ship from Le Havre to Rio de Janeiro. *Semble*: The contract is governed by the law of the United States and, in so far as this is relevant, by the law of that State in which the ship is registered.

7. A, a United States citizen resident in Michigan, contracts with X & Co., a Michigan corporation, for his carriage by air from Detroit to Buffalo. The contract is made in Detroit (Michigan). The aircraft crashes in Ontario and A is fatally injured. *Semble*: X & Co.'s liability to A's widow is governed by the law of Michigan as the *lex loci contractus*.⁹⁷

8. A, who is resident in Glasgow, takes at Glasgow a railway return ticket to London. During the return journey he is fatally injured in an accident caused by the negligence of the railway servants. The accident occurs in

⁹³ See *Branley v. S. E. Ry.* (1862) 12 C.B. (n.s.) 63. The case is not decisive because the contract was not illegal according to either law.

⁹⁴ See *Cohen v. S. E. Ry.* (1877) 2 Ex.D. 253 (C.A.). The point was not decided because the contract was invalid under both systems of law.

⁹⁵ Suggested by Brett, L.J., in *Cohen v. S. E. Ry.* (1877) 2 Ex.D. 253, at pp. 262 f.

⁹⁶ Suggested by *Jones v. Oceanic Steam Navigation Co.* [1924] 2 K.B. 730. In the case itself English law was the proper law of the contract as a result of an express selection. It would be artificial to select as the proper law the *lex loci contractus*; and inconvenient though perhaps less artificial, to choose the law of the place where the voyage began. If the ship calls at a Canadian port on her voyage from the United States to England and there takes passengers on board, the contracts of these passengers should be governed by the same law which applies to the passengers whose voyages began in the United States.

⁹⁷ Cf. *Scott v. American Airlines Inc.* [1944] 3 D.L.R. 27.

England. The Railway Executive is not liable to pay *solatium* to A's father, since its liability to A's father is governed by English law. *Semble*: If A had survived, the Executive's liability to pay damages for personal injuries might have been governed by Scottish law.⁹⁸

5. CONTRACTS OF MARINE INSURANCE⁹⁹

RULE 149.—A marine insurance policy issued by an underwriter carrying on business in England is governed by English law, except in so far as the policy stipulates that it shall be construed or applied in whole or in part according to the law of a foreign country.¹

Comment

This Rule is an application of the general principle that in the absence of an agreement to the contrary, a contract of marine insurance is governed by the law of the country in which the underwriter carries on his business.² This will, as a rule, also be the *lex loci contractus* and the *lex loci solutionis*. The nationality of the assured and his place of business are irrelevant. An English underwriter of a foreign ship or of goods carried on board a foreign ship is not affected by the law of the flag, nor is he affected by foreign law as regards his right to recover from the assured sums received by the latter from other sources in respect of goods lost.³ The principle stated in the Rule does not, however, yield any solution in cases concerning re-insurance.⁴ Nor is it necessarily capable of being applied to contracts of insurance other than marine

⁹⁸ *Naftalin v. L. M. S. Ry.* [1933] S.C. 259.

⁹⁹ Wolff, s. 417; Westlake, §§ 219-221; Foote, pp. 453 ff.; Batiffol, ss. 329-354; Arnould, *Marine Insurance*, 12th ed., ss. 744, 992 ff.

¹ *Greer v. Poole* (1880) 5 Q.B.D. 272, *per* Lush, J., 'It is no doubt competent to an underwriter on an English policy to stipulate, if he thinks fit, that such a policy shall be construed and applied in whole or in part according to the law of any foreign State, as if it had been made in and by a subject of the foreign State, and the policy in question does so stipulate as regards general average; but, except when it is so stipulated, the policy must be construed according to our law, and without regard to the nationality of the vessel'. For the exception to this Rule with reference to general average, see Rule 151, *post*.

² *Greer v. Poole*, *supra*. The conclusion is, of course, reinforced if, as is usual, standard contract forms such as the statutory Lloyd's policy and one of the sets of Clauses drafted by the London Institute of Underwriters are used. The authority of the broker may be governed by foreign law, as in *Ruby Steamship Corporation v. Commercial Union Assurance Co., Ltd.* (1933) 39 Com.Cas. 48 (C.A.). See Rule 159, *post*, p. 712.

³ *Burnand v. Rodocanachi, Sons & Co.* (1881) 6 Q.B.D. 633 (C.A.); (1882) 7 App.Cas. 338 (H.L.). It may be different where, as in *Dent v. Smith* (1869) L.R. 4 Q.B. 414, a judgment has been given by a foreign court of competent jurisdiction.

⁴ As in *Royal Assurance Corporation v. Vega* [1902] 2 K.B. 384 (C.A.), in *Norske Atlas Insurance Co., Ltd. v. London General Insurance Co., Ltd.* (1927), 28 Ll.L.R. 104, and in *Maritime Insurance Co., Ltd. v. Assekuranz Union von 1865* (1935) 52 Ll.L.R. 16.

insurance. The question what, in the absence of an express or implied selection,⁵ is the proper law of a non-marine insurance contract—much debated abroad—does not appear to have been decided in this country.⁶

Illustration

A, who carries on business in England, effects a policy of insurance with X, an English underwriter, upon goods shipped in a French ship. The ship puts into a port for repairs. The master gives a bottomry bond on ship, freight, and cargo. The ship and freight prove insufficient to satisfy the bond. A has to pay the deficiency in order to obtain possession of the goods. This, according to French law, might be a loss by perils of the sea, but it is not so according to English law. If it is a loss by perils of the sea, A has a right to recover the amount paid from X. The rights of A against X must be determined wholly by English law. A has no right to recover from X the amount paid for the goods.⁷

6. AVERAGE ADJUSTMENT⁸

RULE 150.⁹—As amongst the several owners of property saved by a sacrifice or benefited by an expenditure, the liability to general average contribution¹⁰ is governed by the law of the place (called hereinafter the place of adjustment) at which the common voyage terminates (that is to say),—

- (1) when the voyage is completed in due course, by the law of the port of ultimate¹¹ destination; or,

⁵ In the decided cases there was either an express or an implied selection of the proper law. See, e.g., *Spurrier v. La Cloche* [1902] A.C. 446; *Anderson v. Equitable Assurance Society of the United States* (1926) 134 L.T. 557 (C.A.); *Perry v. Equitable Life Assurance Society* (1929) 45 T.L.R. 468. *Crosland v. Wrigley* (1895) 73 L.T. 60, 327 (C.A.); *Ex p. Dever* (1887) 18 Q.B.D. 666 (C.A.), and *Rowett Leakey and Co. v. Scottish Provident Institution* [1927] 1 Ch. 55 (C.A.) may perhaps be mentioned as indicating a preference for the *lex loci contractus*, i.e., usually the assured's place of residence or business rather than for the law of the insurer's place of business.

⁶ For detailed discussion, also of the voluminous American case law, see Batiffol, ss. 329-354. See also Wolff, s. 417.

⁷ *Greer v. Poole* (1880) 5 Q.B.D. 272. But the decision might have been different if the amount had been included in a French average statement. See Arnould, l.c., s. 999.

⁸ Lowndes and Rudolf, *Law of General Average*, 7th ed., Chap. 7; Arnould, *Law of Marine Insurance*, 12th ed., Part III, Chap. 4, esp. ss. 992-1003; Carver, *Carrage by Sea*, 8th ed., ss. 425 ff.; Scrutton, *Charterparties and Bills of Lading*, 14th ed., Art. 120, p. 347; Westlake, § 220; Foote, pp. 453 ff.

⁹ *Simonds v. White* (1824) 2 B. and Cr. 805; *Dalglish v. Davidson* (1824) 5 Dowl. & Ry. 6; *Fletcher v. Alexander* (1868) L.R. 3 C.P. 375; *Wavertree Sailing Ship Co. v. Love* [1897] A.C. 373 (P.C.).

¹⁰ *Burkley v. Presgrave* (1801) 1 East 220, 228, per Lawrence, J., see also *Chellev v. Royal Commission on Sugar Supply* [1922] 1 K.B. 12 (C.A.); Marine Insurance Act, 1906, s. 66 (2).

¹¹ See Arnould, s. 992; Carver, ss. 425 & 426.

- (2) when the voyage is not so completed, by the law of the place where the voyage is rightly ¹² broken up and the ship and cargo part company.

Comment

'The law of general average is part of the maritime law, and should always be studied as such independently of questions of insurance, however much they are mingled together in practice.'^{12a} Rule 150 is intended to deal with the relationship between those interested in ship, freight and cargo, and as such liable to contribute to a general average sacrifice or expenditure, apart from the question of insurance which is the subject-matter of Rule 151. These principles are not as important in practice as one might expect in view of the international implications of general average. Conflicts of law in this field have been reduced to a minimum by the York-Antwerp Rules ^{12b} formulated by the International Law Association. The York-Antwerp Rules are not embodied in a treaty and have no statutory force. But they are commonly incorporated in contracts of affreightment with the result that the substantive law of general average has been unified to a very large extent. They are, in effect, an international code, and their widespread use obviates the need for an elaborate body of conflicts principles.

In so far as the liability to contribute arises between shipowner and cargo owner it may perhaps be said to be of a contractual nature, and to that extent the Rule is in fact an application of the principle ¹³ that the mode of performance of a contract is governed by the law of the country where the performance is to take place. The intention of the parties is that the average adjustment shall be made, *i.e.*, the contract as to this matter shall be performed, at the place where the voyage rightly terminates. It is, therefore, presumably their intention that the adjustment be governed by the law of such place.

This explanation, however, cannot apply to the mutual liability of, *e.g.*, the various cargo owners between whom there is no contractual relation at all. This liability is either quasi-contractual or *sui generis*.¹⁴ The contracts between the carrier and the

¹² *Fletcher v. Alexander* (1868) L.R. 3 C.P. 375; *Messina v. Petrocchino* (1872) L.R. 4 C.P. 144; *Matro v. Ocean Marine Ins. Co.* (1874) L.R. 9 C.P. 595; 10 C.P. 414; *Hill v. Wilson* (1879) 4 C.P.D. 329, at p. 333, *per* Lindley, J.

^{12a} Arnould, s. 908.

^{12b} Those at present in force are the revised rules adopted at the Stockholm Conference of the International Law Association in 1924. They are discussed in detail in Lowndes and Rudolf, *l.c.*, Part II, and printed, *ibid.*, Appendix 6, and also in Scrutton, *l.c.*, Appendix IV, pp. 550 ff.

¹³ See *ante*, Rule 136, Sub-Rule 3, p. 593. See *per* Lord Tenterden in *Simonds v. White* (1824) 2 B. & Cr. 805; *Lloyd v. Guibert* (1865) L.R. 1 Q.B. 115, 120 *per curiam*.

¹⁴ See, for this question, Arnould, s. 908.

various cargo owners may be governed by different laws, since the places of contracting, the ports of loading and the ports of discharge may be different for the various cargo owners. Hence, the only system of law with which all their interests are connected—apart from the law of the flag the application of which would be impractical—is that of the country in which the voyage is intended to end, or does, owing to unforeseen events, in fact find its lawful termination. Whether or not the termination of the voyage at a place other than that of ultimate destination was lawful, would presumably be decided according to the *lex fori*.¹⁵

An average adjustment made at the proper port binds those liable to contribute although it is not in accordance with the law of that port, but the question is not free of doubt.¹⁶ On the other hand, it has been decided that general average if made up in accordance with that law is binding, although it is not made by an average adjuster.¹⁷

RULE 151.—The parties to a contract of marine insurance are bound by an average adjustment duly taken according to the law of the place of adjustment, in the absence of special agreement to the contrary.¹⁸

Comment

This Rule is an exception to Rule 149, above. Both the underwriter and the assured are bound²⁰ by an adjustment duly taken at the proper place. In the absence of the Foreign Adjustment Clause²¹ in its usual form in the policy an underwriter is only affected in so far as the loss of the assured was incurred for the purpose of avoiding, or in connection with the avoidance of, a peril insured against, and what is such a peril must be decided in accordance with the proper law of the contract.²² If, however, the policy contains the Foreign Adjustment Clause, the underwriter is bound although the sacrifice or

¹⁵ See note 12, above.

¹⁶ *De Hart v. Compania 'Aurora'* [1903] 2 K.B. 508 (C.A.), which deals with the interpretation of the Foreign Adjustment Clause in a policy. See Arnould, s. 1000.

¹⁷ *Wavertree Sailing Ship Co. v. Love* [1897] A.C. 373 (P.C.); see, however, *Brandeis v. Economic Ins. Co.* (1922) 11 Ll.L.Rep. 42.

¹⁸ *Walpole v. Ewer* (1789) 2 Park.Mar.Ins., 8th ed., 898; *Newman v. Casalet*, *ibid.* 900; in *Power v. Whitmore* (1815) 4 M. & S. 141, there was no proper allegation of fact as to the law and usage at the port of destination, see *per Lush, J.*, in *Dent v. Smith* (1869) L.R. 4 Q.B. 414, at pp. 450 f., and Arnould, s. 996. *Harris v. Scaramanga* (1872) L.R. 7 C.P. 481; *Hendricks v. Australasian Insurance Co.* (1874) 9 C.P. 460; *Mauro v. Ocean Mar. Ins. Co.* (1875) L.R. 10 C.P. 414 (Ex Ch.); *The Mary Thomas* [1894] P. 108 (C.A.); *De Hart v. Compania Anonima de Seguros 'Aurora'* [1903] 2 K.B. 508 (C.A.).

²⁰ *The Mary Thomas* [1894] P. 108 (C.A.). See Arnould, s. 1001.

²¹ See Arnould, s. 994.

²² Marine Insurance Act, 1906, s. 66 (6).

expenditure was not incurred in connection with a peril covered by the policy,²³ and—this is controversial—he may even be liable to refund to the assured a contribution incurred in connection with an expressly excepted peril, if it was included in the foreign adjustment.²⁴ Where the policy contains a Foreign Adjustment Clause, the underwriter may even become liable in respect of a loss which the proper law of the contract would have classified as particular average but which the law of the place of adjustment classifies as general average, even though the policy may be ‘free from particular average’.²⁵ In effect the Foreign Adjustment Clause constitutes a partial selection of the law of the place of adjustment as the proper law of the contract.

7. BILLS OF EXCHANGE AND PROMISSORY NOTES²⁶

RULE 152.—Any conflict of laws with regard to bills of exchange or promissory notes must be determined in accordance with the provisions of the Bills of Exchange Act, 1882,²⁷ in so far as that statute applies.²⁸

²³ *Harris v. Scaramanga* (1872) L.R. 7 C.P. 481, approved by the Court of Appeal in *De Hart v. 'Aurora'* [1903] 2 K.B. 503.

²⁴ *Arnould*, s. 999, *ad fin*

²⁵ *Mauro v. Ocean Mar. Ins. Co.* (1875) L.R. 10 C.P. 414 (Ex.Ch.).

²⁶ *Cheshire*, Chap. 10, pp. 357–366; Chap. 16, pp. 615–623; *Wolff*, ss. 461–468; ss. 526–530; *Westlake*, §§ 227–234; *Foote*, pp. 458 ff.; *Falconbridge*, Chap. 14, Chap. 20 § 2; *Restatement*, §§ 336, 349, 365, 369; *Beale*, pp. 1047–1050, 1185–1187, 1205–1210, 1271; *Goodrich*, p. 428; *Lorenzen*, *The Conflict of Laws Relating to Bills and Notes*, 1919; *Story*, Chap. 8 *passim* esp. ss. 284a, 289, 314–320, 353; *Stumberg*, pp. 221–230; *Chalmers*, *Law of Bills of Exchange*, 11th ed., pp. 234 ff.; *Byles on Bills*, 20th ed., pp. 315 ff.; *Gutteridge* 16 J.C.L. 53 (1934); *Raiser*, *Die Wirkungen der Wechselerklaerung im internationalen Privatrecht* (1931).

²⁷ Section 72, which refers to bills of exchange and applies to promissory notes with the modifications indicated in ss. 83–89. For definitions of terms see s. 2, for the difference between a ‘foreign’ and an ‘inland’ bill, see s. 4. Cases decided before the passing of the Act may, on occasion, be still consulted with advantage, but only if the provisions of the Act itself are ambiguous. (See *Bank of England v. Vagliano* [1891] A.C. 107, at p. 144 *per* Lord Herschell, at p. 120 *per* Lord Halsbury.)

²⁸ Cases dealing with the law before the passing of the Act: *Burrows v. Jemino* (1726), 2 Strange 733; *Mellish v. Simeon* (1794) 2 H.Bl. 378; *Kearney v. King* (1819) 2 B. & Ald. 301; *Wynne v. Jackson* (1826) 2 Russ. 351; *De la Chaumette v. Bank of England* (1831) 2 B. & Ad. 385; *Trimbey v. Vignier* (1834) 1 Bing N.C. 151; *Don v. Lippman* (1837) 5 Cl. & F. 1; *Cooper v. Waldegrave* (1840) 2 Beav. 282; *Rothschild v. Currie* (1841) 1 Q.B. 43; *Allen v. Kemble* (1848) 6 Moore P.C. 314; *Ralli v. Dennistoun* (1851) 6 Ex. 483; *Gibbs v. Fremont* (1853) 9 Ex. 25; *Sharples v. Rickard* (1857) 2 H. & N. 57; *Suse v. Pompe* (1860) 8 C.B. (n.s.) 538; *Scott v. Pilkington* (1862) 2 B. & S. 11; *Hirschfeld v. Smith* (1866) L.R. 1 C.P. 340; *Lebel v. Tucker* (1867) L.R. 3 Q.B. 77; *Bradlaugh v. De Rin* (1868) L.R. 3 C.P. 538; (1870) L.R. 5 C.P. 473 (Ex.Ch.); *Rouquette v. Overmann* (1875) L.R. 10 Q.B. 525; *Goodwin v. Roberts* (1876) 1 App.Cas. 476; *Willans v. Ayers* (1877) 3 App. Cas. 133; *Horne v. Rouquette* (1878) 3 Q.B.D. 514 (C.A.); *Re Marseilles, etc., Co.* (1885) 30 Ch.D. 598. Cases dealing with the law after the passing of the Act: *Re Commercial Bank of South Australia* (1887) 36 Ch.D. 522; *Alcock v. Smith* [1892] 1 Ch. 286 (C.A.); *Embiricos v. Anglo-Austrian*

Comment

A bill of exchange²⁹ and a promissory note³⁰ may, perhaps, be described as a congeries of contracts dependent on one original contract,³¹ which always has a certain effect on the others. It exists for one object, namely, to secure to the holder³² the payment in due course³³ of the sum for which the bill is drawn or the note is made. Nevertheless the several contracts entered into for this purpose by the drawer, the acceptor, and the indorser of a bill, or by the maker and the indorser of a note, and therefore the several rights and liabilities of each of these parties, are distinct and different. Many difficulties in reference to the conflict of laws relating to bills and notes have arisen from the habit of regarding the instrument as a single contract, instead of regarding it as what it really is—a document embodying several distinct contracts. The principal feature of the provisions of the Bills of Exchange Act, 1882, on the conflict of laws is that they reject the 'single law' or 'interdependence'³⁴ doctrine and adopt the 'several laws' or 'independence' view, with a number of important exceptions.³⁵ The 'several laws' doctrine prevails on the Continent³⁶ and in

Bank [1904] 2 K.B. 870, [1905] 1 K.B. 677 (C.A.); *Bank of Montreal v. Exhibit and Trading Co.* (1906) 11 Com.Cas. 250; *Haarbleicher v. Baerselman* (1914) 137 L.T.Jo. 564, *Guaranty Trust Co. v. Hannay* [1918] 1 K.B. 43, [1918] 2 K.B. 623 (C.A.), *Re Francke and Rasch* [1918] 1 Ch. 470, *Koechlin v. Kestenbaum* [1927] 1 K.B. 889 (C.A.); *Koch v. Dicks* [1933] 1 K.B. 307 (C.A.); *Bank Polski v. Mulder* [1941] 2 K.B. 266, [1942] 1 K.B. 497 (C.A.); *Cornelius v. Banque Franco-Serbe* [1942] 1 K.B. 29, better reported [1941] 2 All E.R. 728, *Syndic in Bankruptcy of Khoury v. Khayat* [1943] A.C. 507 (P.C.)

²⁹ 'Bill' means bill of exchange (s. 2) as defined in s. 3. For the meaning of 'cheque' see s. 73.

³⁰ 'Note' means promissory note (s. 2) as defined in s. 83 (1). Whether a bill must comply with the requirements of s. 3 in order to be a bill, and whether a note must comply with those of s. 83 in order to be a note, depends on the law which governs it. These definitions apply only to instruments governed by the law of the United Kingdom.

³¹ The original contract is, in the case of a bill drawn to the order of the payee, the contract between the drawer and the payee, in the case of a bill drawn to the drawer's own order the contract with the first indorsee, in the case of a bearer bill that with the first transferee by delivery. In the case of a note the original contract is that between the maker and the payee, or, if it is made payable to maker's order, the first indorsee; if it is a note payable to bearer the original contract is that between the maker and the first transferee by delivery. The acceptance of a bill, which may in time precede the 'issue' of the bill to the first holder, as defined in s. 2, is a 'super-vening' contract for the purposes of the conflict of laws (s. 72 (1)). For the definition of 'issue', see s. 2.

³² For the definition of 'holder', 'bearer', 'delivery' and 'indorsement', see s. 2.

³³ For definition see s. 59 (1) and, with respect to cheques, also s. 60.

³⁴ The expression 'single law or several laws' is used by Falconbridge, p. 293, the terms 'independence' and 'interdependence' or their equivalents are used on the Continent. See, e.g., Raiser, *l.c.*, § 4, pp. 58 ff. See, for a different view, Westlake, § 230.

³⁵ The principal exceptions are s. 72 (2) proviso, s. 72 (3) and s. 72 (5). See below Rule 153. On the 'several laws' principle, see *Horne v. Rouquette* (1878) 3 Q.B.D. 514 (C.A.), at p. 520, *per* Brett, L.J.

³⁶ See Geneva Convention of June 7, 1930, for the Settlement of Certain Conflicts of Laws in Connection with Bills of Exchange and Promissory Notes, e.g.,

the United States³⁷ and may perhaps be regarded as one of the few aspects of the conflict of laws on which there exists a widespread consensus of opinion throughout the world.

Bills and notes are clearly instruments which from their nature are likely to give rise to a conflict of laws. A bill may be drawn in one country, e.g., France; be accepted in another, e.g., England; be indorsed in a third, e.g., Belgium; and be payable in a fourth, e.g., Germany. The law of each of these countries may affect the validity of the bill or of any one or more of the contracts contained in it, or the rights and obligations of the parties. As in the case of other contracts it may be necessary to determine the law governing the formation of the contract, the capacity of the parties, the formal and essential validity of the contract, and its interpretation, effect and discharge. The Bills of Exchange Act does not *expressis verbis* deal with all these matters. Its provisions are confined to the questions of formal validity,³⁸ interpretation,³⁹ the so-called 'duties' of the holder,⁴⁰ and the due date of payment.⁴¹ It also contains a few provisions of the domestic law of the United Kingdom⁴² which are likely to be of practical importance in cases involving international elements, such as those determining the rights of the holder of a bill or note governed by the law of the United Kingdom, but dishonoured abroad,⁴³ and the rights of the holder of a bill drawn in a foreign currency, but payable in the United Kingdom.⁴⁴ Moreover, the Act draws a distinction between 'inland' bills and 'foreign' bills and notes.⁴⁵ This distinction is primarily of

Arts. 2, 3, 4; see, however, Art. 5 and Art. 8. Similarly Geneva Convention of March 19, 1931, for the Settlement of Certain Conflicts of Laws in Connection with Cheques; see, however, Art. 7. See, for the Conventions, League of Nations Treaty Series II, C. 360, M. 351, 1930 II. They are printed in Lorenzen, *Cases and Materials on the Conflict of Laws*, 4th ed., pp. 579 ff.

³⁷ See the decisions collected in Stumberg, pp. 226 f.

³⁸ Section 72 (1).

³⁹ Section 72 (2). This may possibly cover the question of essential validity. This was the view of Romer, J., in *Alcock v. Smith* [1892] 1 Ch. 293, and of Sargant, L.J., in *Koechlin v. Kestenbaum* [1927] 1 K.B. 889, but not, it seems, that of Vaughan-Williams, L.J., in *Embiricos v. Anglo-Austrian Bank* [1905] 1 K.B. 677, at p. 685; see Cheshire, p. 361 f., pp. 620 ff.; Falconbridge, pp. 290 ff.

⁴⁰ Section 72 (3). The 'duties' to present, to note, to protest, and to give notice of dishonour are not obligations which can be enforced against the holder, but pre-conditions of the exercise of his right of recourse. See Wolff, s. 467, who calls them 'burdens'.

⁴¹ Section 72 (5).

⁴² The Act applies to Scotland and to Northern Ireland.

⁴³ Section 57 (2).

⁴⁴ Section 72 (4). How, in view of s. 89, this applies to notes appears doubtful.

⁴⁵ Section 4. According to this provision an inland bill is a bill which is or on the face of it purports to be drawn within the British Islands and is either payable there or drawn upon a person resident there. 'British Islands' for this purpose includes the United Kingdom of Great Britain and Northern Ireland, the Isle of Man, the Channel Islands and adjacent islands. Eire is not included: Irish Free State (Consequential Adaptation of Enactments) Order, 1923, s. 2. If the place of drawing of a bill drawn within the British Islands is changed so as to make it appear as a foreign bill, the bill is thereby materially altered and, if governed by the law of the United Kingdom, avoided by virtue of s. 64. *Koch v. Dicks* [1933] 1 K.B. 307 (C.A.).

importance for the domestic law of the United Kingdom with reference to the duties of the holder,⁴⁶ and to stamp law.⁴⁷ In one respect, however, this distinction assumes importance in the conflict of laws, *viz.*, with regard to the interpretation of the indorsement abroad of an instrument governed by the law of the United Kingdom.⁴⁸

The Act is thus by no means an exhaustive codification of the conflict of laws with regard to bills and notes.⁴⁹ Its provisions relating to the conflict of laws do not settle all the questions of the choice of laws in regard to a bill or a note which might be raised in an English court. Not only does the Act contain no special rules regarding such matters as capacity and essential validity,⁵⁰ it also fails to deal with what one may call the 'property' as distinguished from the 'contract' aspect of bills and notes.⁵¹

The provisions of the Bills of Exchange Act on the conflict of laws reproduce, for the most part, the effect of decided cases. These are in conformity with the principles of the choice of law in regard to contracts in general adopted by the English courts and set out in the preceding Rules of this Digest.⁵² It is, however, clear that, in view of the exigencies of commerce, the proper law doctrine cannot be applied to contracts embodied in negotiable instruments in the same way in which it is applied to other contracts, and it is also clear that the Act has not so applied it. The main characteristic of a negotiable instrument is that it is intended to circulate, and that, for this purpose, anyone becoming a party to it should be able to see from the instrument itself what are going to be his rights and his obligations. Agreements which do not appear on the face of the instrument should therefore not be allowed to affect the rights and duties of those who are parties to it. Moreover, in order to permit rapid circulation, all those agreements which are embodied in the instrument must be reduced to a strict form, the '*rigor cambialis*', which does not leave room for any ambiguity of interpretation. These may be counsels of perfection, and it must be admitted that the legislation of various countries has not always lived up to these standards.⁵³ There is, however, nothing, either in the Act or in any

⁴⁶ Section 51. Upon being dishonoured (in the United Kingdom, s. 72 (3)) an inland bill may be protested, a foreign bill must be. Unless the contrary appear on the face of it, the holder may treat it as an inland bill (s. 4 (2)). A foreign note need not be protested, s. 89 (4).

⁴⁷ Stamp Act, 1891, ss. 35 f. The definition of a foreign bill or note for purposes of stamp law differs from the definition in the Bills of Exchange Act.

⁴⁸ Section 72 (2). See *post*, Rule 153, p. 687.

⁴⁹ *Re Gillespie, ex p. Roberts* (1886) 18 Q.B.D. 286 (C.A.).

⁵⁰ See, however, note 39 above, p. 680.

⁵¹ See *post*, Rule 153, pp. 687, 693.

⁵² See note 28, p. 678, above.

⁵³ *E.g.*, Art. 2 of the Geneva Convention of 1930 on Conflicts of Laws in Connection with Bills of Exchange (*lex patriae* determining capacity, in conjunction, it is true, with *lex loci contractus*, but each country may treat as invalid a contract for which its own national lacks capacity under his *lex patriae*, though he would have capacity under the *lex loci contractus*). On the other

decided case, to compel an English court to apply to bills and notes the principle that the parties are free to choose the law applicable to their contract without reference either to the place where the contract was made or the place where it was to be performed. The proper law of a contract embodied in a negotiable instrument must appear from the instrument itself. It can only be the *lex loci contractus* or the *lex loci solutionis*. Nor, it is submitted, can any choice between these two systems be relevant unless the choice appears on the face of the instrument.⁵⁴ The contract between the drawer of a bill and the acceptor must be governed either by the law of the place where the contract was made or by the place of payment. The Act has made the *lex loci contractus* the relevant law in matters of form and of interpretation.⁵⁵ In the law of negotiable instruments there is a strong case for applying one system of law to the form of each contract, the formation of the contract, and the capacity of the parties to make it, and it is therefore submitted that the formation of the contract,⁵⁶ including the need for, and the meaning of, consideration,⁵⁷ and the capacity of the parties⁵⁸ should be governed by the law of the place where the contract was made. The argument that that place may be fortuitous⁵⁹ has less force in relation to the contracts now under discussion than to any others. It is true that it may be ambiguous, but, as far as English law is concerned, that

hand, the Convention treats the place of signature as the place of contracting, which is less likely to lead to ambiguities than the Bills of Exchange Act, which treats the place of delivery as the place of contracting. See Wolff, s. 464, who does not regard the English solution as inferior to the Geneva solution.

⁵⁴ Nor should a choice of law *dehors* the instrument be only ineffective against a *bona fide* purchaser. *Alister Wolff*, s. 468. Which law is to decide what, in this connection, is *bona fides*, e.g., whether it is excluded by negligence, and who is a 'purchaser'?

⁵⁵ This is the effect of the Act, although it is not in accordance with the intention of the draftsman, Sir M. Chalmers. See below, Rule 153, pp. 684, 690.

⁵⁶ This is, of course, subject to the overriding principle of public policy: see *Société des Hôtels Réunis v. Hawker* (1913) 29 T.L.R. 578.

⁵⁷ See Falconbridge, p. 311. The same would be true of the requirement of *causa* under a foreign law. 'Value' which, in the Bills of Exchange Act (see s. 2) means 'valuable consideration' is defined in s. 27 in terms of English domestic law. Falconbridge, *l.c.*, and *Law of Banking*, 5th ed., Chap. 39, discusses the problems to which the analogous provisions of the Canadian Statute, R.S.C., 1927, c. 16, give rise in the Province of Quebec. The same problem may arise, but does not as yet seem to have arisen, in Scotland. See also *Allen v. Hay* (1922) 69 D.L.R. 193. The remarks in the text are not intended to apply to the question of the legality of the consideration. See Rule 153, *post*, p. 687.

⁵⁸ *Bondholders Securities Corporation v. Manville* [1933] 4 D.L.R. 699: capacity of married woman domiciled in Saskatchewan to make promissory note in Florida held by Saskatchewan courts to be governed by law of Florida. *Re Soltykoff* [1891] 1 Q.B. 413 (C.A.) appears implicitly to adopt the same principle. Under the Geneva Conventions, Art. 2, the decision in *Bondholders Securities Corporation v. Manville*, above, would have had to be in favour of the law of Saskatchewan (if the law of the domicile is substituted for that of the nationality). See Falconbridge, pp. 323 ff.; Wolff, s. 462.

⁵⁹ See Rule 136, Sub-Rule 3, *ante*, p. 593.

ambiguity is removed by positive enactments.⁶⁰ Each contract, with the exception of the acceptance, is made when the instrument is delivered in order to give effect to the contract, and delivery means transfer of possession, actual or constructive.⁶¹ The contract of acceptance is completed by delivery or notice of acceptance, whichever is the earlier.⁶² The place of signature is not as such the *locus contractus*. These provisions of the Bills of Exchange Act are primarily intended to regulate matters belonging to the domestic law of the United Kingdom, but they also define the connecting factor 'place of contracting' for the purposes of the conflict of laws. If, e.g., an indorser sends a bill after indorsement⁶³ to a foreign country, that will be the place where his contract becomes complete, not the place where he actually signed the bill.

The principles governing the conflict of laws with reference to bills and notes do not apply to contracts commercially connected with negotiable instruments but not embodied in the instrument itself. Thus the obligations arising from confirmed documentary credits are governed by the general rules of the conflict of laws applicable to contracts. This is true of the duties of a banker who has issued a confirmed letter of credit towards the seller of the goods as well as of his duties towards his own customer. It is also true of the customer's duty to provide the banker with funds before the date of the maturity of the bills.⁶⁴ The question, on the other hand, which law decides whether a bill of exchange drawn and accepted by virtue of a documentary credit is conditional upon the genuineness of the bills of lading attached to it, is a question concerning the conflict of laws with regard to bills and notes.⁶⁵

Whether a bill operates as an assignment of funds in the hands of the drawee, as it does, in certain circumstances, under Scottish law,⁶⁶ is not a question to be answered by the law applicable to the bill as such, but governed by the principles of the conflict of laws with reference to assignments. A cheque drawn in Scotland on an English bank and issued in Scotland does not operate as an assignment of the drawer's bank balance in England.

⁶⁰ Bills of Exchange Act, s. 21.

⁶¹ Section 2. These provisions are unambiguous in the sense that they remove any doubt as to how the law defines the place of contracting. Their application may lead to difficulties, e.g., in determining what is constructive possession (see above, p. 681, note 53), though no such difficulties seem so far to have arisen in the courts. See also *Chapman v. Cottrell* (1865) 3 H. & C. 865.

⁶² Section 21 (1) proviso, and s. 2: 'Acceptance means an acceptance completed by delivery or notification'.

⁶³ 'Indorsement' is defined in s. 2 as 'an indorsement completed by delivery'.

⁶⁴ See *Kleinwort, Sons & Co. v. Ungarische Baumwolle Industrie Aktiengesellschaft* [1939] 2 K.B. 678 (C.A.).

⁶⁵ *Guaranty Trust Co. v. Hannay* [1918] 1 K.B. 43; [1918] 2 K.B. 623 (C.A.). The choice of law question was left undecided by the Court of Appeal, because the relevant laws, 'English and 'American' law, happened to be identical.

⁶⁶ Bills of Exchange Act, 1882, s. 53.

RULE 153.⁶⁷—Where a bill drawn in one country is negotiated,⁶⁸ accepted, or payable in another, the rights, duties and liabilities of the parties thereto are determined as follows⁶⁹ :—

(1) The validity of a bill as regards requisites in form is determined by the law of the place of issue,⁷⁰ and the validity, as regards requisites in form, of the supervening contracts, such as acceptance,⁷¹ or indorsement,⁷² or acceptance *supra protest*,⁷³ is determined by the law of the place where such contract was made.

Provided that—

- (a) Where a bill is issued out of the United Kingdom, it is not invalid by reason only that it is not stamped in accordance with the law of the place of issue ;
- (b) Where a bill, issued out of the United Kingdom, conforms, as regards requisites in form, to the law of the United Kingdom, it may, for the purpose of enforcing payment thereof, be treated as valid as between all persons who negotiate, hold, or become parties to it in the United Kingdom.

Comment

Formal validity of bills and notes and of contracts contained in them.

The principle laid down in this subsection, independently of

⁶⁷ Rules 153 and 154 consist of sections 72 and 57 of the Bills of Exchange Act which have reference to the conflict of laws or to such principles of domestic law as are likely to be of importance in cases involving an international element. The illustrative comment is placed, not at the end of each Rule, but after that part of each enactment, *e.g.*, subsection, which the comment most naturally follows.

⁶⁸ For the meaning of this term, see s. 31 of the Act.

⁶⁹ The provisions of s. 72 and those of s. 57, set out in Rule 154, apply to promissory notes as well as to bills of exchange. A promissory note, as defined in s. 89, is, subject to the provisions of Part IV of the Act, governed by the same principles as a bill of exchange, with the necessary modifications (s. 89). For the purposes of the conflict of laws these modifications, some of which are laid down in s. 89 (2) and (3), do not appear to call for comment. 'Delivery', 'holder', and 'issue' have the same meaning in reference to both instruments (s. 2).

⁷⁰ This is the place at which the instrument is first delivered, complete in form, to a person who takes it as a holder. S. 2, where 'holder' and 'bearer' are also defined.

⁷¹ For definition, see s. 2.

⁷² For definition, see s. 2.

⁷³ See ss. 65-67.

the provisos, by which the effect of the subsection is modified, corresponds with the rule *locus regit actum*, set out above in Rule 140. It cannot, however, apply to bills and notes as a merely optional rule,⁷⁴ i.e., as a permission to use the formalities required by the law of the place of contracting. It was the intention of the draftsman, Sir M. Chalmers, that section 72 (1) should be considered as an imperative rule,⁷⁵ and it is submitted that he has succeeded in giving effect to this intention. It is further submitted that this interpretation is in accordance with commercial necessities.⁷⁶ The formal validity of a bill or note and of the several contracts contained in the instrument depends exclusively on the law of the country where each contract is made or completed. Hence the formal validity of the bill or note itself is governed by the law of the place of issue, i.e., by the law of the place where the instrument, being complete in form,⁷⁷ is first delivered to a person who takes it as holder; the formal validity of the acceptance or indorsement is determined by the law of the place where the acceptor's or indorser's contract is completed. What, for these purposes, is to be characterised as a matter of 'form' is far from clear, the less so since in view of the strictly formal nature of these contracts the question of essential validity is apt to merge in that of formal validity. Thus, the first proviso shows that the requirement of a stamp is to be considered as a matter of form. Bailhache, J.,⁷⁸ and, perhaps, also Pickford, L.J.,⁷⁹ and Scrutton, L.J.,⁸⁰ thought that the conditional or unconditional nature of the bill was a question of form, and this would appear to indicate that all the requirements set out in section 3 of the Act are formal requirements. Bankes, L.J., and, with some reservations, Sargant, L.J., took the view that it was a question of form whether the chain of indorsements was interrupted by the signature of a person signing in his own name as agent for the payee or last indorsee without indicating that he was signing as agent.⁸¹ If this is the correct view, the validity of the transfer of bills and notes would appear to a considerable extent to be covered by this subsection.⁸²

⁷⁴ See *ante*, Rule 140, p. 624.

⁷⁵ See Chalmers, *Bills of Exchange Act*, 11th ed., p. 235. See also Falconbridge, p. 275; Cheshire, pp. 258 f.; Wolff, ss. 463-464.

⁷⁶ See *ante*, Rule 152, p. 678.

⁷⁷ *Quære*, which law determines whether, for this purpose, the instrument is 'complete in form'? Logically it should be the *lex fori*, because this is a question concerning the interpretation of the connecting factor. In practice it would probably be the law of the place of delivery, an illogical but convenient solution.

⁷⁸ *Guaranty Trust Co. v. Hannay* [1918] 1 K.B. 48, at p. 55.

⁷⁹ *Guaranty Trust Co. v. Hannay* [1918] 2 K.B. 628, at p. 634, 'without deciding it'.

⁸⁰ *Ibid.*, at p. 670, 'no final opinion'.

⁸¹ *Koechlin v. Kestenbaum* [1927] 1 K.B. 889, 897 (Bankes, L.J.), 899 (Sargant, L.J.).

⁸² See *post*, p. 693.

The provisos are exceptions to the principles enunciated in subsection 1.

*Proviso (a).*⁸³ Independently of the Bills of Exchange Act, 1882, it would seem that where a bill or note issued abroad is, on account of its not being stamped in accordance with the law of the place of issue, void and not merely inadmissible in evidence, it would be void in England, on the ground that the principle *locus regit actum* applies here as an imperative rule.⁸⁴ Under the Act, however, such an instrument is clearly not invalid in the United Kingdom for want of the stamp with which it ought to have been stamped in the country in which it was issued. For business purposes it would be unfortunate if it were necessary to consider in the case of bills and notes issued abroad the regularity of the absence or otherwise of a stamp.⁸⁵ The proviso applies only to invalidity arising from the want of a stamp. It has no reference to any other cause of invalidity.

*Proviso (b).*⁸⁶ This second proviso, again, is a partial deviation from the principle that the formal validity of each contract depends on the law of the place where it is made. Under it a bill or note, which for defect of form is void in the country where it is issued, i.e., under its *lex loci contractus*, is for certain purposes treated as valid in the United Kingdom. It would seem that an indorsement or acceptance invalid in respect of form by the law of the country where it takes place might be valid in the United Kingdom in an analogous situation.⁸⁷ The presumable object of this exception from the 'several laws' doctrine is to make bills issued (or indorsed or accepted) abroad more easily negotiable in the United Kingdom.⁸⁸

The validity, however, of an instrument, under this proviso, is subject to three limitations: (1) It must conform, as regards requisites in form, to the law of the United Kingdom. (2) It can be treated as valid only for the purpose of enforcing payment, and not, it seems, e.g., in an action for a declaration.⁸⁹ (3) The bill or note

⁸³ See also Finance Act, 1933, s. 42.

⁸⁴ See *Clegg v. Levy* (1812) 3 Camp. 166; *James v. Catherwood* (1823) 3 Dowl. & Ry. 190; *Bristow v. Sequerville* (1850) 5 Ex. 275. And see *ante*, Rule 140, notes 32 ff., p. 627; *Cp. Republica de Guatemala v. Nunez* [1927] 1 K.B. 669 (C.A.), at pp. 690 f., *per Scrutton, L.J.*

⁸⁵ On the other hand, an instrument issued in the United Kingdom is, in the United Kingdom, void for want of a stamp, though it was negotiated abroad. *Bank of Montreal v. Exhibit and Trading Co.* (1906) 11 Com.Cas. 250. Falconbridge, p. 279, deals with the anomalies created by this proviso in the event of a bill or note being issued in one part of the British Commonwealth, e.g., in the United Kingdom, and negotiated in another, e.g., in Canada.

⁸⁶ For a convincing criticism of this proviso, see Falconbridge, Chap. 14, para. 2 (d).

⁸⁷ So also Wolff, s. 465. This is perhaps a bold, but certainly a reasonable interpretation of the statute *per analogiam*.

⁸⁸ See Cheahire, p. 359 f.

⁸⁹ See *Guaranty Trust Co. v. Hannay* [1918] 2 K.B. 623, where this limitation is criticised by Scrutton, L.J., at p. 670, as unequal in its operation, since it might exclude a plaintiff who, as in that case, asked for a declaration that

is to be treated as valid only between persons who negotiate, hold, or become parties to it in the United Kingdom, *e.g.*, between a plaintiff who holds (or has held⁹⁰) the instrument in the United Kingdom and a defendant who has negotiated it here, but not between a plaintiff who holds the bill abroad and a defendant who has negotiated it here, or between a plaintiff who holds it here and a defendant who has negotiated it abroad.

Illustrations

1. By German law a bill cannot be drawn payable to bearer.⁹¹ By the Bills of Exchange Act it can.⁹² A bill drawn to bearer and issued in London, but payable in Germany, is valid.

2. E. V. draws a bill in France upon X in London who accepts payable at an English bank. The payee is M. V. in France, and E. V. indorses there in his own name to A, who sues in England. It is proved that under French law E. V. as a duly authorised agent can indorse in his own name. The indorsement is valid, despite the fact that such an indorsement is inadequate in English law.⁹³

3. Before 1922⁹⁴ a bill is drawn in France by a firm carrying on business there in the French language, in an English form, indorsed in blank, and delivered to another French firm. It is drawn on an English company, by whom the bill is accepted payable in London. Although the indorsement in blank is invalid by French law, a holder who has acquired the bill by negotiation in England, can, by virtue of proviso (b), enforce it in England against the acceptor.⁹⁵

4. A bill drawn, issued and payable in Germany does not contain the words 'bill of exchange' or their equivalent and is therefore void under German law.⁹⁶ It is indorsed here to a firm carrying on business in England. The indorser could be sued here⁹⁷ by the indorsee under proviso (b), though the drawer could not.

(2) Subject to the provisions of this Act,⁹⁸ the interpretation of the drawing, indorsement, acceptance, or

the payment made to him under a bill was valid. See also Pickford, L.J., at p. 648, and Bailhache, J., *S.C.* [1918] 1 K.B. 43. For detailed discussion, Falconbridge, pp. 280 ff.

⁹⁰ This seems to be a reasonable extension of the principle. See Wolff, p. 488, note 1.

⁹¹ German Bills of Exchange Law, 1933, Art. 1.

⁹² Bills of Exchange Act, s. 3.

⁹³ *Koechlin et Cie v. Kestenbaum Bros.* [1927] 1 K.B. 889 (C.A.).

⁹⁴ *I.e.*, before the passing of the French law of February 8, 1922, by which negotiation of a bill by means of an indorsement in blank was introduced in France. See Chalmers, p. 114.

⁹⁵ See *Re Marseilles Extension Railway and Land Co.* (1885) 30 Ch.D. 598. The case refers to bills made before the passing of the Bills of Exchange Act, 1882, and was decided on a different ground on which it could not have been decided under the Act.

⁹⁶ German Bills of Exchange Law, 1933, Art. 1, No. 1. No such requirement exists under s. 3 of the Bills of Exchange Act, 1882.

⁹⁷ Cf. *Wynne v. Jackson* (1826) 2 Russ. 351.

⁹⁸ The provisions referred to are the remaining subsections of the Bills of Exchange Act, 1882, s. 72, or, in other words, the other subsections or clauses of Rule 158. Of these, sub-s. 4 is not, however, a rule of the conflict of laws, but a principle of domestic law. S. 57, mentioned in this connection in Chalmers, *Bills of Exchange*, 11th ed., p. 285, note 15, is also a rule of domestic law. So are ss. 15 and 53.

acceptance *supra* protest of a bill is determined by the law of the place where such contract is made."⁹

Provided that where an inland bill¹ is indorsed in a foreign country,² the indorsement shall, as regards the payer, be interpreted according to the law of the United Kingdom.³

Comment

Interpretation of bills and notes and of contracts contained in them.

This subsection lays down two principles: (1) The interpretation of each contract contained in a bill or note is governed by the proper law of that contract, *i.e.*, the interpretation of each contract is governed by its own law and there is not one 'single law' to apply to the interpretation of all contracts embodied in the instrument. (2) The proper law of each contract for the purpose of its interpretation is the *lex loci contractus*, *i.e.*, in the case of the contract between the drawer of a bill or the maker of a note and the payee or first indorsee and in the case of all contracts between indorsers and indorsees the place of delivery, and in the case of the contract of acceptance the place at which the accepted bill was delivered or notice of the acceptance was given, whichever be the earlier event.⁴

Thus, whether the addition of words such as 'for me' to the indorsement of a bill is to be interpreted as a 'restriction' which 'prohibits further negotiation of the bill'⁵ is to be determined by the law of the country in which the indorser delivered the bill to the indorsee, irrespective of the law of the place at which the bill itself is payable, and irrespective of the law of the place at which

⁹ *Francis v. Rucker* (1768) Ambler 673; *Allen v. Kemble* (1848) 6 Moore P.C. 314; *Horne v. Rouquette* (1878) 3 Q.B.D. 514 (C.A.), at p. 520, *per* Brett, L.J.; *Alcock v. Smith* [1892] 1 Ch. 238 (C.A.); *Embricos v. Anglo-Austrian Bank* [1904] 2 K.B. 870; [1905] 1 K.B. 677 (C.A.); *Haarbleicher v. Baerselman* (1914) 137 L.T.Jo. 564; *Koechlin et Cie v. Kestenbaum Bros.* [1927] 1 K.B. 889 (C.A.); *Bank Polski v. Mulder* [1941] 2 K.B. 266 (*affd.* [1942] 1 K.B. 497 (C.A.)); *London and Brazilian Bank v. Maguire* (1895) Q.R. 8 S.C. 358; *Sanders v. St. Helens Smelting Co.* (1906) 39 Nova Scotia R. 370.

¹ *I.e.*, 'a bill which is or on the face of it purports to be (a) drawn and payable within the British Islands, or (b) drawn within the British Islands upon some person resident therein': s. 4.

² *I.e.*, a country not forming part of the British Islands. 'For the purposes of this Act, "British Islands" means any part of the United Kingdom of Great Britain and [Northern] Ireland, the Islands of Man, Guernsey, Jersey, Alderney and Sark, and the islands adjacent to any of them being part of the dominions of [His] Majesty': s. 4. The term 'foreign' is here used in a sense different from, and less extensive than, the sense given it in other Rules of this Digest.

³ *Lebel v. Tucker* (1867) L.R. 3 Q.B. 77.

⁴ Section 21. In practice this is not always observed and the place of signature is sometimes treated as the *lex loci contractus*. See, *e.g.*, *Haarbleicher v. Baerselman* (1914) 137 L.T.Jo. 564. There is possibly a presumption that the place of signature is the place of delivery. This is suggested by Wolff, s. 464.

⁵ See Bills of Exchange Act, 1882, s. 35.

the indorser has undertaken to pay the indorsee in the event of the bill being dishonoured.⁶ Again, whether a bill drawn payable 'to X' without the addition of the words 'or order' is, as under the Bills of Exchange Act, regarded as payable to order and therefore negotiable,⁷ or whether, as under the United States Uniform Negotiable Instruments Act, it is not, is a question to be answered by the law of the country in which the drawer delivered the instrument to the payee, and not by the law of the country in which the bill is payable.⁸ Whether the acceptance of a bill is to be interpreted as general or as qualified is decided in accordance with the law of the place at which the contract of acceptance is made, and not in accordance with the law of the place at which the acceptor undertakes to pay.⁹

Of the two principles formulated above the first appears to correspond with the general principles of the conflict of laws,¹⁰ with business necessity, and also with the solution adopted in the Geneva Conventions.¹¹ On the other hand, it would have been more consistent with the English conflict rules governing contracts in general and more in accordance with the best interests of commerce to choose as the proper law of each contract, not the law of the place of delivery but the law of the place of payment. This applies with particular force to the case of a bill accepted or a note made in one country but payable in another. In this case the application of the *lex loci contractus* involves a regrettable discrepancy between the solution adopted by the Bills of Exchange Act and that embodied in the Geneva Conventions. But desirable as the selection of the *lex loci solutionis* may be, none of the considerations mentioned above can prevail against the clear wording of the statute. It is impossible to attribute to the words 'the law of the place where the contract is made' in subsection (2) a meaning different from that which they bear in subsection (1). There is no rule of statutory interpretation which would enable a court to hold that in subsection (2) these words mean the opposite of what they say, namely, 'the law of the place where such contract is to be performed'.

⁶ See *Haarbleicher v. Baerselman*, *supra*.

⁷ Bills of Exchange Act, 1882, s. 8 (4).

⁸ Example taken from Falconbridge, p. 283.

⁹ *Bank Polski v. Mulder* [1941] 2 K.B. 266 (affd. on other grounds: [1942] 1 K.B. 497); *Sanders v. St. Helens Smelting Co., Ltd.* (1906) 89 Nova Scotia R. 370. In the latter case the place of signature was treated as the *lex loci contractus*. Where, as in these cases, the question at issue is, whether acceptance at one place 'payable' at another is a qualified acceptance (see Bills of Exchange Act, 1882, s. 19 (1) (c)), any other solution would be impossible because the interpretation of the acceptance determines the place of payment and cannot, therefore, depend on the law of that place.—Note that the general or qualified character of the acceptance is a matter of interpretation, but the conditional or unconditional character of the bill itself is a matter of form, see *Guaranty Trust Co. v. Hannay* [1918] 2 K.B. 623.

¹⁰ See *ante*, Rule 136, p. 579. The classical formulation is in Story, ss. 314 f.

¹¹ Convention on Bills and Notes, Art. 4; Convention on Cheques, Art. 5.

This, however, is precisely what the draftsman of the Act, Sir M. Chalmers, intended, but failed to say.¹² Following the example set by Huber¹³ and the doctrine of Story,¹⁴ Chalmers took the view that the fiction *Contraxisse unusquisque in eo loco intellegitur in quo ut solveret se obligavit*¹⁵ had to be read into the words 'law of the place where the contract is made' in subsection (2) (but not in subsection (1)). Story, whose language apparently suggested the terms of subsection (2), clearly intended to lay down, though in a very roundabout way, that each contract embodied in a bill or note is to be interpreted according to the law of the country where it is to be performed. Unfortunately the language of the subsection reproduces the words rather than the meaning of Story, and Chalmers' own suggestion is in conformity rather with the doctrine of Story when properly understood than with the wording of the statute.¹⁶

The proviso is an exception to the rule that each indorsement is subject to its own law. It applies to all inland bills or notes, including bills payable abroad which have been drawn within the British Islands upon a person resident there. The indorsements on such a bill or note are interpreted not according to their proper law but to the law of the United Kingdom. This, however, only applies 'as regards the payer', i.e., the acceptor of a bill or the maker of a note.¹⁷ If an inland bill has been indorsed abroad the question whether the indorsement is to be interpreted as enabling the indorsee to claim payment from the acceptor is decided according to the law of the United Kingdom, but a dispute between two claimants to the bill on the same issue must be decided according to foreign law.¹⁸ On the other hand, the proviso does apply although the holder became party to the instrument and holds it abroad. In this respect and in some others it is of wider application than section 72 (1), proviso (b), but, unlike the latter, it does not apply as between indorser and indorsee.

¹² Chalmers, *Bills of Exchange*, 11th ed., p. 237. Chalmers' further suggestion that the law of the place where the bill is accepted might refer to the law of the place of payment and that this reference should be followed, amounts to an application of the *renvoi* doctrine in the law of contract. See for a submission that this is undesirable Rule 136, note 12, p. 581, *ante*. And see Falconbridge, p. 280. The view advanced in the text is shared by Falconbridge, pp. 282 ff.; Cheshire, p. 361; Wolff, s. 466; but not, it seems, by Westlake, ss. 229 f.

¹³ *De Conflictu Legum*, 1689, Nos. 5 and 10; see *ante*, Rule 136, Sub-Rule 3, p. 593.

¹⁴ Story, s. 280. See for an analysis of Story's doctrine and of Chalmers' doctrine, Falconbridge, pp. 285-290. (Chalmers misunderstood a passage in Story (ss. 314 f.) which refers to the 'several laws' principle as a statement with regard to the choice of the proper law of each contract.)

¹⁵ D. 44, 7, 21. See above, Rule 136, Sub-Rule 3, p. 597, note 74.

¹⁶ The matter here discussed is left undetermined in *Guaranty Trust Co. v. Hannay* [1918] 2 K.B. 623, at p. 634, *per* Pickford, L.J., and at p. 670 *per* Scrutton, L.J. It appears that in *Bank Polski v. Mulder* [1941] 2 K.B. 286, Tucker, J., interpreted the subsection in the sense suggested in the text.

¹⁷ See Wolff, s. 530; Cheshire, p. 362, pp. 621 ff.

¹⁸ See *Alcock v. Smith* [1892] 1 Ch. 238, *post*, p. 604.

Validity and effect of bills and notes and of contracts contained in them.

There is some judicial authority¹⁹ for the view taken by Chalmers²⁰ that 'the term "interpretation" in this subsection . . . includes the obligations of the parties as deduced from such interpretation'. It has been suggested²¹ that this extension of the subsection to a matter not strictly covered by its language is undesirable, and that, in order to arrive at a result in accordance with the requirements of commerce, the *lex loci solutionis* should decide whether a contract contained in a bill or note is valid and what effect it produces. Thus, according to this view, if a bill were drawn in Germany upon a drawee in Germany payable three months after date and accepted payable in England, a stipulation in the bill to pay interest would, in accordance with English law, be valid, while, according to the opposite view, it would, in accordance with German law, be 'deemed not to be written' into the bill.²² Again, if a 'referee in case of need'²³ was inserted in a bill, it would, as Chalmers himself suggests,²⁴ be for the law of the place of payment to decide whether the holder can take his recourse against the drawer or previous indorsers without having demanded payment from the 'case of need'. There is, it is submitted, great force in the argument in favour of a narrow construction of subsection (2) and in favour of the application of the *lex loci solutionis* to the validity and effect as distinguished from the interpretation of bills and notes and of the contracts contained in them.²⁵

Legality of bills and notes and of the contracts contained in them.

This argument derives further support from the attitude of the courts towards the legality of negotiable instruments. In *Moulis v.*

¹⁹ Chalmers' view was adopted by Romer, L.J., in *Embiricos v. Anglo-Austrian Bank* [1905] 1 K.B. 677, at p. 686, and (when Romer, J.) in *Alcock v. Smith* [1892] 1 Ch. 238, by Sargant, L.J., in *Koechlin v. Kestenbaum* [1927] 1 K.B. 889, at p. 899, by Walton, J., in *Embiricos v. Anglo-Austrian Bank* [1904] 2 K.B. 870, and, with some reservation, by Stirling, L.J., *S.C.* [1905] 1 K.B. 677, at p. 687. These judicial utterances are, however, dicta, and the matter is not settled. In Canada, Chalmers' view was adopted in *London and Brazilian Bank v. Maguire* (1895) Q.R. 8 S.C. 358. It is shared by Wolff, s. 466, accepted (with regret) by Cheshire, pp. 361-2, and, it seems, rejected by Falconbridge, p. 291. The dicta occur in cases dealing with the transfer of bills and notes, to which special considerations apply. See *post*, p. 693.

²⁰ *Bills of Exchange Act*, 11th ed., p. 286.

²¹ By Falconbridge, *l.c.*

²² *Cp.* Bills of Exchange Act, 1882, s. 9 (1) (a), with German Bills of Exchange Law, 1933, Art. 5. It is assumed that, if German law applied, English law would not accept the *renvoi* contained in Art. 93 of the German statute, which reproduces Art. 4 of the Geneva Convention.

²³ Bills of Exchange Act, 1882, s. 15.

²⁴ Chalmers, *l.c.*, p. 89.

²⁵ The effect of the contract includes the measure of damages which, in the law of bills and notes at any rate, are a matter of substantive law and governed by the proper law of the contract, not by the *lex fori*. See, e.g., *per* Lindley, L.J., in *Re Gillespie, ex p. Roberts* (1886) 18 Q.B.D. 286, at pp. 292 f. See further, *post*, Rule 154, p. 701.

Owen,²⁶ the Court of Appeal held that English law governed the question whether a cheque drawn upon an English bank was deemed to be given for an illegal consideration, although the cheque was drawn and issued in France. It appears that, if a bill or note is illegal, or deemed to have been given for an illegal consideration according to the *lex loci solutionis* of the bill or note itself, all the contracts contained in the bill are affected. This principle laid down by Lord Mansfield in *Robinson v. Bland*²⁷ has not, it seems, been abrogated by the Bills of Exchange Act and is one of those common law principles which 'continue to apply'.²⁸ Since all the contracts, except those of the acceptor of a bill or the maker of a note, are somewhat in the nature of suretyship,²⁹ it is obviously right that they should be void if the principal contract is illegal. This, as *Moulis v. Owen* shows, must also apply where the drawee himself is not liable on the bill at all. In so far the question of legality is dominated not by the 'several laws' but by the 'single law' principle.

It is, however, submitted that where any contract contained in the instrument is illegal under its proper law³⁰ it must be considered as illegal everywhere, though it might be legal according to the law of the country in which the bill or note itself is payable. If a cheque was drawn upon a French bank for a wager, it could not be enforced in an English court by the payee against the drawer, if the contract between them was governed by English law. In order to be valid, it is submitted, any contract embodied in a negotiable instrument must be legal according to the law governing the bill or note and also according to its own proper law.³¹

Discharge of bills and notes and of the contracts contained in them.

The Bills of Exchange Act, 1882, does not deal generally with the law determining the validity and effect of a discharge from liability under a bill or note. This is regulated by the law in reference to discharge of contracts generally. The validity and effect of the discharge under each contract, therefore, depends on its

²⁶ [1907] 1 K.B. 746 (C.A.). See also *Cornelius v. Banque Franco-Serbe* [1941] 2 All E.R. 728, at p. 734.

²⁷ (1760) 2 Burr. 1077. In *Moulis v. Owen*, *supra*, at p. 750, Collins, M.R., referred to this principle and made it the basis of his decision. S. 72 was not mentioned. In *Société des Hôtels Réunis v. Hawker* (1913) 20 T.L.R. 578, the decision was based on public policy.

²⁸ Bills of Exchange Act, 1882, s. 97. It must be emphasised that *Moulis v. Owen*, *supra*, was not decided on a point of public policy.

²⁹ See Westlake, s. 230.

³⁰ There is no English authority on this point, but there is Canadian authority: *Story v. McKay* (1888) 15 O.R. 169. In that case it was also held,—rightly, it is submitted,—that for this purpose the proper law of each contract is the law of its place of payment. See Falconbridge, p. 316.

³¹ On the question of legality, see Falconbridge, pp. 314 ff. *Cloyes v. Chapman* (1876) 27 U.C.C.P. 22, mentioned by Falconbridge, p. 316, note (f), is clearly incompatible with the principle laid down in *Robinson v. Bland* (1760) 2 Burr. 1077, and affirmed in *Moulis v. Owen* [1907] 1 K.B. 746.

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proper law.³² Thus, if, according to the proper law of the contract between the drawer or an indorser and an indorsee, a right of set-off which the acceptor has against the holder is not, as in English law, characterised as a personal procedural remedy, but as a discharge of the obligation, the debt between these parties is extinguished, whatever view the law of the place of payment of the bill itself may take about it.³³

It must, however, be remembered that 'the discharge of a bill must be distinguished from the discharge of one or more of the parties thereto'.³⁴ If the bill or note as a whole is discharged under the law of the place where the principal obligation is payable or where, in the case of a cheque or other unaccepted bill, the drawee is 'expected' to pay, then, it is submitted, all the subsidiary contracts are also discharged, whether or not they would be discharged under their proper law. 'Payment in due course'³⁵ under the *lex loci solutionis* of the principal debt must discharge the drawer and all indorsers.

Transfer of bills and notes.

Since the passing of the Bills of Exchange Act, 1882, no problem concerning the conflict of laws with regard to bills and notes has loomed larger in the practice of the English courts than the question which law governs the passing of property in a negotiable instrument. The Act itself fails to solve this problem *expressis verbis*, but the gap thus left by the Act has been filled by a body of fairly unambiguous case law: whether or not the transferee, *e.g.*, the indorsee of a bill or note, acquires property in it, is determined by the law of the place where the alleged transfer occurs, *i.e.*, by the *lex loci actus* which, in the nature of things, must be the *lex situs*, *i.e.*, the law of the place where the instrument is situated at that time.³⁷ Thus, if an instrument is overdue according to the law of the country in which it is payable, but not according to the law of the country in which the alleged transfer takes place, or if, as in

³² See Rule 143, *ante*, p. 651.

³³ *Allen v. Kemble* (1848) 6 Moo.P.C. 314. In Canada a similar conclusion was reached by means of an extensive interpretation of the provision corresponding to s. 72 (2). See *London & Brazilian Bank v. Maguire* (1895) Q.R. 8 S.C. 358. For comment, see Falconbridge, p. 292, and pp. 325 f.

³⁴ *Chalmers, l.c.*, p. 195.

³⁵ See Wolff, p. 490.

³⁶ Bills of Exchange Act, 1882, ss. 59, 60.

³⁷ *Alcock v. Smith* [1892] 1 Ch. 238 (C.A.); *Embiricos v. Anglo-Austrian Bank* [1904] 2 K.B. 870, [1905] 1 K.B. 677 (C.A.); *Koechlin v. Kestenbaum* [1927] 1 K.B. 889 (C.A.). The earlier case law is contradictory. See, on the one hand, *Trimbey v. Vignier* (1894) 1 Bing.N.C. 151, and *Bradlaugh v. De Rin* (1868) L.R. 3 C.P. 538; (1870) L.R. 3 Q.B. 77 (Ex.Ch.), and, on the other hand, *De la Chaumette v. Bank of England* (1831) 2 B. & Ad. 385 (which, it is submitted, is no longer law); *Lebel v. Tucker* (1867) L.R. 3 Q.B. 77; *Re Marseilles, etc., Co.* (1885) 30 Ch.D. 598. These three cases exhibit a strong tendency towards the 'single law' doctrine. See *Cheshire*, pp. 619 ff.; Wolff, ss. 528 ff.; Falconbridge, Chap. 14, § 4; Chap. 20, § 2; Westlake, § 228.

Alcock v. Smith,³⁸ the instrument is overdue according to the law of both countries, but nevertheless capable of being negotiated in the strict sense of that term according to the law of the place where it is transferred, property may pass to a *bona fide* purchaser. If, according to the *lex loci actus*, property in a bill can be transferred by delivery and an indorsement in the name of an agent of the payee or previous indorsee, a transfer in this form will be sufficient to pass the property in the instrument, although according to the law of the country in which the bill is payable property in the bill would not have passed by an indorsement in this form.³⁹ The application of the 'several laws' doctrine to this aspect of the conflict of laws with regard to bills and notes is particularly important in view of what is probably the most significant discrepancy between the Anglo-Saxon and the Continental systems of laws of negotiable instruments. The rule 'once a forgery—always a forgery' which is embedded in the Bills of Exchange Act⁴⁰ does not, in this form, exist on the Continent. There a forgery is purged if the instrument reaches the hands of a purchaser in good faith, while in this country even a *bona fide* purchaser for value does not acquire property in an instrument if the chain of indorsements has been interrupted by a forgery. The conflicts situation to which this fundamental difference between the domestic laws of the United Kingdom and of the Continental countries gives rise is illustrated by the case of *Embiricos v. Anglo-Austrian Bank*.⁴¹ There an indorsement of a cheque drawn in Roumania upon an English bank was forged, and the cheque was acquired in good faith and for value by a transferee in Austria. It was held by the Court of Appeal that property in the cheque had passed to the *bona fide* transferee under Austrian domestic law which, according to English conflicts rules, determined the question whether by an alleged negotiation of the cheque in Austria property passed to the transferee.

While there is thus little doubt about the principle itself, it is far from clear whether it rests (a) upon an extensive interpretation of section 72 (2) of the Act, or (b) upon an application of section 72 (1), or (c) upon the general principles of the conflict of laws governing the transfer of intangible or (d) that of tangible movables.⁴² Of these four possibilities the second and third, *i.e.*, the classification of these issues as matters of 'form' and the treatment of negotiable instruments as intangible movables (on the analogy of ordinary debts) have little to commend themselves. It is true that there are

³⁸ [1892] 1 Ch. 238 (C.A.).

³⁹ *Koechlin v. Kestenbaum* [1927] 1 K.B. 889 (C.A.).

⁴⁰ Section 24. It is mitigated by the doctrine of estoppel. See, in particular, s. 54 (2) (a), s. 55 (2) (b) and (c). Canadian Bills of Exchange Act, 1927, s. 49. United States Uniform Negotiable Instruments Act, s. 23. Contrast, *e.g.*, German Bills of Exchange Law, 1933, Art. 7.

⁴¹ [1904] 2 K.B. 870, [1905] 1 K.B. 877 (C.A.).

⁴² See especially the detailed discussion in Falconbridge, pp. 294 ff.

some judicial dicta⁴³ in favour of applying section 72 (1), but they occurred in a case concerning the sufficiency, for the transfer of property in a bill, of an indorsement in the name of the payee's agent, a question which might perhaps be regarded as one of form, while issues such as those before the court in *Alcock v. Smith*⁴⁴ and in *Embiricos v. Anglo-Austrian Bank*⁴⁵ could not, by any stretch of language, be so classified. That negotiable instruments and the contractual debts embodied in them are not, in the conflict of laws, treated as intangible movables is not only clear from cases such as *Alcock v. Smith* and *Embiricos v. Anglo-Austrian Bank*, but also from the cases discussed in connection with Rule 156, below, such as, e.g., *Picker v. London and County Banking Co.*,⁴⁶ where it was held that the negotiability in England of a bond issued abroad depends upon the law of England and not upon that of the foreign country of issue. For the purposes of the conflict of laws negotiable instruments are 'chattels', choses in possession, not choses in action.⁴⁷

There remains the question whether the application of the law of the place of the alleged transfer should be justified by an extensive interpretation of section 72 (2) of the Bills of Exchange Act or by the general rules governing property in tangible movables, i.e., whether the first or the fourth of the possible explanations of the principle enumerated above is the proper one. There are judicial dicta in favour of both explanations, although the preponderant opinion appears to be that this is a matter governed by general principles and not by the Act.⁴⁸ The question is not by any means devoid of practical importance. If cases like *Alcock v. Smith* and *Embiricos v. Anglo Austrian Bank* must be understood as disputes about the 'interpretation' of the contract underlying the transfer, and if, therefore, they are governed by section 72 (2), the proviso to that subsection must apply whenever the validity of the transfer abroad of an inland bill or note arises as an incidental issue between the holder and the 'payer', i.e., the acceptor of a bill or the maker of a note. In other words: if *Alcock v. Smith* (which was a case concerning inland bills) had arisen not, as it did, as a dispute of title between two claimants to the instrument, but as a dispute

⁴³ See *ante*, p. 685, note 81. *Koechlin v. Kestenbaum* [1927] 1 K.B. 889 (C.A.), *per* Sargant and Bankes, L.JJ.

⁴⁴ [1892] 1 Ch. 238 (C.A.).

⁴⁵ [1904] 2 K.B. 870; [1905] 1 K.B. 677 (C.A.).

⁴⁶ (1887) 18 Q.B.D. 515 (C.A.).

⁴⁷ Falconbridge, p. 295, summarises this in the following words: 'The matter is primarily one of the transfer of the property in an obligation to pay money which is in effect merged in a tangible document, . . .'

⁴⁸ See on the one hand the dicta of Romer, L.J., of Walton, J., of Stirling, L.J., and of Sargant, L.J., quoted above, p. 691, note 19, and, on the other hand, those of Lopes and Kay, L.JJ., in *Alcock v. Smith* [1892] 1 Ch. 238 (C.A.), at pp. 266, 268, of Vaughan-Williams, L.J., in *Embiricos v. Anglo-Austrian Bank* [1905] 1 K.B. 677 (C.A.), at p. 685, and of Scrutton, L.J., in *Republica de Guatemala v. Nunez* [1927] 1 K.B. 669 (C.A.) at p. 691.

between either of them and the English drawees, an application of section 72 (2) of the Act would have compelled the court to judge the validity of the negotiation in Sweden in accordance with the domestic law of the United Kingdom. On the other hand, in *Embiricos v. Anglo-Austrian Bank*, Austrian law would have been applicable whichever of the two explanations of the principle had been regarded as the proper one, because the bill in question was a foreign bill. If, however, these cases are held to be justifiable by a general principle of the conflict of laws, then the *lex situs* applies to the validity of the transfer of both inland and foreign bills, in whatever context the issue arises. From a practical point of view it appears preferable to avoid the somewhat artificial differentiation between inland bills or notes and foreign bills or notes in this context, and also to prevent the question of the passing of property being governed by different systems in accordance with the type of dispute which gives rise to the issue. Moreover, as has been pointed out above, there is a case for a narrow construction of section 72 (2). In any event, it does not seem to be natural to say that the determination of the effect of a forged signature or of the transfer of an overdue bill or note is a matter of 'interpretation' of the contract, the less so, because what is here in issue is not the contract itself but the transfer of property which is carried into effect by way of performance of the contract. It is therefore submitted that the principle laid down in the cases on the validity of transfers should be regarded as an application of the general rule governing the transfer of property in tangible movables and as unaffected by section 72 of the Act, which deals with the law of contract and not with the law of property.⁴⁹

Illustrations

1. A bill is accepted in England payable in Amsterdam. The law of the United Kingdom determines whether this is a general or a qualified acceptance.⁵⁰

2. X in Germany indorses a bill drawn in Germany on A in London and payable there. X adds to his indorsement the words '*für mich*' ('for me'). According to the domestic law of the United Kingdom,⁵¹ this might have to be interpreted as a restrictive indorsement; according to German law it is not so interpreted. This is not a restrictive indorsement.⁵²

3. A bill is drawn in London on X in London payable there. The payee indorses the bill in Germany to A and adds to the indorsement the words '*für mich*'. As between X and A the Bills of Exchange Act determines whether these words have to be interpreted as a restrictive indorsement, but

⁴⁹ See for the law governing tangible movables in general, *ante*, Chap. 28, Rules 129-181, and for a further application of the principles here under discussion, Rule 156, *post*, p. 705.

⁵⁰ *Bank Polski v. Mulder* [1941] 2 K.B. 266; [1942] 1 K.B. 497 (C.A.); see also *Don v. Lippmann* (1887) 5 Cl. & F. 1, 12, 13. And see *Wilde v. Sheridan* (1852) 21 L.J.Q.B. 260.

⁵¹ Bills of Exchange Act, 1882, s. 35.

⁵² *Haarbleicher v. Baerselman* (1914) 187 L.T.Jo. 564: this is a foreign bill. The proviso does not apply. The case falls within the principle of *Bradlaugh v. De Rin* (1868) L.R. 3 C.P. 538; (1870) L.R. 5 C.P. 473 (Ex.Ch.).

German law determines, as between A and the payee, whether title has passed by virtue of the indorsement.⁵³

4. A draws in London a bill upon B in London payable there. It is drawn to the order of C in Norway who indorses it in Norway to D. D indorses it in Norway in blank and delivers it to E who acts as agent for X, an English firm. The bill is seized in Norway by a judicial officer in execution of a judgment against X, and, in accordance with Norwegian law, sold to D who resells it in Sweden to Y. At that moment the bill is overdue, but, according to Swedish and Norwegian law, Y, being ignorant of any adverse claim on the part of X, acquires a good title to the bill. This title is, as against X, recognised by the English courts.⁵⁴

5. A draws in Roumania a cheque upon an English bank payable to X or order. X indorses the cheque in Roumania to C, an English firm, and posts it to London, but the letter is intercepted by a fraudulent clerk of X's who forges C's indorsement in blank and sells and delivers the cheque to D in Vienna, who purchases it in good faith and transfers it to Y in London for collection. Y collects the amount of the cheque from the drawee bank. An action for conversion of the cheque brought by X against Y fails in the English courts on the ground that D (and Y through him) had acquired a good title to the cheque under Austrian law.⁵⁵

(3) The duties of the holder with respect to presentment for acceptance or payment and the necessity for or sufficiency of a protest or notice of dishonour, or otherwise, are determined by the law of the place where the act is done or the bill is dishonoured.⁵⁶

Comment

Duties of the holder.

The language of this subsection is obscure. It should probably be construed *reddendo singula singulis*. The words 'act is done' refer to presentment for acceptance or payment; the words 'bill is dishonoured' refer to protest and notice of dishonour.

The duties of the holder with respect to presentment for acceptance or payment are determined by the law of the place 'where the act is done'. Does that law determine whether the holder has to present the bill at all or does it merely determine how he has to present it, assuming that the proper law of the contract imposes upon the holder a duty to present? ⁵⁷ If the necessity for presentation were within the subsection it would have to be read as if the words 'or to be done' were inserted after 'the act is done'.⁵⁸

⁵³ This is an inland bill and the proviso applies. The case falls within the principle of *Lebel v. Tucker* (1867) L.R. 3 Q.B. 77.

⁵⁴ *Alcock v. Smith* [1892] 1 Ch. 238 (C.A.).

⁵⁵ *Embiricos v. Anglo-Austrian Bank* [1904] 2 K.B. 870; [1905] 1 K.B. 677 (C.A.).

⁵⁶ Westlake, ss. 231 f.; Falconbridge, pp. 319-321; Foote, pp. 460 ff.; Cheshire, pp. 362-366; Wolff, s. 467.

⁵⁷ See Mann, 5 Mod.L.R., pp. 251 ff.

⁵⁸ Not, as suggested by Westlake, s. 232, the words 'or not done'. The 'law of the place where the act is not done' is the law of any conceivable place in the universe.

There is, however, judicial authority for the view that the existence or non-existence of the duty to present is not within the terms of the subsection.⁵⁹ Thus by the law of England if the acceptance is for the accommodation of the drawer, no presentment to the acceptor is necessary to charge the drawer.⁶⁰ If X in London draws a bill to the order of A in London, and Y in Paris accepts it for the accommodation of X, A or any other holder for value can charge X, without having presented the bill for payment to Y. If A chooses to present the bill to Y, French law determines the manner in which this must be done. The necessity for presentation is governed by the 'several laws' principle, the sufficiency of presentation by the 'single law' principle.

On the other hand, the necessity for and sufficiency of a protest or notice of dishonour are determined by the law of the place where the bill is dishonoured. The law of the place where the bill or note is payable decides whether, how, and when the last holder must protest the instrument or give notice of dishonour. Does it also apply to the notice of dishonour to be given by prior holders? The wording of the subsection suggests that it does, unless Westlake is right in thinking that 'holder' must mean the last holder.⁶¹ Westlake's view is that each notice of dishonour depends on the law of the contract governing the indorsement or drawing. The decision of the Court of Appeal in *Horne v. Rouquette*,⁶² on which Westlake relies, does not appear to support his view. On the contrary, it demonstrates the difficulties which Westlake's doctrine would encounter in practice. The court held that, as between an English indorsee and an English indorser, a notice of dishonour which, according to English domestic law, would have been out of time was valid as a result of the operation of Spanish law which governed the duties of the last holder. How could the English indorsee have given what would have been timely notice from the point of view of English domestic law, if his own knowledge of the dishonour depended on the compliance with Spanish law by his successor in title?

Since the law of the place of dishonour determines the need for protest, it may happen that, despite the wording of section 51 of the Bills of Exchange Act, an inland bill or note must be protested in order to make prior indorsers or the drawer liable. If, e.g., a bill is drawn in England upon a drawee in England payable in France, and if the bill is dishonoured in France, the

⁵⁹ *Bank Polski v. Mulder* [1941] 2 K.B. 266, per Tucker, J., and, in particular, *Cornelius v. Banque Franco-Serbe* [1941] 2 All E.R. 728, at p. 732, per Stabile, J.

⁶⁰ Bills of Exchange Act, s. 46 (2) (c): 'Presentment for payment is dispensed with as regards the drawer, where the . . . acceptor is not bound, as between himself and the drawer, to . . . pay the bill, and the drawer has no reason to believe that the bill would be paid if presented'.

⁶¹ Westlake, s. 282.

⁶² (1878) 3 Q.B.D. 514 (C.A.).

drawer or any indorser of this inland bill can only be made liable if it has been duly protested in accordance with French law.

Illustrations

1. X in London draws a cheque to the order of A in London upon a bank in Berlin. Under German law a cheque must be presented for payment in three weeks. A does not present the cheque in time. This failure is a bar to A's claim against X in England.⁶³

2. X, a French bank, draws a cheque to the order of A, an English firm, upon a bank in Holland. English law determines whether, as between A and X, presentation of the cheque in Holland is excused owing to war events.⁶⁴

3. X indorses to A in England a bill payable in Paris. A indorses it to Y in France, who on dishonour protests it, and transmits notice of protest to X, in accordance with French law. A can recover from X though he has not given him notice of dishonour according to English law.⁶⁵

4. A bill is drawn in England payable in Spain. It is indorsed in England by X to A. A indorses it to M in Spain, who further indorses it. It is dishonoured by non-acceptance, and twelve days afterwards M gives notice of this to A. A at once-gives notice to X. By Spanish law, no notice of dishonour by non-acceptance is required. A can recover from X.⁶⁶

(4) Where a bill is drawn out of, but payable in, the United Kingdom, and the sum payable is not expressed in the currency of the United Kingdom, the amount shall, in the absence of some express stipulation, be calculated according to the rate of exchange for sight drafts⁶⁷ at the place of payment on the day the bill is payable.⁶⁸

Comment

This is a rule of the domestic law of the United Kingdom. Its application presupposes that that law is the *lex loci solutionis* of the principal debt owing by virtue of a bill or note or the law of the place at which the drawee is expected to pay. The currency in which the bill or note may be discharged, *i.e.*, the money of payment, is, like other matters concerning the discharge of a bill or note,⁶⁹ determined by the law of the place where the bill or note is payable. According to the law of the United Kingdom

⁶³ *Franklin v. Westminster Bank* (1931), printed in Mann, *The Legal Aspect of Money*, App. II, pp. 315 ff. See the judgment of MacKinnon, J., at p. 316, and, in the Court of Appeal, that of Lord Hanworth, M.R., at p. 319.

⁶⁴ *Cornelius v. Banque Franco-Serbe* [1941] 2 All E.R. 728.

⁶⁵ *Hirschfeld v. Smith* (1866) L.R. 1 C.P. 340; see *Rothschild v. Currie* (1841) 1 Q.B. 43; *Rouquette v. Overmann* (1875) L.R. 10 Q.B. 525.

⁶⁶ *Horne v. Rouquette* (1878) 3 Q.B.D. 514 (C.A.).

⁶⁷ Bills of Exchange Act, 1882, s. 10.

⁶⁸ *Syndic in Bankruptcy of Khoury v. Khayat* [1943] A.C. 507. See Falconbridge, p. 321 f.; Mann, *Legal Aspect of Money*, Chap. 8, p. 245. This matter is further dealt with, *post*, p. 740, Rule 164.

⁶⁹ See *ante*, p. 692. The law of the United Kingdom is the proper law as well as the law of the place of payment.

an instrument payable therein may, in the absence of an agreement to the contrary, be paid in sterling, in whatever currency it is expressed. The subsection determines the method to be followed in this exchange operation and the date which determines the rate of exchange. According to its wording the provision applies only to bills drawn or notes made abroad, but the Privy Council has held that the same principle must apply to a bill drawn or note made in the United Kingdom and expressed in a foreign currency.⁷⁰

The parties are free⁷¹ to stipulate that an instrument payable in the United Kingdom should not only be expressed, but also paid in foreign currency, and there is no reason why such an instrument should not be negotiable.⁷² In this case the subsection would not apply. If the bill or note was, however, to be sued upon in England, the action would have to be brought for the sterling equivalent of the amount of the bill or note. English law as the *lex fori* would determine the rate of exchange at which the sum in foreign money would have to be converted into sterling, and the relevant date for determining the rate of exchange.⁷³

Illustration

By a promissory note made and payable in London X undertakes to pay to A or order three months after date the sum of 10,000 French francs. Five months after date, after a fall in the rate of exchange of the franc, X pays 5,000 French francs on account. A (or the holder of the note, if it has been negotiated) can claim from X (1) the sterling value of a sight draft on Paris for 5,000 francs at the rate of exchange on the day of the maturity of the note, and (2) the difference between the sterling value of a sight draft on Paris for 5,000 francs on the date of the maturity of the note and the value of a similar draft two months later.⁷⁴

(5) Where a bill is drawn in one country and is payable in another, the due date thereof is determined according to the law of the place where it is payable.⁷⁵

⁷⁰ *Syndic in Bankruptcy of Khoury v. Khayat*, *supra*, per Lord Wright. See also Mann, *l.c.*, p. 245, quoting *Cohn v. Boulken* (1920) 36 T.L.R. 767.

⁷¹ Provided they comply with the provisions of the Exchange Control Act, 1947, and Regulations made under it.

⁷² It is impossible to agree with Falconbridge, p. 322, that an instrument containing an 'effective clause' is not negotiable.

⁷³ See Rule 165, *post*, p. 744.

⁷⁴ *Syndic in Bankruptcy of Khoury v. Khayat*, *supra*. If the franc had risen, *i.e.*, sterling had fallen, between the maturity of the note and the payment, the creditor would presumably have to account for the difference. The Bills of Exchange Act, passed in 1882, does not envisage this possibility. As Mann says (p. 245), s. 72 (4) 'gives vivid expression to the fact that, at least in 1882, a depreciation of the pound sterling was believed to be impossible'.

⁷⁵ Compare *Burrows v. Jemino* (1726) 2 Str. 783; *Allen v. Kemble* (1848) 6 Moo.P.C. 814; *Gibbs v. Fremont* (1853) 9 Ex. 25; *Rouquette v. Overmann* (1875) L.R. 10 Q.B. 525; *Horne v. Rouquette* (1878) 3 Q.B.D. 514; *Re Francke and Rasch* [1918] 1 Ch. 470; *Franklin v. Westminster Bank* (1931) Mann. *l.c.*, App. II. *Mellish v. Simeon* (1794) 2 H.Bl. 378, may be deemed to be overruled by *Rouquette v. Overmann*, *supra*.

Comment*The date of maturity.*

This subsection is an application of the principle⁷⁶ that the manner of performance of a contract is governed by the law of the place of performance. It is also the most important concession to the 'single law' principle in the law of the United Kingdom.⁷⁷ The due date of a bill or note is determined by the law of the place of payment not only for the principal debt, *i.e.*, that of the acceptor or maker, but also for all the subsidiary contracts.

Illustrations

1. By the Bills of Exchange Act, days of grace are allowed on bills payable after date. By French law, they are not. A bill drawn in Paris on London and payable there, is entitled to three days of grace, whilst a bill drawn in London payable in Paris is not entitled to any days of grace⁷⁸

2. A bill is drawn in England payable in Paris three months after date. After it is drawn, but before it is due, a moratorium has been passed in France, in consequence of war, postponing the maturity of all current bills for one month. The maturity of the bill is for all purposes to be determined by French law,⁷⁹ and the right of an English indorsee to claim payment from an English indorser is accordingly postponed.

RULE 154.—Where a bill is dishonoured, the measure of damages, which shall be deemed to be liquidated damages, shall be as follows:—

(1) The holder may recover from any party liable on the bill, and the drawer who has been compelled to pay the bill may recover from the acceptor, and an indorser who has been compelled to pay the bill may recover from the acceptor, or from the drawer, or from a prior indorser,—

- (a) the amount of the bill;
- (b) interest thereon from the time of presentment for payment if the bill is payable on demand, and from the maturity of the bill in any other case;
- (c) the expenses of noting, or, when protest is necessary and the protest has been extended, the expenses of protest.

(2) In the case of a bill which has been dishonoured abroad, in lieu of the above damages, the holder may

⁷⁶ See *ante*, Rule 136, Sub-Rule 3, p. 593.

⁷⁷ See *ante*, Rule 152, p. 678.

⁷⁸ *Rouquette v. Overmann* (1875) L.R. 10 Q.B. 525, 535–538.

⁷⁹ *Rouquette v. Overmann* (1875) L.R. 10 Q.B. 525; *Re Francke and Rasch* [1918]

1 Ch. 470. See *ante*, Rule 143, p. 651.

recover from the drawer or an indorser, and the drawer or an indorser who has been compelled to pay the bill may recover from any party liable to him, the amount of the re-exchange, with interest thereon until the time of payment.⁸⁰

(3) Where by this Act interest may be recovered as damages, such interest may if justice require it be withheld wholly or in part; and where a bill is expressed to be payable with interest at a given rate, interest as damages may or may not be given at the same rate as interest proper.⁸¹

Comment

Damages for dishonour of a bill or note.

This Rule, which reproduces section 57 of the Bills of Exchange Act, 1882, and which *mutatis mutandis* applies to promissory notes,⁸² fixes the measure of damages for the dishonour of a bill in the domestic law of the United Kingdom. It is not a rule of the conflict of laws.

There is no provision in the Bills of Exchange Act by which the choice of law with regard to the measure of damages recoverable for the breach of a contract contained in a bill or note is dealt with *expressis verbis*. It is, however, clear that—whatever may be the principles governing the measure of damages in the conflict of laws in general⁸³—the courts classify the measure of the damages recoverable under a bill or note as a matter of substantive law. The damages due from the party to a bill or note are determined by the proper law of his contract.⁸⁴ This rule is in conformity with the general principles as to the law governing liability under a contract,⁸⁵ whether or not it has always been applied to contracts other than those contained in negotiable instruments.

It is also clear that the 'several laws' principle applies to

⁸⁰ *Mellish v. Simeon* (1794) 2 H.Bl. 378; *Suse v. Pompe* (1860) 8 C.B. (n.s.) 538, at p. 565, *per* Byles, J.; *Willans v. Ayers* (1877) 3 App.Cas. 133 (P.C.), at p. 146; *Re General South American Co.* (1877) 7 Ch.D. 637.

⁸¹ *Westlake*, § 234; *Chalmers, Bills of Exchange*, 11th ed., pp. 186 ff., p. 238.

⁸² Section 89.

⁸³ See Rule 193, *post*; *Cheshire*, pp. 850 ff.; *Wolff*, s. 226; *Falconbridge*, pp. 20, 688.

⁸⁴ *Re Gillespie, ex p. Roberts* (1836) 18 Q.B.D. 286 (C.A.), at pp. 292 f., *per* Lindley, L.J., delivering the judgment of the court (Lord Esher, M.R., Lindley and Lopes, L.J.J.); *Re Commercial Bank of South Australia* (1887) 38 Ch.D. 522, at p. 525, *per* North, J.; *Chalmers, l.c.*, p. 238. No one seems ever to have suggested that this should be regarded as a 'matter of procedure' to be governed by the *lex fori*.

⁸⁵ See for a decision adopting what, it is submitted, is the proper doctrine in relation to contractual damages in the conflict of laws: *Livesley v. Clements Horst Co.* [1924] S.C.R. 606, [1925] 1 D.L.R. 159 (Supreme Court of Canada). This was a case of sale of goods.

the measure of damages, so that, *e.g.*, the rate at which the drawer must pay interest to the payee in the event of dishonour is determined by the law governing the contract between the drawer and the payee and not by the law governing the acceptance.⁸⁶ It is doubtful whether, for these purposes, the *lex loci contractus* or the *lex loci solutionis* is the proper law of each contract. Chalmers himself, despite his general tendency towards a wide interpretation of section 72 (2), questions 'whether the measure of damages comes within the meaning of the word "interpretation"' in that subsection.⁸⁷ The cases decided before the Act came into force are not always in harmony, but the principle which they on the whole suggest is that the law of the place of payment of each obligation governs this matter.⁸⁸ These principles of the conflict of laws are among those 'rules of the common law' which 'continue to apply' by virtue of section 97 (2) of the Act, and the Court of Appeal has held that they have not been affected by the domestic provision in section 57.⁸⁹

A party to a bill or note who has paid damages in accordance with the law governing his liability may, by way of recourse, claim from another party to the instrument damages to the extent to which the law governing their contract permits him to do so. This may include any amount the claimant was himself compelled to pay by virtue of the law applying to his own liability. According to English law a foreign drawer of a bill accepted and dishonoured in England may recover from the English acceptor the 're-exchange' calculated according to the foreign law governing his own liability which, by virtue of that law, he has paid to the holder.⁹⁰ 'Re-exchange' recoverable under this rule of English domestic law (another common law rule which has survived the Act⁹¹) is quite different from the 're-exchange' which can be claimed by the terms of section 57 (2). The latter is recoverable if the instrument has been dishonoured abroad, the former if it has been dishonoured in England.

⁸⁶ *Gibbs v. Fremont* (1853) 9 Ex. 25, following *Allen v. Kemble* (1848) 6 Moo. P.C. 314, and Story, s. 154, approved in *Livesley v. Horst*, *supra*. Westlake's criticism of the decision, s. 234, appears to be unjustified. And see the cases quoted above, note 84.

⁸⁷ *L.c.*, p. 238.

⁸⁸ *Op.*, *e.g.*, *Gibbs v. Fremont*, *supra*, with *Cooper v. Waldegrave* (1840) 2 Beav. 282. Older dicta referring to the *lex loci contractus*, such as *e.g.*, that of North, J., in *Re Commercial Bank of South Australia* (1887) 36 Ch.D. 522, at p. 525, must often be read as a general reference to the proper law of the contract. See Rule 136, Sub-Rule 3, *ante*, p. 593. The *lex loci solutionis* is favoured by Chalmers, *l.c.*, p. 238, quoting *Mayne on Damages*, 10th ed., p. 270, and Story, s. 815.

⁸⁹ *Re Gillespie, ex p. Roberts* (1886) 18 Q.B.D. 286.

⁹⁰ *Re Gillespie, ex p. Roberts* (1885) 16 Q.B.D. 702; (1886) 18 Q.B.D. 286 (C.A.). Such re-exchange on a foreign bill dishonoured in England cannot, like re-exchange under s. 57 (2), be claimed as liquidated damages.

⁹¹ *Re Gillespie, ex p. Roberts*, 16 Q.B.D. at p. 704, *per* Cave, J.; 18 Q.B.D., at p. 292, *per* Lindley, L.J.; Chalmers, *l.c.*, p. 188.

This, however, appears to be the only case in which, under English domestic law, any damages can be claimed other than those expressly provided for in section 57.⁹² Under that provision the measure of damages depends on the place where the bill or note was dishonoured, *i.e.*, whether it was dishonoured within the British Islands or 'abroad', a term not defined in the Act, which here probably means outside the British Islands as defined in section 4.⁹³ When a bill or note, wherever drawn or made, is dishonoured within the British Islands, the measure of damages recoverable under a contract governed by English law⁹⁴ is to be determined in accordance with subsection (1). If the instrument is expressed in a foreign currency, the sterling amount will have to be calculated in accordance with section 72 (4).⁹⁵ When a bill or note, wherever drawn or made, is dishonoured abroad, then the amount recoverable under any English contract contained in the instrument is the amount of the re-exchange, with interest thereon until the time of payment. In that event, damages cannot be claimed under subsection (1).⁹⁶ Re-exchange is the value of a sight draft drawn at the rate of exchange of the day of dishonour and at the place of dishonour upon the place of residence of the party to be charged covering the amount of the bill or note and certain expenses.⁹⁷

Illustrations

1. X draws in England a bill on M in Vienna, payable there, for 100,000 schillings. X indorses the bill in England to A. M accepts the bill, but it is dishonoured. A is entitled to recover from X the re-exchange, *i.e.*, the sterling amount of a sight bill on London drawn at Vienna at the date of dishonour and acquired for the sum in Austrian currency for which the original bill was drawn, with interest and expenses.⁹⁸

2. A in Tobago draws a bill upon X in London to the order of Y in London. The bill, which is payable in London, is accepted, but dishonoured by X. Y claims and obtains from A the amount of the bill with an addition of ten per cent. payable by way of 're-exchange' under the law of Tobago. X is liable to refund to A the amount of the bill and also the 're-exchange' A had to pay under the law of Tobago.⁹⁹

⁹² *Re English Bank of River Plate* [1893] 2 Ch. 438; *Banque Populaire de Bienné v. Cave* (1895) 1 Com.Cas. 67; Chalmers, *l.c.*, p. 187.

⁹³ See *ante*, Rule 153, p. 688, note 2.

⁹⁴ If, therefore, Y draws a bill in France made payable and accepted by X in England, and indorses it to A in France, and the bill is dishonoured in England, the damages recoverable in an action in England by A against Y are not, it is submitted, determined by sub-s. 1, but are determined by the law of France. *Aliter* the previous edition of this work. X's liability would, of course, be governed by sub-s. 1.

⁹⁵ See *ante*, Rule 153. This presupposes that the instrument is payable within the British Isles and does not contain an 'effective' clause.

⁹⁶ *Re Commercial Bank of South Australia* (1887) 36 Ch.D. 522.

⁹⁷ For a detailed analysis of the meaning of 're-exchange', see Chalmers, *l.c.*, pp. 188 ff.

⁹⁸ *Suse v. Pompe* (1860) 8 C.B. (N.S.) 538; *Manners v. Pearson* [1898] 1 Ch. 581 (C.A.).

⁹⁹ *Re Gillespie, ex p. Roberts* (1885) 16 Q.B.D. 702; (1886) 18 Q.B.D. 236 (C.A.).

8. NEGOTIABLE INSTRUMENTS GENERALLY

RULE 155.—Any instrument for securing the payment of money, *e.g.*, a bill of exchange or a Government bond, whether issued in England or elsewhere, may in England be made a negotiable instrument either—

- (1) by custom of the mercantile world in England, which custom may, if well established, be of recent origin; or
- (2) by Act of Parliament.

A 'negotiable instrument' means an instrument for securing the payment of money which has the following characteristics:—

- (a) The property in the instrument and all rights under it pass to a *bona fide* holder for value by indorsement and delivery or by mere delivery to him.
- (b) In the hands of such holder the property in and the rights under such instrument are not affected by defects in the title of or defences available against the claims of any prior transferor or holder.¹

RULE 156.—No instrument, whether issued in England or elsewhere, is a negotiable instrument in England unless it is made so by English law, *i.e.*, either by the custom of the mercantile world in England, or by Act of Parliament.²

Comment

The nature and characteristics of a negotiable instrument have thus been broadly summarised: 'A negotiable instrument payable to bearer is one which, by the custom of trade (or under statute)

¹ *Goodwin v. Roberts* (1875) L.R. 10 Ex. 337, 344, *per* Cockburn, C.J.; (1876) 1 App.Cas. 476; *Rumball v. Metropolitan Bank* (1877) 2 Q.B.D. 194; *Bechuanaland Exploration Co. v. London Trading Bank* [1898] 2 Q.B. 658; *Edelstein v. Schuler & Co.* [1902] 2 K.B. 144. *Crouch v. Credit Foncier of England* (1873) L.R. 8 Q.B. 374, must be considered in the light of *Goodwin v. Roberts*, above (see *Rumball v. Metropolitan Bank*, above, and *Bechuanaland Exploration Co. v. London Trading Bank*, above). See also *Garey v. Dominion Manufacturers* [1925] 1 D.L.R. 99.

² *Picker v. London and County Banking Co.* (1887) 18 Q.B.D. 515 (C.A.); *Colonial Bank v. Cady* (1890) 15 App.Cas. 267; and see judgment in court below (1888) 38 Ch.D. 388; *Lacave & Co. v. Credit Lyonnais* [1897] 1 Q.B. 148; *Guaranty Trust Co. of New York v. Hannay* [1918] 2 K.B. 623 (C.A.).

passes from hand to hand by delivery,³ and the holder of which for the time being, if he is a *bona fide* holder for value without notice, has a good title, notwithstanding any defect of title in the person from whom he took it'.¹

From this judicial statement, combined with the language of Rules 155 and 156, can be gathered that the general features which mark an instrument as 'negotiable' in the strict sense of that term are all connected with the passing of the property in the instrument and of the rights which can be claimed by virtue of that property. (1) Property in the instrument, and all rights under it, pass by indorsement and delivery or by mere delivery to the holder. (2) The holder for value who receives the instrument *bona fide*⁵ has a perfectly good title to it, however defective may be the title of the transferor or of the transferor's predecessors in title, and whatever personal defences may be available against these persons.

Strictly 'negotiable' instruments, e.g., bills of exchange, promissory notes, bank notes, bearer debentures, dividend warrants, British or foreign Government bonds issued to bearer, and other instruments of the most different kinds, are transferable like chattels by delivery, and, in English law, so assimilated to chattels that a suit lies for their conversion.⁶

In the conflict of laws, negotiable instruments are therefore treated as chattels, i.e., as tangible movables. Whether they are 'negotiable' is a question to be determined by the law of the country where the alleged transfer by way of 'negotiation' takes place and this is, in the nature of things, the country in which the instrument is situated at that time. Of this general principle Rule 156 is merely an application. In the case of bills of exchange the same principle has been applied by the courts to 'negotiation' abroad. Whether and how an instrument, wherever issued, in England or abroad, can be transferred by delivery or by indorsement and delivery so as to confer a good title upon a *bona fide* transferee for value is a matter exclusively to be determined by the law of the country in which the instrument is transferred.⁷

No instrument can therefore be in England transferred as a negotiable instrument, unless it has been made so by English law. Instruments are negotiable in England either by virtue of an Act of

³ If, and as long as, it is payable to order it passes by indorsement and delivery.

⁴ *Simmons v. London Joint Stock Bank* [1891] 1 Ch. 270 (C.A.), at p. 294, *per curiam*. The decision in this case was reversed: *London Joint Stock Bank v. Simmons* [1892] A.C. 201, but the reversal does not affect the passage cited.

⁵ For the precise definition of 'good faith' in this context, see Bills of Exchange Act, 1882, s. 29 (1), which is of general application in the law of negotiable instruments.

⁶ *Morison v. London County and Westminster Bank* [1914] 3 K.B. 356, at p. 378; *A. L. Underwood, Ltd. v. Bank of Liverpool* [1924] 1 K.B. 775; *Lloyds Bank v. Chartered Bank of India* [1929] 1 K.B. 40 (C.A.); *Lacove & Co. v. Credit Lyonnais* [1897] 1 K.B. 148.

⁷ *Alcock v. Smith* [1892] 1 Ch. 238 (C.A.); *Embiricos v. Anglo-Austrian Bank* [1905] 1 K.B. 677 (C.A.). See *ante*, Rule 158, p. 693.

Parliament, *e.g.*, bills of exchange under the Bills of Exchange Act, 1882, or of English mercantile custom, *e.g.*, bonds issued by foreign Governments or debentures issued to bearer by English or foreign companies. This custom must be a custom of the English mercantile world. If it is well established, such a custom may grow up within a very few years.⁸ By mere agreement between the parties or by a mercantile custom which is not general an instrument cannot become negotiable.

Hence, instruments which are negotiable in a foreign country, *e.g.*, bonds issued by a foreign Government, are not on that account negotiable in England unless they have become negotiable by the custom of the English mercantile world. This applies even to instruments which are negotiable in the country in which they have been issued but whose negotiability is not recognised by mercantile custom in this country.⁹ In most of the reported cases involving the question whether an instrument was negotiable, the point at issue was whether a *bona fide* holder to whom the instrument was in England transferred for value, had a right to retain it against a person from whom it had been stolen or obtained by fraud. The answer to that question depended upon the reply to the inquiry whether the instrument was or was not negotiable according to English mercantile custom.¹⁰

Illustrations

1. Bonds are issued by the Prussian Government. They are stolen in England from A without their coupon sheets, and deposited with the X Bank by one of their customers as a security for an overdraft. Bonds without the coupon sheets attached are negotiable by the mercantile custom of Prussia, but not by that of England. Although they took the bonds in good faith, the X Bank are not entitled to retain the bonds against A.¹¹

2. Scrip issued by the Russian Government, containing a promise on full payment to issue a bond in respect of a loan, is purchased for A by his broker N, in whose hands A leaves it. N fraudulently deposits the scrip with X, an English banker, who takes it *bona fide*, as security for a loan to N. By the custom of merchants in England this Russian scrip is treated as a negotiable instrument. X is entitled to retain the scrip as against A.¹²

3. A & Co. are owners of debentures issued by an English company in England payable to bearer. They are not promissory notes. N, a secretary of A & Co., fraudulently takes the debentures and pledges them for a loan with X who takes them in good faith. They are negotiable instruments by mercantile custom and X has a right to retain them as against A.¹³

⁸ See *per Cockburn, C.J.*, in *Goodwin v. Roberts* (1875) L.R. 10 Ex. 337, at p. 346; *per Bigham, J.*, in *Edelstein v. Schuler & Co.* [1902] 2 K.B. 144, at p. 154 f.; and see *Bechuanaland Exploration Co. v. London Trading Bank* [1898] 2 Q.B. 658.

⁹ *Picker v. London and County Banking Co.* (1887) 18 Q.B.D. 515 (C.A.).

¹⁰ See in particular the judgment of Bowen, L.J., in *Picker v. London and County Banking Co.* (1887) 18 Q.B.D. 515, at p. 520.

¹¹ *Picker v. London and County Banking Co.* (1887) 18 Q.B.D. 515 (C.A.).

¹² *Goodwin v. Roberts* (1876) 1 App.Cas. 476; *Gorgier v. Mieville* (1824) 3 B. & C. 45.

¹³ *Bechuanaland Exploration Co. v. London Trading Bank* [1898] 2 Q.B. 658; see also *Edelstein v. Schuler & Co.* [1902] 2 K.B. 144; *Venables v. Baring*

9. INTEREST¹⁴

RULE 157.—The liability to pay interest, and the rate of interest payable in respect of a debt, *e.g.*, in respect of a loan, is determined by the proper law of the contract under which the debt is incurred, *e.g.*, by the proper law of the contract under which the loan is made.¹⁵

Comment

Interest may be payable either by virtue of an express or implied term of a contract or by way of damages. Interest payable by way of damages is, in general, governed by the *lex fori*,¹⁶ whether or not its payment is regulated by statute,¹⁷ and irrespective

[1892] 3 Ch. 527; *Re General Estate Co* (1868) L.R. 3 Ch. 758; *Williams v. Colonial Bank* (1888) 38 Ch.D. 388 (C.A.), at 404, 408; *Lloyds Bank v. Swiss Bankverein* (1912) 17 Com.Cas. 280, 297

¹⁴ Westlake, s. 225; Foote, pp. 478, 524; Johnson, Vol. 2, p. 301; Batiffol, ss. 220-239; Story, ss. 291-306; Restatement, §§ 418-420; Beale, pp. 1241-1245; Goodrich, s. 108; Lorenzen, pp. 318 ff.; Cook, pp. 401 ff.; Nussbaum, pp. 182 ff.; Bar, Gillespie's Transl., ss. 264-266, pp. 578-587; MacLaren, *Court of Session Practice*, pp. 306 f.

¹⁵ *Connor v. Bellamont* (1742) 2 Atk. 382; *Stapleton v. Conway* (1750) 3 Atk. 727 (Lord Mansfield); *Bodily v. Bellamy* (1760) 2 Burr 1094; *Dewar v. Span* (1789) 3 T.R. 425; *Graham v. Keble* (1820) 2 Bli. 126, 152 f. (Lord Eldon); *Harvey v. Archbold* (1825) 3 B. & C. 626; *Arnott v. Redfern* (1825) 2 C. & P. 88, (1826) 3 Bing. 353; *Anon.* (1825) 3 Bing. 193; *Thompson v. Powles* (1828) 2 Sim. 194; *Cooper v. Waldegrave* (1840) 2 Beav. 282; *Fergusson v. Fyffe* (1841) 8 Cl. & F. 121, 140; *Chili Republic v. R.M.S. Packet Co.* (1895) 11 T.L.R. 203; *Shrichand v. Lacon* (1906) 22 T.L.R. 245; *Société des Hôtels du Touquet v. Cummings* [1922] 1 K.B. 451 (C.A.); *Shaik Sahied v. Sockalnjam Chettiar* [1933] A.C. 342 (P.C.); *Mount Albert Borough Council v. Australasian, etc., Society, Ltd.* [1938] A.C. 224 (P.C.); *Cloyes v. Chapman* (1876) 27 U.C.C.P. 22; *Stuart and Stuart, Ltd. v. Boswell* (1916) 50 N.S.R. 16; *Livesley v. Clements Horst Co.* [1924] S.C.R. 605, 609; *Re Savage's Estate* (1908) 29 N.L.R. 397; *Barcelo v. Electrolytic Zinc Co., etc., Ltd.* (1932) 48 C.L.R. 391; *Wanganui, etc., Board v. Australian Mutual Provident Society* (1934) 50 C.I.R. 581.

¹⁶ On the different kinds of interest, see Law Revision Committee Second Interim Report, Cmd. 4546 (1934); *Mayne on Damages*, 11th ed., Chap. 9; *Chitty on Contracts*, 20th ed., Chap. 23, Sect. 2. In *Ekins v. East India Co.* (1717) P.Wms. 395, (1718) 2 Bro.P.C., interest by way of damages was awarded in a tort case in accordance with the *lex loci delicti*. See for discussion, Cheshire, p. 855. *Quare*: must this case now be regarded as a case of quasi-contract and is it an authority that the law governing a quasi-contractual claim also governs the rate of interest?

¹⁷ For the difference between interest by way of damages and contractual interest, see *Stapleton v. Conway* (1750) 3 Atk. 727; *Arnott v. Redfern* (1826) 3 Bing. 353, *per Best, C.J.*; although this case was not followed in later cases on the point of domestic law which it decided (see Law Revision Committee Second Interim Report, *supra*, p. 4), the conflict of laws point involved in it was not affected thereby. The application of statutes such as the Law Reform (Miscellaneous Provisions) Act, 1934, s. 3, or the (repealed) Civil Procedure Act, 1833, ss. 28, 29, depends on the *lex fori*, *i.e.*, they are always applicable by an English court and never by a foreign court applying English law, provided the foreign court characterises claims for interest in the same way as an English court. Interest awarded in its discretion by a court of equity is also governed by the *lex fori*. The same applies to interest payable on a judgment debt. For interest on foreign judgment debts, see Foreign Judgments (Reciprocal Enforcement) Act, 1933, s. 2 (2) (c).

of the scope of the discretion the court has in awarding it.¹⁸ Interest as damages for the dishonour of bills of exchange, however, is governed by the proper law of the contract.¹⁹ Whether, in a given case, a claim for interest must be characterised as a claim for contractual interest or as a claim for damages, is a matter to be decided in accordance with the *lex fori*.²⁰

If interest is payable on a loan or any other debt, otherwise than by way of damages, it must be so under the contract between the parties. Whatever law, therefore, governs the contract must determine all questions relating to interest. Thus, whether an express undertaking to pay interest is lawful or whether it is made invalid wholly or partly by legislation referring to usury or money-lending, depends on the question whether that legislation forms part of the proper law of the contract.²¹ The proper law of the contract decides whether an undertaking to pay interest can and must be implied, and also determines the rate of interest so payable, including the question of compound interest. The proper law of the contract will in general be the law of the country where the debt is to be paid or the loan repaid,²² but this need not be so, and if the law of the place of payment is not the proper law of the contract, the liability to pay interest will be governed by the latter and not by the former. Thus, if a local authority in New Zealand raises a loan from an insurance company in the Australian State of Victoria, and undertakes to pay interest in Victoria, the proper law of the contract of loan (which is secured by a charge on the local rates in New Zealand) will be the law of New Zealand. Legislation reducing the rate of interest in Victoria will therefore not affect the contract, although it forms part of the *lex loci solutionis*.²³ If, however, payment of interest is illegal under the law of the place of payment, it cannot be claimed, although the law of the place of payment is not the proper law of the contract, not, at any rate, if the contract is governed by English law.²⁴

¹⁸ Cp. Law Reform (Miscellaneous Provisions) Act, 1934, s. 3, with Judgments Act, 1838, ss. 17 and 18.

¹⁹ See *ante*, Rule 154, p. 701; *Cooper v. Waldegrave* (1840) 2 Beav. 282; *Falconbridge*, pp. 287 ff.; p. 316. In the case of a negotiable instrument, contractual interest (which, according to the Bills of Exchange Act, 1882, s. 9 (1) (a), can be stipulated in the instrument) must also be distinguished from interest by way of damages, regulated in s. 57, and is subject to different principles in the conflict of laws.

²⁰ See *ante*, p. 62. A difficult problem of characterisation would be presented by a claim for interest under s. 24 of the Partnership Act, 1890. Presumably this must be characterised as contractual.

²¹ *Shrichand v. Lacon* (1906) 22 T.L.R. 245.

²² See Story, s. 391. Will this include interest payable under the proper law from the moment of the commencement of an action? See Wolff, s. 230.

²³ *Mount Albert Borough Council v. Australasian, etc., Society, Ltd.* [1938] A.C. 224 (P.C.); see also *Barcelo v. Electrolytic Zinc Co., etc., Ltd.* (1932) 48 C.L.R. 391; *Wanganui, etc., Board v. Australian Mutual Provident Society* (1934) 50 C.L.R. 581.

²⁴ See Rule 141, Exception, *ante*, and see *Ralli Bros. v. Compania Naviera Sota y Aznar* [1920] 2 K.B. 287 (C.A.).

Illustrations

1 X borrows money from A in India. The loan is repayable in India. Whether and what interest is payable is determined by the law of India.²⁵

2 X, a business man carrying on business in England, agrees in London to pay A commission for services to be rendered by A in Scotland. A debt of £200 is due under the contract from X to A. Whether the debt carries interest by virtue of an implied term in the contract is *prima facie* to be determined by the law of England which is the proper law of the contract.²⁶

3 X owes a debt of 18,035 French francs to A in France, payable in France in December, 1914. The debt remains unpaid until 1919 when A sues X in England. X's liability to pay interest under the contract is governed by French law and under it none is recoverable.²⁷ If A obtains judgment against X, English law will determine whether and at what rate he can claim interest on the judgment debt.

10. CONTRACTS THROUGH AGENTS²⁸*Contract of Agency.*

RULE 158.—An agent's authority, as between himself and his principal, is governed by the law with reference to which the agency is constituted, which is in general the law of the country where the relation of principal and agent is created.²⁹

Comment

If P, a principal in Spain, constitutes A his agent, Spanish law is 'a . . . circumstance to be taken into account in considering the nature and extent of the authority given by [P. to A.], but the Spanish law is not . . . material for any other purpose'.³⁰ If a principal, that is to say, in a particular country, there appoints an agent, it is to be presumed that the authority of the agent, as *between him and the principal*, as well as the terms of his appointment, his liability to removal from his employment, remuneration,

²⁵ *Graham v. Keble* (1820) 2 Bli. 126. Compare *Thompson v. Powles* (1828) 2 Sim. 194, with *Fergusson v. Fyffe* (1841) 8 Cl. & F. 121.

²⁶ See *Arnott v. Redfern* (1825) 2 C. & P. 88, (1826) 3 Bing. 353; compare *Connor v. Bellamont* (1742) 2 Atk. 382.

²⁷ *Société des Hôtels Le Touquet Paris Plage v. Cummings* [1922] 1 K.B. 451 (C.A.), see *per* Scrutton, L.J., at p. 460.

²⁸ Cheshire, p. 320 f.; Wolff, ss. 333, 404, 416, 424; Westlake, ss. 151, 223, 224; Footc., pp. 474 ff.; Falconbridge, Chap. 18; Batiffol, ss. 304-326; Restatement, ss. 342-345; Beale, pp. 1192-1199; Story, ss. 286 ff.; Breslau, *Agency in Private International Law* (1938) 50 Juridical Review 282.

²⁹ *Arnott v. Redfern* (1825) 2 C. & P. 88, (1826) 3 Bing. 353; *Great Northern Ry. Co. v. Laing* (1848) 10 D. 1408; *Maspons v. Mildred* (1882) 9 Q.B.D. 580 (C.A.), *per* Lindley, L.J., at p. 539; *R. v. Doutré* (1884) 9 App.Cas. 745 (P.C.); *Re Maugham* (1885) 2 T.L.R. 115 (C.A.); *Re Anglo-Austrian Bank* [1920] 1 Ch. 69; see also *Prager v. Blatspiel, Stamp and Hancock, Ltd.* [1924] 1 K.B. 566.

³⁰ *Maspons v. Mildred* (1882) 9 Q.B.D. 580 (C.A.), at p. 539, *per* Lindley, L.J., delivering the judgment of the court. The decision itself is discussed, Rule 159, *post*.

and similar matters, is governed by the law of such country, *e.g.*, Spain. The contract of agency, *i.e.*, the relationship between principal and agent, is, like other contracts, governed by its proper law, which is in general the law of the country where the principal carries on his business and where, therefore, the relationship is constituted.³¹ When principal and agent live in different countries, there is no presumption that the contract will be subject to the law where the principal resides or carries on business. In this case, and even in a case in which both parties live in the same country, the conclusion may and will sometimes be justified that they intended their contract to be governed by the law of the country in which the agent is intended to act.³² Thus a contract between a solicitor or advocate and a foreign client will presumably be governed by the law of the country in the courts of which the solicitor or advocate is admitted to practice³³; a contract between a stockbroker and a client by the law of the stock exchange of which the broker is a member³⁴; a contract with an estate agent by the law of the place where the land to be purchased or sold is situated. It is further submitted that the principle of Rule 158 should also apply to legal relationships other than contracts by virtue of which one person is authorised to act for another. Thus, as between husband and wife, the wife's authority to pledge the husband's credit should be governed by the law of their domicile, irrespective of the place at which the wife purports to exercise the authority.³⁵

Rule 158, however, is not intended to express a principle affecting the rights and duties as between the principal and the third party with whom the agent contracts or the rights and duties as between the agent and the third party. English domestic law draws a clear distinction between the rights and obligations of principal and agent towards each other and the rights and obligations of either as regards third parties. This distinction should, it is submitted, also be drawn in the conflict of laws. It is perhaps somewhat unfortunate that Rule 158 has been approved by high judicial authority as a principle

³¹ *Arnott v. Redfern* (1825) 2 C. & P. 88; (1826) 3 Bing. 353; *Re Anglo-Austrian Bank*, [1920] 1 Ch. 69.

³² See Breslauer, 'Agency in Private International Law' (1938) 50 *Juridical Review*, 282, at pp. 291-295. There is great force in Breslauer's argument that the law of the place of the principal's main business governs his contract with an agent who is a servant, as *Re Anglo-Austrian Bank* [1920] 1 Ch. 69, but that the law of the country where the agent performs his contract applies if the agent is not a servant, as, *e.g.*, in *Chatenay v. Brazilian Submarine Telegraph Co.* [1891] 1 Q.B. 79 (C.A.).

³³ See *R. v. Doutre* (1884) 9 App.Cas. 745 (P.C.); *Re Maugham* (1885) 2 T.L.R. 115 (C.A.).

³⁴ Unless, of course, an intention to the contrary emerges from the contract itself. Thus, if in *Chatenay v. Brazilian Submarine Telegraph Co.* [1891] 1 Q.B. 79, there had been a dispute between the plaintiff and the stockbroker the court might have applied Brazilian law. The case itself deals with a different point. See Rule 159, *post*.

³⁵ See Wolff, ss. 382 f.

affecting third parties, *i.e.*, in a context in which it was not intended to apply.³⁶

Illustrations

1. P, a Spaniard living in Spain, there constitutes A his agent for the sale of goods, under a document written in Spanish. The authority of A, as between P and A, must be determined in accordance with Spanish law.

2. P, a firm carrying on business in Roumania, makes A its agent in London for certain definite purposes. During the war of 1914-1918 A asserts a right to act as an agent of necessity and to dispose of property of P deposited with him. English law is the proper law of the contract between P and A, and, as between P and A, A's action is to be judged by English law.³⁷

3. P, a firm carrying on business in London, makes in London a contract with A, who is resident in Glasgow, by which A is to sell goods for P in Scotland on a commission basis. *Seemingly*: A's right to commission is governed by English law.³⁸

4. P, a German bank, make in Berlin a contract in the German language by which A is appointed manager of P's branch in London. The contract is governed by German law.³⁹

Relation of Principal and Third Party.

RULE 159.— When a principal in one country contracts in another country through an agent, the rights and liabilities of the principal as regards third parties are, in general, governed by the law of such other country, *i.e.*, by the proper law of the contract concluded between the agent and the third party.⁴⁰

Comment

'If I, residing in England, send down my agent to Scotland,

³⁶ *Per* Scrutton, L.J., in *Ruby S.S. Corp., Ltd. v. Commercial Union Assurance Co., Ltd.* (1933) 39 Com.Cas. 18 (C.A.), at p. 52. For a clear statement of the difference between the two kinds of problem, see Cheshire, p. 320; Wolff, s. 404 *ad fin.*, 424. Falconbridge, Chap. 18, draws a distinction between 'authority' and 'power' akin to, though not identical with that made in the text. Batiffol, s. 315, rejects this distinction, but his reasons for doing so are not convincing. It must, however, be admitted that there is often a need for choosing the *lex loci solutionis* as the proper law of the contract between principal and agent so as to obviate conflicts between the law applicable to their rights and duties *inter se* and the law applicable to the rights and liabilities of third parties arising from the exercise of the agent's authority.

³⁷ See *Prager v. Blatspiel, etc., Ltd.* [1924] 1 K.B. 566, and compare *Jebara v. Ottoman Bank* [1927] 2 K.B. 251 (C.A.), at pp. 270 ff., *per* Scrutton, L.J.

³⁸ *Arnott v. Redfern* (1825) 2 C. & P. 88; (1826) 3 Bing. 353.

³⁹ *Re Anglo-Austrian Bank* [1920] 1 Ch. 69.

⁴⁰ *Pattison v. Mills* (1828) 1 Dow & Cl. 342, 363; *Armstrong v. Stokes* (1872) L.R. 7 Q.B. 598, 606; *Maspons v. Mildred* (1882) 9 Q.B.D. 580 (C.A.); *Kaltenbach v. Lewis* (1885) 10 App.Cas. 617; *Delaurier v. Wylie* (1889) 17 R. 191; *Chatenay v. Brazilian Submarine Telegraph Co.* [1891] 1 Q.B. 79 (C.A.); *The Tolla* [1921] P. 22; *The Luna* [1920] P. 22; *Employers' Liability Assurance Corporation v. Sedgwick Collins & Co.* [1927] A.C. 95; *First Russian Insurance Co. v. London and Lancashire Insurance Co.* [1928] Ch. 922, 938 f.; *Ruby Steamship Corp. v. Commercial Union Assurance Co.* (1933) 39 Com.Cas. 48 (C.A.); *Sinfra Aktien-Gesellschaft v. Sinfra, Ltd.* [1930] 2 All E.R. 675.

affecting third parties, *i.e.*, in a context in which it was not intended to apply.³⁶

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³⁶ *Per* Scrutton, L.J., in *Ruby S.S. Corp., Ltd. v. Commercial Union Assurance Co., Ltd.* (1933) 39 Com.Cas. 48 (C.A.), at p. 52. For a clear statement of the difference between the two kinds of problem, see Cheshire, p. 320; Wolff, s. 404 *ad fin.*, 424. Falconbridge, Chap. 18, draws a distinction between 'authority' and 'power' akin to, though not identical with that made in the text. Batiffol, s. 315, rejects this distinction, but his reasons for doing so are not convincing. It must, however, be admitted that there is often a need for choosing the *lex loci solutionis* as the proper law of the contract between principal and agent so as to obviate conflicts between the law applicable to their rights and duties *inter se* and the law applicable to the rights and liabilities of third parties arising from the exercise of the agent's authority.

³⁷ See *Prager v. Blatspiel, etc., Ltd.* [1924] 1 K.B. 566, and compare *Jebara v. Ottoman Bank* [1927] 2 K.B. 254 (C.A.), at pp. 270 ff., *per* Scrutton, L.J.

³⁸ *Arnott v. Redfern* (1825) 2 C. & P. 88; (1826) 3 Bing. 353.

³⁹ *Re Anglo-Austrian Bank* [1920] 1 Ch. 69.

⁴⁰ *Pattison v. Mills* (1828) 1 Dow & Cl. 342, 363; *Armstrong v. Stokes* (1872) L.R. 7 Q.B. 598, 605; *Maspons v. Mildred* (1882) 9 Q.B.D. 590 (C.A.); *Kaltenbach v. Lewis* (1885) 10 App.Cas. 617; *Delaurier v. Wyllie* (1889) 17 R. 191; *Chatenay v. Brazilian Submarine Telegraph Co.* [1891] 1 Q.B. 79 (C.A.); *The Tolla* [1921] P. 22; *The Luna* [1920] P. 22; *Employers' Liability Assurance Corporation v. Sedgwick Collins & Co* [1927] A.C. 95; *First Russian Insurance Co. v. London and Lancashire Insurance Co.* [1925] Ch. 922, 938 f.; *Ruby Steamship Corp. v. Commercial Union Assurance Co.* (1933) 39 Com.Cas. 48 (C.A.); *Sinfra Aktien-Gesellschaft v. Sinfra, Ltd.* [1939] 2 All E.R. 675.

and he makes contracts for me there, it is the same as if I myself went there and made them.'⁴¹

These words contain a rough statement of the rule which determines the position of a principal in one country who, through an agent, makes contracts in another. Hence, if P in one country authorises A to act for him as regards certain matters, *e.g.*, the sale and purchase of goods, in a specified or unspecified⁴² number of countries, A has authority to act in each country in accordance with the laws thereof. He is authorised to do any of the acts which an agent of his class may do under the law of that country with reference to the laws of which he contracts.⁴³ This is in accordance with the presumable intention of the principal who gives the authority.⁴⁴ It also responds to the requirements of commercial intercourse. As between P and A the scope of A's authority to bind P and to confer rights upon him is necessarily determined by the law which governs their relationship, but third parties who contract with reference to a different law must be able to assume that A's authority covers everything which would be covered by the authority of an agent appointed under the law applicable to the contract made between the agent and the third party. 'If [the principal's] . . . intention appears to be that the authority shall be acted upon in different countries, it follows that the extent of the authority, in any country in which the authority is to be acted upon, is to be taken to be according to the law of the particular country where it is acted upon'.⁴⁵

Thus it is for the proper law of the contract made between the agent A and the third party T to determine whether and to what extent A has created privity of contract between T and his own principal P, especially in a case in which A did not disclose the fact that he was acting as an agent, or, as in *Maspons v. Mildred*,⁴⁶

⁴¹ *Pattison v. Mills* (1828) 1 Dow & Cl. 342, at p. 363, *per* Lyndhurst, C.

⁴² English conflicts rules make no distinction between a power of attorney, like the one in *Chatenay's Case*, *supra*, which may be used anywhere, and a power of attorney, like the one in the *Sinfra Case*, *supra*, which specifies the country or countries in which it is to be exercised. This appears to be different in the United States, see *Batiffol*, s. 309. Nor does English law distinguish in this respect between 'general' or 'permanent' and 'special' authority, as is done in some Continental countries, see *Batiffol*, ss. 307, 316.

⁴³ *I.e.*, by the proper law of the contract which he concludes. See *per* Lindley, L.J., delivering the judgment of the Court of Appeal in *Maspons v. Mildred* (1882) 9 Q.B.D. 530, at p. 539. And see *Cheshire*, p. 320 f.; *Westlake*, s. 223; *Batiffol*, ss. 304 f., 320; *Breslauer, l.c.*, pp. 309 ff.; *contra* *Wolff*, s. 424.

⁴⁴ See *per* Lord Esher, M.R., in *Chatenay v. Brazilian Submarine Telegraph Co.* [1891] 1 Q.B. 79 (C.A.), at pp. 83 f., and *per* Lindley, L.J., *ibid.* p. 85.

⁴⁵ See *per* Lord Esher, M.R., *l.c.* A fortiori the agent's own rights and liabilities arising from the contract must be governed by the proper law of that contract. This may be of importance in connection with contracts made by agents acting for undisclosed principals and also in connection with warranty of authority or the analogous liability of the *falsus procurator*.

⁴⁶ (1882) 9 Q.B.D. 530 (C.A.).

did not disclose the identity of his principal.⁴⁷ Again, the extent to which A is or must be deemed to be authorised by P to sell property on his behalf or enter into other contracts, i.e., the interpretation of A's actual authority and the definition of his ostensible authority, is a matter for the proper law of the contract which he concludes.⁴⁸ So is the question whether the agent's authority has been revoked, whether it is revocable at all,⁴⁹ and also, it is submitted, whether it is automatically revoked by the principal's death, bankruptcy, or insanity, or whether it has expired by lapse of time.⁵⁰

Until 1938 our authorities on these matters drew a clear line between the relationship P-A (governed by the proper law of their contract) and the rights and obligations of P and third parties, governed by the proper law of the contract made by A, although there is only one case⁵¹ which makes it clear that it is the proper law of the contract between T (the third party) and A, and not necessarily the law of the place where that contract was concluded, which determines A's authority as regards the rights and duties between P and T.⁵² (It is true that the power of a company and of its directors to make binding contracts between third parties and the shareholders and, by doing so, to impose personal obligations on the latter, is governed by the law under which the company is incorporated and not by the law of the country in which the company purports to act on behalf of the shareholders,⁵³ but this is a case *sui generis* and hardly an exception to the general principle.) In 1938, however, the Court of Appeal decided that a New York firm of insurance brokers, appointed under New York law as agents to take out, on behalf of their principals, a marine insurance policy through English brokers from English underwriters, were entitled to cancel the policy in circumstances in which, by English domestic law, a broker would not have had the authority to cancel the policy.⁵⁴ In the circumstances of this case the application of New York law, i.e., of the proper law of the contract between

⁴⁷ Including, it is submitted, the question whether an unnamed or an undisclosed principal can validly ratify a contract made without his authority.

⁴⁸ *Chatenay v. Brazilian Submarine Telegraph Co.* [1891] 1 Q.B. 79 (C.A.). It is true that the agent's ostensible authority according to English domestic law rests on the procedural principle of estoppel. Nevertheless it cannot be regarded as a matter for the *lex fori* as such. An English court is unlikely to regard the ostensible authority of an agent contracting in France on behalf of an American principal as governed by English law.

⁴⁹ *Sinfra Aktien-Gesellschaft v. Sinfra, Ltd.* [1939] 2 All E.R. 675

⁵⁰ See *Employers' Liability Assurance Corp. v. Sedgwick, Collins & Co.* [1927] A.C. 95, 109; *First Russian Insurance Co. v. London and Lancashire Insurance Co.* [1928] Ch. 922, 938 ff.

⁵¹ *Maspons v. Mildred* (1882) 9 Q.B.D. 530; as *Breslauer points out, l.c.*, p. 301, the *locus contractus* is not stated in the judgment, but may possibly have been in Spain.

⁵² See *Cheshire*, p. 321; *Batiffol*, s. 305.

⁵³ *Risdon Iron and Locomotive Works v. Furness* [1905] 1 K.B. 304; [1906] 1 K.B. 49 (C.A.), for a discussion, see *Breslauer, l.c.*, p. 303.

⁵⁴ *Ruby S.S. Corp. v. Commercial Union Assurance Co.* (1938) 39 Com.Cas. 48.

P and A, was more favourable to the third party, *i.e.*, to the English underwriters, than the application of the proper law of the contract between themselves and the agents, *i.e.*, English law, would have been, and this may be the explanation of the decision. It is possible that, in the light of this decision, the principle of Rule 159 has to be limited in the sense that it only confers rights on the third party and none on the principal, in other words that A's authority is governed by the proper law of his own contract with P, but that he has such additional authority to bind P as is conferred upon A by the law governing his contract with the third party. Thus interpreted, the decision of the Court of Appeal in *Ruby S.S. Corp., Ltd. v. Commercial Union Assurance Co., Ltd.*⁵⁵ can perhaps be reconciled with the actual decisions of the Court of Appeal in earlier cases,⁵⁶ but not, it is submitted, with their spirit and with the dicta of Lindley, L.J., and Lord Esher, M.R. It is therefore perhaps better to regard the matter as *res integra* and to take the view that, on a future occasion, the Court of Appeal will be faced with conflicting decisions of its own and therefore 'entitled and bound to decide . . . which it will follow'.⁵⁷ It is permissible to express the hope that, if such an occasion arises, the Court of Appeal will follow *Maspons v. Mildred*⁵⁸ and *Chatenay v. Brazilian Submarine Telegraph Co.*⁵⁹ in preference to *Ruby S.S. Corp. v. Commercial Union Assurance Co., Ltd.*⁶⁰

Even if the law were clarified in this way, there would remain a number of questions, much discussed by learned writers, but not yet, it seems, decided by English courts. Thus it has never been decided whether a principal is bound by the rules or provisions of a law under which the agent acts but had no actual authority to act. If, *e.g.*, P in New York gives to A a general authority to buy goods for him in Europe, but instructs him not to buy goods in England, would P be bound, in accordance with the English principles of authority by 'holding out', if A purported to buy goods on P's behalf in England? It is submitted he would be so bound, but the

⁵⁵ *Ubi supra*. For a critical discussion of the case, see Falconbridge, pp. 372 ff.

⁵⁶ *Maspons v. Mildred* (1882) 9 Q.B.D. 530; *Chatenay's Case* [1891] 1 Q.B. 79. The reasoning of Lord Esher in the latter case leaves open the question whether the extent of A's authority as regards a third person who knows of the existence of the document appointing A, is to be measured by the law of the country under the law of which A contracts with the third party. Breslau, *l.c.*, p. 312, regards this as 'a matter of course'. Further, did Lord Esher's language mean that the agent's authority was governed by Brazilian law, under which the appointment was made, but that where the terms of the instrument appointing the agent are general, he must be presumed to have at least the authority possessed by an agent of his class in the country under the law of which he acts? If this should be the proper interpretation of *Chatenay's Case*, the decision in the *Ruby Case*, *supra*, would not be at variance with it.

⁵⁷ *Young v. Bristol Aeroplane Co., Ltd.* [1944] K.B. 718, at p. 729.

⁵⁸ (1882) 9 Q.B.D. 530.

⁵⁹ [1891] 1 Q.B. 79.

⁶⁰ (1935) 39 Com.Cas. 48.

opinions of learned writers are divided.⁶¹ On the other hand, P can hardly be bound (and entitled) by virtue of a law which became the proper law of the contract with the third party only because A, in excess of his actual authority, agreed to its selection as the proper law of the contract. This problem is similar to that raised by the question of contractual capacity,⁶² and it is submitted that it should be solved in a similar way. The *lex loci contractus* is not, as was assumed in the previous editions of this work, necessarily the proper law of the contract between A and T, for the purpose of determining the scope of A's authority in relation to T, but, on the other hand, no other law should be regarded as the proper law, unless it has been made such with the principal's actual authority or else is that system with which the contract between A and T has the closest connection. The agent cannot, by selecting a proper law, confer upon himself an authority which otherwise he would not have had, but, on the other hand, it would be unreasonable to hold that the scope of the authority of an agent, acting for an American firm, to buy goods in England, should be determined by French law, merely because the letter of acceptance of an offer made by an English firm was posted by the agent in France.⁶³

The decided cases refer to the 'operation' of the agent's power, or to its 'extent' in scope or in time. Does the principle of cases such as *Maspons v. Mildred*⁶⁴ and *Chatenay's Case*⁶⁵ also apply to the formation or creation of the authority? If, e.g., the power conferred upon A by P lacked validity under the proper law of their contract owing to a defect in form, should this be allowed to affect the rights and duties of third parties contracting with A under a law under which his authority would have been valid? It is suggested that the dicta of Lindley, L.J., in *Maspons v. Mildred*, and of Lord Esher, M.R., in *Chatenay's Case*, are sufficiently comprehensive to permit an answer to this question which is in accordance with the needs of commerce, i.e., to apply to this question, too, the proper law of the contract between A and T.⁶⁶

⁶¹ See, for quotations, note 43, *ante*, p. 718. Wolff, s. 424, would apply 'the law of the country in which the delegated authority is to operate, i.e., in which A is entitled or bound to exercise it'. Falconbridge, p. 369, mentions the problem, but leaves it open. The language of Lord Esher in *Chatenay's Case*, above, appears to support Wolff's opinion, that of Lindley, L.J., in *Maspons v. Mildred*, is more favourable to the view taken by Cheshire and Batifol. Breslauer, l.c., pp. 312 ff., suggests a compromise solution, viz., that, under the law of his contract with the principal, the agent must have been authorised, 'to create international obligations'.

⁶² See Rule 139, *ante*, p. 619.

⁶³ For detailed discussion, see Batifol, s. 305.

⁶⁴ (1882) 9 Q.B.D. 530.

⁶⁵ [1891] 1 Q.B. 79.

⁶⁶ On the other hand, in *Sinfra Akt.-Ges. v. Sinfra, Ltd.* [1939] 2 All E.R. 675, the question whether a German contract operated as a power of attorney in relation to third parties in England was treated as a question governed by German law, while the question whether a German power of attorney was revocable with respect to third parties in England was treated as a matter governed by English law.

The principle which determines the law governing the existence, scope and duration of the authority of an agent may, it is submitted, also apply to the authority of a partner to bind his co-partners,⁶⁷ and to the authority of a married woman to pledge the credit of her husband.⁶⁸ On the other hand, as regards contracts made by masters of ships, the principle is subject to the limitation imposed by Rule 147, Sub-Rule 2.⁶⁹ It must also be remembered that, whatever be the law governing the agent's authority, his disposition of property apparently in his disposal may be governed by the law of the country where the property is situated.⁷⁰ Rule 159 has no application to contracts made between the principal and the third party if the agent has merely served to bring the parties into touch.⁷¹

Finally, our Rule does not in any way preclude the possibility that the domestic law which governs the contract made by the agent may contain special rules as to the legal position of a foreign principal,⁷² e.g., that normally he cannot sue or be sued on a contract made by a commission agent who in such a case is presumed to act as principal.

Illustrations

1. P, a merchant living in England, makes through A in Scotland a contract with T which is valid according to Scottish, but not according to English law. The contract is governed by Scottish law.⁷³

2. P, a merchant carrying on business in Spain, consigns a cargo to T, who carries on business in England. The contract is made between T and A, a Spanish shipping agent who discloses to T the fact that he is acting as agent for a principal, but does not disclose the latter's identity. The mutual rights and duties of P and T are governed by English law.⁷⁴

3. P, a Brazilian citizen resident in Brazil, executes in Brazil in the Portuguese language a power of attorney to A, a broker resident in London, authorising A to buy and sell shares on P's behalf. A sells P's shares in the T Co., Ltd., and they are registered in the names of the purchasers. P claims

⁶⁷ See Cheshire, p. 321.

⁶⁸ See Wolff, s. 333.

⁶⁹ See *ante*, p. 668. In *The Luna* [1920] P. 22, and in *The Tolla* [1921] P. 22, the master's authority was determined in accordance with the law under which he had acted, but the law of the flag was not pleaded. The cases, therefore, leave open the question whether the law of the flag rule can apply in circumstances in which the third party was ignorant of the nationality of the vessel.

⁷⁰ *Cammell v. Sewell* (1860) 5 H. & N. 728; *The Gratitude* (1801) 3 C. Rob. 258, *per* Lord Stowell; *Kaltenbach v. Lewis* (1885) 10 App. Cas. 642; see *ante*, Rules 129-131; Westlake, s. 151.

⁷¹ For a discussion of the 'courtier' in the conflict of laws, see Batiffol, s. 306.

⁷² *Armstrong v. Stokes* (1872) L.R. 7 Q.B. 598; and compare the more recent statement of the law as to the liability of a foreign principal, whose identity is not disclosed, in *Miller Gibb and Co. v. Smith and Tyree, Ltd.* [1917] 2 K.B. 141 (C.A.). Compare Pollock, *Contracts*, 12th ed., p. 81; Anson, *Law of Contract*, 19th ed., p. 407. It is doubtful in English domestic law, whether such special rules exist or continue to exist.

⁷³ *Pattison v. Mills* (1828) 1 Dow. & Cl. 342.

⁷⁴ *Maspons v. Mildred* (1882) 9 Q.B.D. 530 (C.A.).

that the broker, in doing so, has exceeded his authority, and claims rectification of the register. The scope of A's authority is determined by English law.⁷⁵

4. P, a merchant of New Orleans, orders goods from A, a commission agent in London, who procures them from T, an English manufacturer. P's rights and liabilities towards T are governed by English law and not by the law of Louisiana.⁷⁶

5. By a power of attorney conferred by virtue of a contract governed by German law, P, a Swiss firm, authorise A, who resides in England, to enter in England into contracts on behalf of P. Subsequently P purport to revoke the power of attorney and give notice to this effect to T, an English firm and one of the parties with whom A had made contracts on behalf of P. Afterwards T, alleging that A's power of attorney is irrevocable under German law, continue to make expenditures on behalf of P under contracts made with them by A in the name of P. The revocability of the power is governed by English law, and, whatever be the position under German law, the power has been validly revoked so that T has no claim against P for the money spent on their behalf.⁷⁷

6. P, a firm of shipowners in Nova Scotia, instruct A, insurance brokers in New York, to take out an insurance policy on one of P's ships. The contract between P and A is made in New York. A obtain a policy through an English broker from T, an English underwriter who acknowledges the receipt of the premium from the English broker. P having failed to pay the premium to A, A, with the consent of T, purport to cancel the policy which they are authorised to do under the law of New York, but, in view of the receipt, not under English law. In these circumstances it is held that A's authority to revoke the policy is governed by the law of New York and that the policy has been validly cancelled.⁷⁸

7. P, who carries on business in Germany, employs A as his representative in England. Their contract is governed by German law. P gives A a power of attorney authorising him to make in England contracts on behalf of P. By German law this power would not be revoked by P's death. *Semble*: P's death operates as a revocation of A's authority to make contracts in England.

8. W, the wife of H, who is domiciled and resident in France, lives apart from her husband in England. *Semble*: as regards third parties, W's power to pledge her husband's credit in England as his agent of necessity is governed by English law.

11. FOREIGN CURRENCY OBLIGATIONS ⁷⁹

(1) *General: The Nominalistic Principle.*

RULE 160.—A debt expressed in the currency of any country involves an obligation to pay the nominal amount

⁷⁵ *Chatenay v. Brazilian Submarine Telegraph Co.* [1891] 1 Q.B. 79 (C.A.).

⁷⁶ *Armstrong v. Stokes* (1872) L.R. 7 Q.B. 596, 605.

⁷⁷ *Sinfra Aktien-Gesellschaft v. Sinfra, Ltd.* [1939] 2 All E.R. 675.

⁷⁸ *Ruby Steamship Corporation v. Commercial Union Assurance Co., Ltd.* (1938) 39 Com.Cas. 48 (C.A.).

⁷⁹ Rules 160–166 are new. They were not contained in previous editions of this work. Rule 181 of the previous edition, the only Rule to deal with the subject, has been re-formulated (Rules 160 and 165 below). The following text is merely an attempt to summarise the principles which have been laid down by the courts with respect to some points of particular practical importance. It does not purport to be a complete presentation of the law of foreign money. Special acknowledgment is due to the treatise by Mann, *The Legal Aspect of Money* (1938), both as a source of information on decided cases and for a large number of formulations which have been taken from this

of the debt in whatever is legal tender at the time of payment according to the law of the country in the currency of which the debt is expressed (*lex monetæ*), irrespective of any fluctuations of the value of that currency in terms of sterling or any other currency, of gold, or of any commodities which may have occurred between the time when the debt was incurred and the time of payment (Principle of Nominalism).⁸⁰

If damages are to be assessed in terms of a given currency, any fluctuations in the value of that currency which may have occurred after the event giving rise to the claim for damages (breach of contract, tort) must be disregarded.⁸¹

Comment

The principle of nominalism has been consistently applied by the English courts since the seventeenth century. Of all the principles which govern the treatment of foreign money obligations in this country it is the most fundamental. It is primarily a rule of domestic law, and, as such, it was laid down by the Privy Council of Ireland in the leading case of *Gilbert v. Brett*, generally known as the *Case de Mint Money*s.⁸² This case was concerned with fluctuations in the value of the currency of Ireland which, since the case

work. The American treatise by Nussbaum, *Money in the Law* (1939), contains much material on English law. See further: Cheshire, pp. 337 ff., 857 f.; Wolff, ss. 444-460; Cohn, 'Currency Restrictions and the Conflict of Laws' (1939) 55 L.Q.R. 552; Wortley, 'The Gold Clause' (1936) 17 B.Y.B.I.L. 112; Schmitthoff, 'The International Government Loan' (1937) Jo.Comp.Leg. 179; Mann, 'Problems of the Rate of Exchange' (1945) 8 M.L.R. 177.

⁸⁰ *Gilbert v. Brett* (1604) Davis 18; *Lindsay, Gracie & Co. v. Russian Bank for Foreign Trade* (1918) 34 T.L.R. 448; *British Bank for Foreign Trade v. Russian Commercial and Industrial Bank* (No. 2) (1921) 38 T.L.R. 65; *Société des Hôtels Le Touquet-Paris Plage v. Cummings* [1922] 1 K.B. 451 (C.A.); *Anderson v. Equitable Life Assurance Society of the U.S.* (1926) 134 L.T. 557 (C.A.); *Buerger v. New York Life Assurance Co.* (1927) 43 T.L.R. 601 (C.A.); *Perry v. Equitable Life Assurance Society of the U.S.* (1929) 45 T.L.R. 468; *Re Chesterman's Trusts* [1923] 2 Ch 466 (C.A.); *Franklin v. Westminster Bank* (1927) (C.A.), printed Mann, l.c., pp. 315 ff.; *Kricorian v. Ottoman Bank* (1932) 48 T.L.R. 247; *Ottoman Bank v. Chakarian* (No. 2) [1938] A.C. 260 (P.C.); *Sforza v. Ottoman Bank* [1938] A.C. 282 (P.C.); *Pyrmont, Ltd. v. Schott* [1939] A.C. 145 (P.C.); *Marrache v. Ashton* [1943] A.C. 311 (P.C.). Mann, pp. 59 ff., pp. 191 ff.; Nussbaum, pp. 249 ff., pp. 411 ff.; Cheshire, p. 338; Wolff, ss. 448-450; Story, ss. 309 ff.

⁸¹ This principle underlies the cases discussed in connection with Rule 165 below, especially *Di Ferdinando v. Simon, Smits & Co., Ltd.* [1920] 3 K.B. 409 (C.A.), and *S.S. Ceha v. S.S. Volturmo* [1921] 2 A.C. 544, where the amount in foreign currency was regarded as fixed from the day of breach or loss, but was, owing merely to the fact that proceedings were pending in this country, converted into sterling as from that date. On the principle, see Mann, pp. 79 ff., 215 ff.; Nussbaum, pp. 255 ff.

⁸² (1604) Davis 18 (P.C. of Ireland).

arose in the Irish courts, was the *moneta fori*. It was held that the defendant was able to discharge a debt of £100 payable in Dublin by tendering this amount in a debased coinage introduced by Queen Elizabeth between the time of the contract and the time when the money fell due. The case is therefore the leading, and, it appears, the only judicial authority for a rule of English law which has never been questioned and hardly ever been mentioned in recent times, namely, that a debt incurred in pounds can be discharged in whatever are 'pounds' at the time of discharge, irrespective of any fluctuations which the British currency may have undergone since the time when the debt was incurred. It is no exaggeration to say that this principle is one of the basic rules of English law, none the less so because it is regarded as a matter of course and therefore continuously applied without becoming articulate.

The same principle is also applied where, as the decided cases show, it is far from being inarticulate, namely, with respect to debts expressed in foreign currency. If X in Germany, by a contract made in 1911 and by its express terms governed by English law, borrows a sum in marks from A in Amsterdam on the security of a mortgage on a reversionary interest in an English trust fund, he can, according to English law, discharge this debt by tendering to A in 1923 the nominal amount of marks advanced by A in 1911.⁸³ More precisely: X can discharge his debt to A by tendering those chattels (notes, coins) which, according to the German law as it stands in 1923, symbolise the number of units of account (marks) owing by him. That, in terms of sterling or of dollars or of gold or of any commodity, this sum represents only a fraction of the value advanced, is immaterial. The creditor bears the risk of the depreciation, and the debtor bears the risk of the appreciation of the currency in which the debt is expressed.

The principle of nominalism, as applied to foreign currency obligations, is, in the first place, a rule of English domestic law: it applies to debts governed by English law but expressed in a foreign currency. This statement, however, is of little more than academic significance. The nominalistic principle forms part of the legal systems of all civilised countries.⁸⁴ It is an indispensable foundation of modern economic life. It will therefore claim application in an English court, no matter whether the debt which forms the subject-matter of the litigation is governed by English or by any foreign

⁸³ *Re Chesterman's Trusts* [1923] 2 Ch. 466 (C.A.).

⁸⁴ See the comparative surveys in Mann, pp. 64 ff.; Nussbaum, pp. 249 ff. These authors deal with those anti-nominalistic theories ('metallism', 'valorism', Savigny's exchange value theory, discussed in detail by Nussbaum, pp. 297 ff.) which have from time to time been propounded by jurists and economists, without any practical effect in modern times. Mann, pp. 196 f., mentions a few aberrations of English case law in the remote past, which have long ceased to be of practical importance. 'Turkey is perhaps the only country in the world where the existence of the nominalistic principle is by no means secure': Mann, pp. 96 f., note 4.

law, and no matter whether that foreign law, *e.g.*, the proper law of the contract, or, in the case of a pecuniary legacy, the law of the testator's last domicile, is the law of that country in the currency of which the debt is expressed.⁸⁵ On a strict analysis, the English court which applies the nominalistic principle in a case not governed by English law does so, not by virtue of English domestic law but in accordance with the *lex causæ*. It is by virtue of French law that a debt incurred under French law in 1914 can be discharged in 1919 in depreciated paper francs,⁸⁶ and it is by virtue of the law of the State of New York that a loan raised by the British Government under the law of that State in 1917 can, in 1937, be repaid in depreciated paper dollars.⁸⁷ But in practice it makes no difference whether the nominalistic principle is applied by the court directly by virtue of English domestic law, or, through the interposition of English conflict rules, as part of a foreign legal system which, in accordance with these rules, is applicable in the English court.

Nevertheless the principle of nominalism involves a rule of the conflict of laws, to the effect that it is for the *lex monetæ* and for that law alone to determine what is 'legal tender' for the purpose of defining the medium in which a debt expressed in the currency governed by that law can be discharged. 'The form in which such payment is to be made must be regulated by the municipal law of the country whose unit of account is in question, and what would or would not be a legal tender must depend upon the law on that subject in force at the time when the tender should have been made.'⁸⁸ A debt incurred in Spanish pesetas under the law of Gibraltar must be discharged in what are, at the time of the discharge, Spanish pesetas according to Spanish law.⁸⁹ German and not English law determines what are 'marks' for the purpose of the payment of insurance money in 1922 on an English policy taken out in 1887.⁹⁰ No rule of English equity will protect a bank which has

⁸⁵ This principle was expressed in many of the cases cited in note 80, p. 719, especially clearly by Lord Sterndale, M.R., and by Warrington, L.J., in *Re Chesterman's Trusts* [1923] 2 Ch. 466, at pp. 478, 483, by Lord Wright in *Ottoman Bank v. Chakarian* (No. 2) [1938] A.C. 260, at p. 278; and by Lord Porter in *Pyrmont, Ltd. v. Schott* [1939] A.C. 145 at p. 158.

⁸⁶ *Société des Hôtels Le Touquet Paris-Plage v. Cummings* [1922] 1 K.B. 451 (C.A.).

⁸⁷ *R. v. International Trustee* [1937] A.C. 500.

⁸⁸ *Per* Lord Porter in *Pyrmont, Ltd. v. Schott* [1939] A.C. 145 (P.C.), at p. 158.

⁸⁹ *Pyrmont, Ltd. v. Schott* [1939] A.C. 145. Contrast *Marrache v. Ashton* [1943] A.C. 311 (P.C.). Both cases were concerned with Spanish peseta notes circulating in Gibraltar, but the notes (without 'guías') considered in the former case were not legal tender according to Spanish law, the notes considered in the latter case were Spanish legal tender. Spanish law determined in both cases what was Spanish legal tender, but, as the latter case shows, Spanish law cannot determine the rate of exchange as between its own currency and a (from the Spanish point of view) foreign currency for the purposes of a contract not governed by Spanish law and not to be performed in Spain. The province of the *lex monetæ* is clearly determined by the contrast between these two cases.

⁹⁰ *Anderson v. Equitable Life Insurance Society* (1926) 134 L.T. 557 (C.A.).

granted a loan in roubles on a mortgage of securities: what are 'roubles' for the purpose of the discharge of the debt will exclusively be determined by Russian law as it stands at the time of the redemption of the mortgage.⁹¹

The *lex monetæ* which thus defines the meaning of the currency in which the debt is expressed is 'that law as it exists from time to time',⁹² the law of the currency applies as it stands at the time when the debt falls due. This law is 'incorporated' in the contract or will or other transaction which gives rise to the debt.⁹³ The importance of this becomes strikingly evident in those cases—increasingly numerous under present conditions—in which, owing to the total collapse of a monetary system or to territorial changes, the currency in which a debt is expressed disappears and is replaced by another currency. In a case of that kind the new currency is linked by a rate of conversion with the old currency the place of which it is intended to take. Thus, when, in 1924, the mark currency of Germany was replaced by the reichsmark currency, the rate of conversion was one billion⁹⁴ marks to one reichsmark. This rate of conversion is embodied in a rule of law which forms part of the *lex monetæ*, and as such it must be applied to a debt expressed in the old currency, no matter what law governs the transaction from which the debt arises. If A in London acquires in September, 1923, for £15 from an English bank a cheque on a German bank for nine milliard marks, that cheque will, in 1926, represent 9/1000ths of a German reichsmark, and A will argue in vain that, as between him and the English bank, a different rate of conversion should apply on the ground that their transaction was governed by English law.⁹⁵ In the case of territorial changes very delicate questions may arise if a country with one uniform monetary system is divided into a number of independent States with separate currencies, as happened in the case of Austria-Hungary. The question does not appear to have arisen in any court in the British Commonwealth or in the United States,⁹⁶ but it has given rise to a controversy on the Continent. The most convenient solution of the problem would appear to consist in a translation of the debt into the currency of

⁹¹ *British Bank for Foreign Trade, Ltd. v. Russian Commercial and Industrial Bank* (No. 2) (1921) 38 T.L.R. 65.

⁹² *Per* Lord Sterndale, M.R., in *Re Chesterman's Trusts* [1923] 2 Ch. 466, at p. 478.

⁹³ Warrington, L.J., *ibid.* at p. 483, took the view that the *lex monetæ* becomes *pro tanto* the proper law of the contract. The question is without practical interest. See Mann, p. 118.

⁹⁴ A 'billion' in the English, not in the American sense, *i.e.*, one million millions, not 1000 millions.

⁹⁵ *Franklin v. Westminster Bank, Ltd.* (1927), printed Mann, *l.c.*, pp. 315 ff.

⁹⁶ Mann, pp. 197 ff. (who takes a different view), Nussbaum, pp. 146 ff. The excuse for mentioning the problem here is, that in view of contemporary developments in Europe, it may engage the attention of English lawyers in the future.

that country or part of country with which it is most closely connected.⁹⁷

As a principle, nominalism applies to claims for unliquidated damages no less than to debts. Thus, if damages are claimed for breach of a contract to deliver goods in a foreign country, they have to be assessed in the currency of that country and any change in the value of the goods or in the exchange value of the currency after the date of the breach must be disregarded.⁹⁸ If, therefore, X undertakes to carry goods for A from England to Italy and to deliver them there on a given day and fails to perform this undertaking, A can claim as damages the value in lire of those goods on that date. A subsequent fall in the purchasing power of the lira in terms of gold or commodities or another currency, say United States dollars, does not confer, as such, any additional right upon A, nor would a rise in the exchange value or purchasing power of the Italian currency subsequent to the day of breach permit X to make any deduction from the nominal amount of the damages assessed in lire. A similar rule applies to damages in the law of tort, which have to be assessed in foreign currency, e.g., if a shipowner claims compensation for loss of hire⁹⁹ incurred in foreign currency or for money spent on repairs in foreign currency as a result of a collision with another vessel.¹

The foregoing remarks must, however, be read in the light of an important principle of the English law of procedure, according to which an English court cannot make an order for the payment of a sum of money expressed in foreign currency, and claims for the payment of debts or of damages have to be translated into sterling for the purpose of proceedings in an English court.² The rate of conversion which has to be used is, in the case of damages for breach of contract, that prevailing on the day when the breach occurred,³ in the case of damages for tort the rate of exchange prevailing when the loss or expenditure was incurred for which the plaintiff claims

⁹⁷ This is the view taken by the Czechoslovakian, Austrian and Belgian, but not that taken by the French and German courts. See Mann, l.c. For an exhaustive analysis, see Neumeyer, *Internationales Verwaltungsrecht*, Chap. 14, § 105, Vol. III, 2, pp. 259 ff.

⁹⁸ *Di Ferdinando v. Simon, Smits & Co., Ltd.* [1920] 3 K.B. 409 (C.A.); *Bain v. Field* (1920) 5 Ll.L.R. 16 (C.A.) and *Re British American Continental Bank, Ltd., Lissner and Rosenkrantz's Claim* [1923] 1 Ch. 276 (C.A.). In cases of this type the courts regard the amount of damages as fixed in the foreign currency as from the date of breach. Subsequent fluctuations upwards or downwards of that currency are as such without influence on the rights and liabilities of the parties. This rule of substantive law must not be obscured by the procedural rule that damages are assessed in sterling with reference to the date of the breach. If, in *Di Ferdinando v. Simon, Smits, supra*, the lira had, after the date of the breach, depreciated in terms of gold, but not in terms of sterling, the plaintiff would not have recovered more than the sterling equivalent of the nominal amount of his loss.

⁹⁹ *S.S. Celia v. S.S. Voltorno* [1921] 2 A.C. 545. The remarks about the relation between substantive and adjective law in the previous note apply *mutatis mutandis* to the law of tort.

¹ *Ibid.* per Lord Sumner, at p. 553.

² *Manners v. Pearson* [1898] 1 Ch. 581 (C.A.).

³ *Di Ferdinando v. Simon, Smits & Co., Ltd.* [1920] 3 K.B. 409 (C.A.).

compensation.⁴ In the case of liquidated debts, the rate of exchange of the day when the debt was payable has been applied, but there are conflicting decisions on this point, and the matter is not yet settled.⁵ In rejecting the 'judgment day rate' rule and in accepting the 'breach day rule' the courts have, for practical purposes, grafted an exception upon the nominalistic principle. In the example given above all that A is entitled to claim is a sum in lire representing the value in Italy of the goods on the day when X should have delivered them there. According to the principle of nominalism, A should bear the risk of a depreciation of the Italian currency after that date, and X should bear the risk of appreciation. Nevertheless, if it so happens that A can invoke the jurisdiction of an English court, he can shift the burden of a depreciation of the lira in terms of sterling between the day of breach and that of judgment upon the shoulders of X. On the other hand, if, during that period, the lira should rise in value in terms of sterling, A will suffer what is in effect a deduction from his claim in lire. Such an encroachment of the law of procedure upon substantive rights is difficult to justify from the point of view of justice, convenience or logic. The matter is further discussed below.⁶

Illustrations

1. X, a German citizen domiciled and resident in Germany, is entitled to a reversionary interest in an English trust fund. In 1911 he mortgages this interest to A, a Dutch citizen carrying on business at Amsterdam, for a loan expressed in German marks. The contract of loan is, by its terms, governed by English law. In 1923 X can discharge the debt and redeem the mortgage by paying the nominal amount of the loan in depreciated German currency.⁷

2. X, a British subject domiciled in England, borrows in 1914 18,000 French francs from A, a French citizen domiciled and resident in France. In 1919 X pays to A this sum in depreciated French currency, and, by doing so, discharges the debt.⁸

3. A is employed in Cyprus by X, a bank carrying on business, inter alia, in Cyprus and in Turkey. The contract is governed by Turkish law and A's salary and pension are expressed in Turkish currency. A can only claim to be paid in Turkish money and has no right to be paid on a gold basis in the absence of an express term of the contract to this effect.⁹ If A is wrongfully dismissed, his claim to damages must be assessed in Turkish currency with reference to the date of dismissal, and without reference to any change in the exchange value of the Turkish currency.¹⁰

4. In 1935 X, a company carrying on business in Gibraltar, borrow from A, an Englishwoman resident in London, the sum of 500,000 Spanish pesetas. The contract is governed by the law of Gibraltar, where Spanish currency is

⁴ *S.S. Celia v. S.S. Volturmo* [1921] 2 A.C. 545.

⁵ Compare on the one hand, *Lloyd Royal Belge v. Louis Dreyfus and Co.* (1927) 27 Ll.L.R. 288 (C.A.) and *Madeleine Vionnet et Cie v. Wills* [1940] 1 K.B. 72 (C.A.) and, on the other hand, *Société des Hôtels Le Touquet v. Cummings* [1922] 1 K.B. 451 (C.A.).

⁶ See post, Rule 165.

⁷ *Re Chesterman's Trusts* [1923] 2 Ch. 466 (C.A.).

⁸ See *Société des Hôtels Le Touquet v. Cummings* [1922] 1 K.B. 451 (C.A.).

⁹ *Ottoman Bank v. Chakarian* (No. 2) [1938] A.C. 260 (P.C.).

¹⁰ *Ottoman Bank v. Chakarian* (No. 1) [1930] A.C. 277 (P.C.).

not legal tender. In 1936 the Spanish Government prohibit the importation of Spanish bank notes into Spain unless they are accompanied by an authorisation known as a *guia*. As a result of this there circulate in Gibraltar two types of peseta notes, those with, and those without *guias*, but only those with *guias* (which command a higher price in sterling) are lawful Spanish currency, i.e., symbols of the Spanish unit of account as established by Spanish law. Consequently, in order to discharge their debt, X must tender Spanish notes accompanied by *guias*.¹¹

5. In 1914 A, a Russian bank, advance to X, an English bank, the sum of 750,000 roubles on the security of a mortgage of gold bonds. At that time this rouble sum represents the equivalent of about £78,000. In 1921, when 750,000 roubles represent a small fraction of this amount, X are entitled to redeem the gold bonds by tendering to A 750,000 paper roubles, because the loan, not being a gold loan, is 'repayable in any paper roubles issued by authority of the Russian Government, and in use at the material date', i.e., at the date of repayment.¹²

(2) *Revalorisation of Debts.*

RULE 161.—In whatever currency a debt be expressed, it is for the law governing the transaction from which the debt arises, e.g., in the case of a contractual debt for the proper law of the contract, to determine whether and to what extent the debtor is liable, in the event of a depreciation of the currency, to make an additional payment to the creditor by way of revalorisation.¹³

Comment

According to some foreign legal systems—not according to English domestic law—the debtor of a monetary obligation must, in certain circumstances, 'revalorise' a debt expressed in a currency which has depreciated during the period between the moment when the debt was incurred and the moment when it becomes payable. The duty to 'revalorise' is not imposed by that part of the law which regulates the currency. It is based on the law of contract, the law of succession, etc., and largely on principles corresponding to what, in this country, would be called rules of equity.¹⁴ 'Revalorisation' must therefore be classified as a matter, not of currency law but of the law of contract, etc. If therefore an English court is confronted with a contractual debt governed by

¹¹ *Pyrmont, Ltd. v. Schott* [1939] A.C. 145 (P.C.).

¹² *British Bank for Foreign Trade, Ltd. v. Russian Commercial and Industrial Bank* (No. 2) (1921) 38 T.L.R. 65.

¹³ Mann, pp. 74 ff., pp. 200 ff.; Nussbaum, pp. 269 ff., esp. pp. 293 ff.; Wolff, s. 451, and, on the general characterisation problem involved, s. 152; Mann and Wolff argue that this is a case of characterisation in which the English courts have applied the *lex causæ*.

¹⁴ In a codified system of law the place of 'equity' is taken by the interpretation of 'general clauses' such as § 242 of the German Civil Code, the *fons et origo* of much of the German law of revalorisation.

English law but expressed in a foreign currency, *e.g.*, with the liability of an insurance company to pay a sum in marks under an English policy, it will refuse to enforce any 'revalorisation' of that debt, although, under the law of contract of the country in the currency of which the debt is expressed, the debtor may be liable to 'revalorise'.¹⁵ The law of revalorisation has nothing to do with the currency itself or with legal tender. It is 'a law not affecting the currency, but affecting the particular contracts that come within the scope of it. . . . In other words, it is the debt that is valorised and not the currency'.¹⁶

Where, however, the contractual or other obligation is governed by a system of law which provides for revalorisation, the English court will apply the foreign principles of revalorisation as forming part, *e.g.*, of the proper law of the contract. Thus, where under a contract concluded in 1905 and governed by German law the plaintiff was entitled to an annuity of 8,000 marks payable by the defendant, a British subject resident in England, the English court 'revalorised' the debt in accordance with section 242 of the German Civil Code, according to which contracts must be performed 'in accordance with good faith and usage'.¹⁷

The same principles, it is submitted, would have to apply *mutatis mutandis* if, in the event of violent deflation of a currency, a foreign law provided for the 'devalorisation' of debts, *i.e.*, for an allowance to be made by the creditor in view of the appreciation of the currency in which the debt is expressed and the resulting increased purchasing power of the stipulated sum in terms of other currencies or of gold or of commodities. No such case has as yet arisen.

Illustrations

1. In 1887 X, an American insurance company, issue a life insurance policy upon the life of A. The premiums and the insurance money are expressed in German marks and payable in London. The policy is governed by English law. The policy becomes fully paid, *i.e.*, all the premiums have been paid, in 1907. A dies in 1922 and the insurance sum becomes payable to his widow in London. A's widow can, in an English court, claim no more than the sterling equivalent of the stipulated mark amount with reference to the day when the policy was payable in 1922, *i.e.*, a small fraction of the sterling value of the mark amount calculated with reference to the rate of exchange in 1887. The principles of German law governing the equitable revalorisation of such debts do not apply, since the contract is governed by English law.¹⁸

2. Under the will of her father (a British subject domiciled in England) A, a German citizen resident in Germany, was entitled to an annuity of 8,000 marks payable by her brother X, a British subject resident in England. The annuity was the subject of litigation in the German courts, where the dispute was settled in 1905 by a compromise by the terms of which X undertook to

¹⁵ *Anderson v. Equitable Life Assurance Society* (1926) 134 L.T. 557 (C.A.).

¹⁶ *Ibid.* per Atkin, L.J., at p. 566.

¹⁷ *Kornatzki v. Oppenheimer* [1937] 4 All E.R. 133. See also *Re Schnapper* [1936] 1 All E.R. 322.

¹⁸ *Anderson v. Equitable Life Assurance Society* (1926) 134 L.T. 557 (C.A.).

pay 8,000 marks p a., and A gave up all rights under the will. This compromise was a contract governed by German law. In 1937 the sum of 8,000 marks is revalorised by the English courts in accordance with the equitable principles of the German law of contract.¹⁹

(3) *Gold and other Protective Clauses.*

RULE 162.—The validity, the meaning and the effect of a gold clause in a contract are determined by the proper law of the contract.²⁰

The same applies to any other contractual clauses by which the parties seek to negative the effect of the nominalistic principle,²¹ i.e., to safeguard the creditor against the risk of a depreciation of the currency in which the debt is expressed, or to safeguard the debtor against the risk of an appreciation of that currency.²²

Where English law is the proper law of a contract, any reference therein to gold is presumed to be a gold value clause, i.e., a definition of the means by which the amount of the indebtedness is to be measured and ascertained, not a definition of the means by which the debt is to be discharged,²³ and to give rise to an obligation to pay in legal tender of the stipulated currency an amount which, on the day of payment, will be sufficient to buy

¹⁹ *Kornatzki v. Oppenheimer* [1937] 4 All E.R. 183.

²⁰ Mann, Chap. 4, pp. 91 ff., Chap. 7, pp. 217 ff.; Nussbaum, Chap. 6, pp. 301 ff., esp. s. 80, pp. 377 ff.; Cheshire, pp. 339 ff.; Wolff, ss. 452-454; Wortley, 17 B.Y.B.I.L. 112 (1936); for further references to the voluminous American literature on the gold clause, see Nussbaum, pp. 361 f., note 25. The principal English authorities on the first paragraph of the Rule are *R. v. International Trustee* [1937] A.C. 500, and *St. Pierre v. South American Stores (Guth and Coes), Ltd.* [1937] 3 All E.R. 349 (C.A.). It should be emphasised that the decision of the House of Lords in *New Brunswick Ry. v. British and French Trust Corporation, Ltd.* [1939] A.C. 1, casts no doubt on this principle, while that of the Court of Appeal [1937] 4 All E.R. 516, does.

²¹ This expression is taken from Mann, see Chap. 4.

²² See, for such clauses, Mann, pp. 140 ff.; Wolff, s. 445; Nussbaum, pp. 403 ff., 447 ff. The decision of the House of Lords in *Howard Houlder and Partner, Ltd. v. Union Marine Insurance Co.* (1922) 10 Ll.L.R. 627, which concerned a 'foreign currency clause' in an English policy, was decided in accordance with English law. For discussion of this case, see Nussbaum, p. 446, note 34, and Mann, pp. 145 ff., esp. p. 146, note 6, where further cases of this type are mentioned.

²³ These words are taken from the speech of Lord Russell of Killowen in *Feist v. Société Intercommunale Belge d'Electricité* [1934] A.C. 161, at pp. 172 f., the leading case on this subject.

gold coins corresponding to the nominal amount of the debt. It is not an obligation to pay gold coins.²⁴

Comment

In the absence of legislation to the contrary the parties are free to contract out of the principle of nominalism. That principle itself rests upon the presumed intention of the parties. It can therefore be abrogated by a contractual term to this effect. The gold clause is the most usual, but not the only type of agreement of this kind.²⁵ Legislation by which coins or notes of a given type are made legal tender does not invalidate gold or other protective clauses.²⁶ Nor does legislation by which bank notes are made inconvertible, *i.e.*, by which the duty of a bank of issue to exchange notes for gold coin is suspended or removed.²⁷ This appears to be the case whether the bank of issue is merely relieved of the duty to redeem its notes in gold at their nominal value or whether the duty to redeem is suspended or removed altogether.²⁸ On the other hand, there is no principle of public policy or other principle by which the validity or international application of legislative enactments expressly abrogating or invalidating gold clauses can be impugned.²⁹ No such

²⁴ *Feist v Société Intercommunale Belge d'Electricité* [1934] A.C. 161; *International Trustee v. R.* [1936] 3 All E.R. 407 (C.A.), *per* Lord Wright, M.R., at pp. 423-428, reversed by the House of Lords [1937] A.C. 500, but approved on this point; *British and French Trust Corporation v. New Brunswick Ry.* [1936] 4 All E.R. 516 (C.A.); [1939] A.C. 1; *Syndic in Bankruptcy of Khoury v. Khayat* [1943] A.C. 507 (P.C.).

²⁵ See note 22, above.

²⁶ See Mann, pp. 104 ff., especially on the doubts raised with regard to the validity of gold coin clauses in English domestic law by s. 6 of the Coinage Act, 1870. Whether this section, on the 'obscurity' of which Lord Tomlin commented in *Adelaide Electricity Supply Co. v. Prudential Assurance Co.* [1934] A.C. 122, at p. 144, invalidates gold coin clauses appears to be a question devoid of practical interest, in view of the decision in *Syndic in Bankruptcy of Khoury v. Khayat* [1943] A.C. 507, which decides that a reference to gold in a contract is, in English domestic law, always a gold value clause, and, as such, unaffected by the Act.

²⁷ Mann, pp. 108 ff., and Nussbaum, pp. 335 ff. *Feist v. Société Intercommunale Belge d'Electricité* [1934] A.C. 161, was decided after the coming into force of the Gold Standard Amendment Act, 1931. In upholding the validity of the clause in an English contract, the House thus implicitly laid down the principle that the convertibility of sterling is not a pre-condition for the validity of a gold clause attached to a sterling obligation in an English contract. In the United States this question was much controverted until the law was clarified by the decision of the Supreme Court in *Bronson v. Rodes* (1868) 7 Wall. (74 U.S.) 229. In France this problem gave rise to the differentiation between '*contrats internes*' and '*contrats internationaux*'.

²⁸ In the latter case, the case of 'fiat money', or '*cours forcé*' gold ceases to be legal tender. This is the present situation in England. See Mann, pp. 30 ff.

²⁹ No attempt was made in this country to deny application to the Joint Resolution of Congress of June 5, 1933, either on the ground that it was against English public policy or that it could have no ex-territorial effect, but in *New Brunswick Ry. v. British and French Trust Corporation, Ltd.* [1939] A.C. 1, at p. 24, Lord Maugham, L.C., observed *obiter* that the Canadian Gold Clauses Act, 1937, could not, even if it was intended to do so, 'be held to diminish or destroy the rights of an English creditor, and, it may be

legislation is in force in the United Kingdom. The most important provision of this type now in existence is the Joint Resolution of the United States Congress of June 5, 1933.³⁰

Whether or not a gold clause is valid is determined by the proper law of the contract, and not by the *lex monetæ*. Hence, if the contract is an English contract, a gold clause attached to an obligation expressed in dollars, sterling, or any other currency will be valid,³¹ but if it is an American contract it will be void, if the obligation is expressed in dollars.³² Similarly whether a given legislative enactment purporting to invalidate gold clauses has any retrospective effect must be decided in accordance with the proper law of the contract.³³ In so far, however, as a clause of this kind does not purport to regulate the substance of the debtor's obligation, but merely the mode in which that obligation is to be performed, its validity must probably be judged in accordance with the law of the place of payment. In view of the construction usually applied to gold clauses by the English courts, this latter contingency is unlikely to occur, nor can it be said that the applicability of the *lex loci solutionis* as such to this problem is beyond doubt.³⁴

The meaning of a reference to gold in a given contract is determined by the proper law.³⁵ That law must, in the first place, determine whether a gold clause can be read into the contract in the absence of an express term, a construction inimical to the nominalistic principle and one to which the English courts are strongly averse,³⁶

added, without compensation, after he has commenced an action in this country'. It is submitted with respect that this would be an extension of the doctrine of public policy unsupported by either authority or principle.

³⁰ See *R. v. International Trustee* [1937] A.C. 500.

³¹ *Feist v. Société Intercommunale Belge d'Electricité* [1934] A.C. 161.

³² *R. v. International Trustee* [1937] A.C. 500. The Joint Resolution deals only with dollar obligations.

³³ This is the *ratio decidendi* in *New Brunswick Ry. v. British and French Trust Corporation, Ltd.* [1939] A.C. 1, as regards the capital of the bonds. The question whether English or Canadian law was the proper law of the contract was left open. If English law was the proper law, the Canadian Gold Clauses Act, 1937, did not, of course, apply, but if Canadian law was the proper law, the only ground on which the Act could be refused application, was that it was not intended to have retrospective effect. See particularly Lord Wright, at p. 34.

³⁴ The point has never been decided. The submission in the text is based on the principle that the mode of performance is governed by the law of the place of performance. See *ante*, p. 601.

³⁵ See cases quoted above, p. 727, note 20.

³⁶ *New Brunswick Ry. v. British and French Trust Corporation* [1939] A.C. 1: gold clause not implied in interest coupons, though contained in the bonds; *International Trustee v. R.* [1936] 3 All E.R. 407, at pp. 430 f., *per* Lord Wright, M.R.: gold clause not to be implied in option for payment in London, though contained in option for payment in New York; *Ottoman Bank v. Chakarian* (No. 2) [1938] A.C. 260 (P.C.); *Sforza v. Ottoman Bank* [1938] A.C. 282 (P.C.); *Ottoman Bank v. Menni* [1939] 4 All E.R. 9 (P.C.); *Kricorian v. Ottoman Bank* (1932) 48 T.L.R. 247; *Sturge v. Excess Insurance Co., Ltd.* (1938) 159 L.T. 606; see, on the other hand, *Ottoman Bank v. Dascalopoulos* [1934] A.C. 354 (P.C.), and, for a case in which the debtor was

but which the Privy Council applied on one occasion,³⁷ owing to what in a subsequent case turned out to be a misunderstanding of the proper law.³⁸ In the second place, and this is a much more important point in practice, an express reference to gold must be construed in accordance with the proper law. It is for the proper law to say whether the reference to gold is to be interpreted (a) as a sale of bullion or of coins (so that the obligation is not of a monetary character),³⁹ whether it is (b) merely a repetition of the statutory definition of a currency unit and therefore not intended to place any obligation upon the debtor beyond payment in legal tender,⁴⁰ whether it is (c) intended as an undertaking to use a particular medium of payment, namely, gold coins (gold coin clause), or whether it has (d) no bearing on the medium of payment at all but serves the object of compelling the debtor to pay an amount varying in accordance with the price of gold coins in terms of the currency in which the obligation is expressed (gold value clause).⁴¹ While, on one occasion, the Court of Appeal, having heard evidence on the law of Chile, came to the conclusion that a reference to gold contained in a Chilean contract had to be construed in accordance with Chilean law as a mere repetition of the statutory definition of the Chilean peso⁴² (construction (b) above), the most important issue in this connection has, for a number of years, been the choice between the construction of a gold clause as a gold coin or a gold value clause ((c) or (d) above). The practical significance of this derives from legislation which makes it illegal to acquire or to transfer gold coins⁴³ or to stipulate for the exclusive use of one of several types of legal tender, *e.g.*, for the use of gold coins to the exclusion of bank notes.⁴⁴ Such legislation may invalidate a gold coin clause because its performance would be, or (in the case of supervening legislation) would become, illegal or, in any event, inoperative. Even in the absence of such legislation the undertaking to pay in gold may be frustrated by factual impossibility of performance if gold coins cease not merely to circulate but to be

estopped from denying that a gold clause had to be implied: *Apostolic Throne of St. Jacob v. Said* [1940] 1 All E.R. 54 (P.C.). See Nussbaum, pp. 313 ff., Mann, pp. 98 ff.

³⁷ *Ottoman Bank v. Dascalopoulos* [1934] A.C. 354 (P.C.)

³⁸ *Ottoman Bank v. Chakarian* (No. 2) [1938] A.C. 260 (P.C.). It is impossible to agree with Mann, p. 98, that the *Dascalopoulos Case* is an authority on English law.

³⁹ See *per Hilbery, J.*, in *British and French Trust Corporation v. New Brunswick Ry.* [1936] 1 All E.R. 13, 16.

⁴⁰ *St. Pierre v. South American Stores (Gath and Chaves), Ltd.* [1937] 3 All E.R. 349 (C.A.). Nussbaum, pp. 320 ff., calls this a 'sham' gold clause.

⁴¹ *Feist v. Société Intercommunale* [1934] A.C. 161.

⁴² *St. Pierre v. South American Stores* [1937] 3 All E.R. 349.

⁴³ For this reason Nussbaum, p. 352, calls the construction of a gold clause as a gold coin clause the 'Tantalus' construction. The gold is, so to speak, constantly kept dangling before the eyes of the unfortunate creditor, but he can never reach it.

⁴⁴ For the question whether s. 6 of the Coinage Act, 1870, is such an enactment, see above, p. 723, note 26.

procurable. In the event of a serious depreciation of the currency in which the debt is expressed such developments are very likely to occur. If they do, the gold coin clause loses its force and what remains is a debt payable in legal tender.⁴⁵ The gold coin clause is thus, from the creditor's point of view, of only precarious benefit, and likely to prove a *brutum fulmen* at the very moment when he is in need of its support. Hence the great commercial importance of those decisions by which the Permanent Court of International Justice⁴⁶ and, subsequently, the House of Lords,⁴⁷ the Supreme Court of the United States⁴⁸ and the courts of many other countries applied to the gold clause what, in this country, has come to be known as the *Feist* construction, i.e., a rule of interpretation by which a reference to 'payment in gold coin of a certain weight and fineness' or even a bare reference to 'gold'⁴⁹ must, in the absence of evidence of a contrary intention, be construed as a gold value clause. Whether the *Feist* rule applies depends on the proper law of the contract. The *Feist Case* itself was a decision on English domestic law which was the proper law of the loan, while in the *International Trustee Case*⁵⁰ the proper law of the contract was, in the view of the House of Lords, the law of the State of New York which, like English law (regarded as the proper law by the Court of Appeal), embodies the *Feist* principle. (The difference of opinion between the Court of Appeal and the House of Lords referred not to the interpretation of the clause but to its validity.) A gold value clause, unlike a gold coin clause, is immune against the effect of legislation prohibiting the use of gold coins or the choice between various kinds of legal tender. It is unaffected by the impossibility of procuring actual coins. Nothing short of an express prohibition such as that contained in the Joint Resolution of Congress of 1933 or in the Canadian Gold Clauses Act, 1937,⁵¹ or else a positive doctrine of public policy such as that developed by the French *Cour de Cassation* for 'internal contracts',⁵² can impair its validity.

Instead of choosing the value of gold coin as the yardstick for

⁴⁵ This has never been expressly decided, but was assumed in the *Feist Case*, *supra*. See Mann, pp. 56 f.

⁴⁶ *Cases of the Serbian and of the Brazilian Loans*, Collection of Judgments, Series A, Nos. 14, 15.

⁴⁷ *Feist v. Société Intercommunale* [1934] A.C. 184.

⁴⁸ *Norman v. Baltimore and Ohio Railroad* (1935) 294 U.S. 240; *Perry v. United States* (1935) 294 U.S. 380.

⁴⁹ This interpretation, foreshadowed by the speech of Lord Russell of Killowen in *R. v. International Trustee* [1937] A.C. 500, at p. 566, and by that of Lord Romer in *New Brunswick Ry. v. British and French Trust Corporation, Ltd.* [1939] A.C. 1 at p. 39, was adopted by the Privy Council in *Syndic in Bankruptcy of Khoury v. Khayat* [1943] A.C. 507 (see at p. 512, per Lord Wright). See *per contra*, *Derwa v. Rio de Janeiro Tramway Light and Power Co.* [1928] 4 D.L.R. 553; *Modiano Bros and Son v. Bailey and Sons* (1933) 47 Ll.L.R. 184.

⁵⁰ [1937] A.C. 500.

⁵¹ See *New Brunswick Ry. v. British and French Trust Corporation, Ltd.* [1939] A.C. 1.

⁵² See Mann, p. 109; Nussbaum, pp. 335 ff.

the purpose of measuring the debtor's obligation, the parties may use gold bullion or silver or other precious metals. Wheat and rye and other commodity clauses have been used for the same purpose.⁵³ Nor is there anything to prevent the parties from agreeing for the payment of a sum of money linked with the purchasing power of a given currency through an index clause,⁵⁴ whether the index referred to be one of wholesale or retail prices or a cost of living index. All these clauses are of the same legal nature as gold value clauses. More important, however, are clauses defining the amount of units of a given currency owed by the debtor by reference to another currency, assumed to be relatively stable, such as a clause in an insurance policy by which the underwriter undertakes to pay a sum in sterling 'at the rate of 4.15 dollars to one pound sterling',⁵⁵ or the undertaking of a charterer to pay a monthly hire in sterling, 'rate of exchange not being below 17 kroners to the £'.⁵⁶ Finally, cases have come before the English courts in which a 'multiple currency' clause was attached to an international loan, i.e., a clause giving the creditor an option to demand payment in one of two or more alternative currencies with or without an option to demand payment at one of two or more alternative places. Such clauses give rise to legal problems of great complexity, inasmuch as it will sometimes be necessary to consider the various alternative promises as separate contracts each of which may be governed by a different system of law.⁵⁷

Illustrations

1. In 1928 a Belgian company issues bonds for the payment of £100 in 1963 and of interest at 5½ per cent. per annum 'in sterling gold coin of the United Kingdom of or equal to the standard of weight and fineness existing on September 1, 1928'. The bonds are to be construed by English law. This is an obligation to pay in sterling, i.e., in legal tender of the United Kingdom, 'a sum equal to the value of £100 if paid in gold coin of or equal to the standard of weight and fineness existing on September 1, 1928'.⁵⁸ As a result of the devaluation of the pound in 1931 it therefore implies an obligation to pay in depreciated pounds a sum sufficient to purchase 100 gold pounds.⁵⁹

⁵³ Nussbaum, pp. 403 ff.

⁵⁴ *Ibid.*, pp. 409 ff.

⁵⁵ *Howard Houlder and Partner, Ltd. v. Union Marine Insurance Co., Ltd.* (1922) 10 Ll.L.R. 627 (H.L.). See the detailed discussion in Mann, pp. 140 ff.

⁵⁶ *Poulsen and Carr v. Massey* (1919) 1 Ll.L.R. 497; see Mann, pp. 146 f., note 6 for a further example.

⁵⁷ See *Rhokana Corporation, Ltd. v. Inland Revenue Commissioners* [1938] A.C. 380. This case and *R. v. International Trustee* [1937] A.C. 500, were cases in which the creditor had the right to payment at alternative places in alternative currencies ('option de change'). *New Brunswick Ry. v. British and French Trust Corporation, Ltd.* [1939] A.C. 1, and *Auckland City Corporation v. Alliance Assurance Co.* [1937] A.C. 587, were cases of a mere 'option de place', but, in the latter case, owing to the development of a rate of exchange between the United Kingdom and the New Zealand 'pounds' and owing to the interpretation of the contract adopted by the Privy Council, the original 'option de place' became an 'option de change'. See on the two kinds of option, Wolff, s. 445; Mann, pp. 147 ff.

⁵⁸ *Per* Lord Russell of Killowen [1934] A.C. 161 at p. 173.

⁵⁹ *Feist v. Société Intercommunale Belge d'Electricité* [1934] A.C. 161.

2. X at Haifa makes a promissory note by which he undertakes to pay to A who is resident in Syria '2,000 Turkish gold pounds'. The word 'gold' 'does not here import an obligation to deliver gold or pay in gold. What it does import is a special standard or measure of value'. It is equivalent to a gold clause of the type described above in Illustration 1⁶⁰

3. A, the owner of premises in Chile, leases them to X, an English company carrying on business in Chile, the rent for the lease being '93,500 pesos of 183,057 millionths of a gramme of fine gold monthly'. According to Chilean law which is the proper law of the contract the reference to gold is 'a mere statutory synonym',⁶¹ i.e., 'a mere synonym for "Chilean pesos"',⁶² as defined in the relevant Chilean statute. It is therefore not a gold clause, and it might have read: 'The rent shall be 93,500 monetary units of Chile'.⁶³

4. In 1917 the Government of the United Kingdom issued in New York bonds to the value of 143,587,000 dollars in denominations of 100, 500, and 1,000 dollars. The capital was repayable in 1937 at holder's option either in New York 'in gold coin of the United States of America of the standard of weight and fineness existing February, 1917', or in London 'in sterling money at the fixed rate of 4.86½ dollars to the pound'. Interest at the rate of 5½ per cent per annum was payable semi-annually at holder's option either in New York in 'gold coin of the United States of America' or in London in sterling at the same dollar rate as the capital. In 1933 the Congress of the United States passed a Joint Resolution by which all gold coin and gold value clauses attached to dollar obligations were declared to be 'against public policy' and all dollar obligations whether incurred before or after the passing of the Resolution were declared to be dischargeable 'upon payment, dollar for dollar, in any coin or currency which at the time of payment is legal tender for public and private debts'. Since the bonds issued by the British Government were governed by the law of New York, the gold clauses contained in them were abrogated by the Joint Resolution and capital and interest were payable in New York in depreciated paper dollars.⁶⁴

5. In 1909 an insurance company carrying on business at Trieste (then belonging to Austria, but since 1920 belonging to Italy) issued a life insurance policy to an Ottoman subject resident in Palestine, by which they undertook to pay '10,000 gold francs' upon the death of the assured. By the Treaty of Lausanne of 1923 (which formed part of the domestic law of Palestine) it was provided that life insurance policies contracted in currencies other than Turkish pounds between persons possessing an allied nationality in 1923 should be settled in French paper francs or in Turkish paper pounds. The gold clause in the insurance policy was thereby abrogated and the obligation dischargeable in paper francs.⁶⁵

6. In 1884 a company incorporated in New Brunswick issued 'first mortgage gold bonds' of £100 each, repayable in 1934 in 'gold coin of Great Britain of the present standard weight and fineness' at holder's option either in London or in New Brunswick. There was no reference to gold in the interest coupons. In 1934 the bondholders were entitled to claim repayment of the capital in accordance with the *Feist* construction (see Illustration 1, above), but no implied gold clause was to be read into the interest coupons. The Canadian Gold Clauses Act, 1937, was held by the House of Lords not to apply to the loan.⁶⁶

⁶⁰ *Syndic in Bankruptcy of Khoury v. Khayat* [1943] A.C. 507 (P.C.).

⁶¹ *Per Greer, L.J.* [1937] 3 All E.R. at p. 351.

⁶² *Per Slessor, L.J., ibid.* at p. 355.

⁶³ *St. Pierre v. South American Stores (Gath and Chaves), Ltd.* [1937] 3 All E.R. 349 (C.A.); see *per MacKinnon, L.J.*, at p. 357.

⁶⁴ *R. v. International Trustee* [1937] A.C. 500.

⁶⁵ *Assicurazioni Generali v. Cotran* [1932] A.C. 268 (P.C.).

⁶⁶ *New Brunswick Ry. v. British and French Trust Corporation, Ltd.* [1939] A.C. 1.

(4) *Determination of the Money of Account (Money of Contract).*

RULE 163.—Where there is doubt as to the currency in which a debt is expressed (money of account, money of contract), and especially where the expression used for the denomination thereof connotes the currencies of two or more States (for example, United States and Canadian dollars, United Kingdom and Australian pounds, French and Swiss francs), the money of account must be ascertained by construing the contract in accordance with its proper law.⁶⁷

Where English law is the proper law of a contract, the parties are presumed to have intended to measure the obligation in the currency of the country in which the debt is payable.⁶⁸

(*Semble*) The currency in which damages for breach of contract are to be assessed, must be ascertained in accordance with the proper law of the contract.⁶⁹

(*Semble*) Where English law is the proper law of a contract, damages for its breach must be assessed in the currency in which the loss was incurred, unless a contrary intention emerges from the contract itself.⁷⁰

⁶⁷ Mann, Chap. 6, pp 161 ff.; Nussbaum, pp. 437 ff., pp. 455 ff.; Wolff, s. 446. *King Line, Ltd. v. Westrahan Farmers, Ltd.* (1932) 48 T.L.R. 598 (H.L.); *Broken Hill Proprietary Co., Ltd. v. Latham* [1933] Ch. 379 (C.A.); *Adelaide Electricity Supply Co., Ltd. v. Prudential Assurance Co., Ltd.* [1934] A.C. 122 (overruling the *Broken Hill Case*); *Payne v. Deputy Federal Commissioner of Taxation* [1936] A.C. 497 (P.C.); *Auckland Corporation v. Alliance Assurance Co., Ltd.* [1937] A.C. 587 (P.C.); *De Bueger v. Bailantyne and Co.* [1938] A.C. 452 (P.C.); *Joffe v. African Life Assurance Society, Ltd.* [1938] T.P.D. 189; *Maudsley v. Colonial Mutual Life Assurance Society, Ltd.* [1945] V.L.R. 161; *Goldsbrough Mort and Co., Ltd. v. Hall* [1948] V.L.R. 145. See also *Bain v. Field* (1920) 5 Ll.L.R. 16 (C.A.); *Ottoman Bank v. Jebara* [1928] A.C. 269. Further cases are collected in Mann, p. 165, note 1.

⁶⁸ *Gilbert v. Brett* (1604) Davis 18. Mann, p. 166, quotes a dictum of Best, C.J., in *Taylor v. Booth* (1824) 1 C. & P. 286, calling this a principle of 'common sense'. See also the cases quoted in note 67.

⁶⁹ Mann, pp. 180 ff.; Nussbaum, pp. 464 ff.

⁷⁰ *Bain v. Field* (1920) 5 Ll.L.R. 16 (C.A.); *Noreuro Traders v. Hardy & Co.* (1928) 16 Ll.L.R. 319; *Versicherungs und Transport Akt. Ges. Daugava v. Henderson* (1934) 49 Ll.L.R. 252 (C.A.); *Di Ferdinando v. Simon, Smits & Co.* [1920] 3 K.B. 409 (C.A.); *Re British-American Continental Bank, Ltd., Goldzieher and Penso's Claim* [1922] 2 Ch. 575; *Re British-American Continental Bank, Ltd., Lissner and Rosenkranz's Claim* [1923] 1 Ch. 276 (C.A.); *S.S. Celis v. S.S. Volturmo* [1921] 2 A.C. 544; *The Canadian Transport* (1932) 43 Ll.L.R. 409.

Comment

The principles tentatively summarised in this Rule have not yet been fully clarified by the courts. Of the subject-matter of its two concluding paragraphs it has been rightly said that it is 'one of the most obscure chapters of the law concerning foreign money'.⁷¹

Money serves the twofold function of a means of measurement and of a medium of payment. Hence a distinction must be drawn between the currency in which a debt is expressed or a liability to pay damages is calculated and the currency in which such debt or liability is to be discharged. The first, the 'money of account' or 'money of measurement' or 'money of contract', concerns the substance of the obligation, its '*quantum*'.⁷² The second, the 'money of payment', concerns the '*quomodo*', the performance of the obligation.⁷³ If a bill of exchange governed by English law is drawn in French francs payable in London, francs will be the money of account, but sterling will be the money of payment.⁷⁴ This means that the amount of the debt must be ascertained in francs, but the debt must, or at any rate may, be discharged in pounds. Wherever money of account and money of payment are not identical, there must be an exchange operation in order to translate the amount of units of the currency of account which are owed by the debtor into the currency in which he pays. The money of measurement is *in obligatione*, the money of payment is *in solutione*.⁷⁵

It is usual for the parties to a contract to leave no doubt as to the currency in which the debts arising from the contract are to be measured. But this is not always the case. If, to choose an example used by Lord Wright,⁷⁶ 'a Frenchman and a Belgian were to agree that francs were to be paid by one or the other in Brussels', it must be decided whether Belgian or French francs are owed, whether the debtor owes, say, 1,000 'francs' of one currency or of the other. It may well be that, on a proper interpretation of the contract, it will be found that the two parties had contemplated French francs. In this case it may be that the debtor will have to

⁷¹ Mann, p. 180.

⁷² See *per* Lord Tomlin in *Adelaide Electricity Supply Co., Ltd. v. Prudential Assurance Co., Ltd.* [1934] A.C. 122 at pp. 145 f.: '... the obligation to pay is an obligation to pay a sum of money expressed in a money of account common to the United Kingdom and Australia, and ... to be discharged ... in what is legal tender in Australia for the sum expressed in that common money of account'.

⁷³ The expressions '*quantum*' and '*quomodo*' are used by Mann, p. 236, similarly Nussbaum, p. 425. The terms 'money of account' (used by Lord Tomlin, see note 72), 'money of contract' (used by Nussbaum), and 'money of measurement' are synonymous. For a clear analysis, see *Goldsbrough Mort and Co., Ltd. v. Hall* [1948] V.L.R. 145 at p. 148.

⁷⁴ Bills of Exchange Act, 1882, s. 72 (4); see above, Rule 153.

⁷⁵ For the desirability of avoiding an exchange operation see Lord Wright in the *Adelaide Case*, *supra*, at p. 156. The terms '*in obligatione*' and '*in solutione*' are used by Mann, p. 139.

⁷⁶ *Adelaide Case*, *supra*, at p. 156.

pay as many Belgian francs (money of payment) as will buy 1,000 French francs (money of account) on the day when the debt falls due.

To ascertain the money of account means to construe the contract, and the canons of construction must be supplied by the proper law.⁷⁷ The proper law must govern this question of interpretation whether or not it happens to be the law of the place of performance. If, in the example above, English law is the proper law of the contract, the question whether the debtor owes Belgian or French francs must be decided in accordance with English law. This does not, of course, mean that British currency is the money of account. To ascertain the money of account in accordance with a given system of law does not mean to decide that the currency of the country the law of which is applied is the money owing by the debtor. Thus the contractual relationship between a company incorporated in England and its shareholders is undoubtedly governed by English law as the proper law of the contract.⁷⁸ If, in accordance with the contract, the dividends are payable in Australia in 'pounds', English law, being the proper law of the contract, must determine whether the word 'pounds' is to be interpreted as United Kingdom pounds or as Australian pounds.⁷⁹ This interpretation may lead, and has led, to the result that what is *in obligatione* are Australian pounds.⁸⁰

⁷⁷ *Adelaide Case*, *supra*, per Lord Atkin, at p. 135; per Lord Tomlin, at p. 145; Lord Tomlin emphasised that the contract, being an English contract, had to be construed by English law, but Lord Wright was of the opinion (at p. 156) that the *lex loci solutionis* governed the construction. In *Auckland City Council v. Alliance Assurance Co., Ltd.* [1937] A.C. 587 at p. 603, and in *De Bueger v. Ballantyne & Co., Ltd.* [1938] A.C. 452, Lord Wright appeared to agree with Lord Tomlin's view. In the latter case the meaning of the word 'pound' in an English contract was determined in accordance with English law, although the money was payable in New Zealand (see at p. 461). And see the explanation of the *Adelaide Case* by Lord Wright in *Mount Albert Borough Council v. Australasian Temperance, etc., Society, Ltd.* [1938] A.C. 224 at p. 241.

⁷⁸ Per Lord Wright in the *Adelaide Case*, *supra*, at p. 156.

⁷⁹ This is based on the explanation of the *Adelaide Case* by Lord Wright in the *Auckland Case*, *supra*, note 77. The problem, he said, 'was solved, as a question of construction, by determining what currency, on the true construction of the contract, was connoted by the use of the word "pound"'. It was held that, in the absence of express terms to the contrary, or of matters in the contract raising an inference to the contrary, the currency of the country in which it was stipulated that payment was to be made was the currency meant'. See the clear analysis by Mann, *l.c.*, esp. at p. 179.

⁸⁰ *Adelaide Electricity Supply Co. v. Prudential Assurance Co.* [1934] A.C. 122. From the point of view of the majority, *i.e.*, Lords Warrington, Tomlin, Russell of Killowen, and, it seems, Lord Atkin, the problem was purely one concerning the money of payment, *i.e.*, the mode of performance, in as much as they held that, as means of measurement, the 'Australian pound' and the 'United Kingdom pound' had remained identical and that 'the difference in the currencies merely concerns the means whereby an obligation to pay so many of such units (of the common currency) is to be discharged' (per Lord Warrington, at p. 138). Lord Wright, however, took the view that the two 'pounds' were different currencies, not only as means of payment but also as means of measurement. From his, and only from his point of view, therefore, was the *Adelaide Case* a case concerning the 'determination of the money of account'. Lord Tomlin, see at p. 145, was in a position to rest his judgment on the principle summarised in Rule 164, *post*.

Again, if a New Zealand local authority issues a loan in 'pounds' secured by a charge on the city revenues and repayable at holder's option in England or in New Zealand, the proper law of the contract is that of New Zealand. But New Zealand law may, and does, say that the undertaking to pay capital and also interest at holder's option in New Zealand or in England is to be construed as an undertaking to pay, in the appropriate currency,⁸¹ either (in England) an amount representing the nominal sum of the loan in United Kingdom pounds or in New Zealand an amount representing the nominal sum in New Zealand pounds.⁸² That, in the first example, Australian, and, in the second example (if the English option is exercised), United Kingdom pounds are owed, does not mean that Australian or English law determines the issue. In these cases the currency of the place of payment is owing. This is not so by virtue of the law of the place of payment, but by virtue of the proper law.

In the absence of an indication to the contrary the parties are, according to English domestic law, presumed to have intended to measure the obligation by the currency of the place where the debt is payable. This rebuttable presumption must be understood in the light of the principle to be discussed below that a debt may normally be discharged in accordance with the law—and this usually means in the currency—of the place where it is paid. The presumption under discussion will therefore in many cases lead to the result that the money of account is identical with the money of payment and that an exchange operation becomes unnecessary. The presumption will not operate in all cases. If, to use once again Lord Wright's hypothetical illustration, a Belgian has, by an English contract, promised to pay 1,000 'francs' to a Frenchman in Brussels, English law will say that the parties must be presumed to have referred to Belgian francs, but if the money was payable in London or in Amsterdam, the presumption that the parties contemplated the money of the place of payment will be of no assistance in ascertaining whether they intended to measure the debt in French or in Belgian francs. According to English law the money of payment will, in that event, be pounds, or, as the case may be, guilders,⁸³ and an exchange operation will be unavoidable. Indications pointing to the intention of the parties will have to be looked for in the terms of the contract and in the circumstances surrounding its making.⁸⁴

⁸¹ See Rule 164, *post*.

⁸² *Auckland City Council v. Alliance Assurance Co., Ltd.* [1937] A.C. 587 (P.C.).

⁸³ See Rule 164, *post*.

⁸⁴ See Mann, *l.c.*, pp. 163 ff. For a case in which the presumption in favour of the currency of the place of payment was rebutted by the terms of the contract see *De Bueger v. Ballantyne & Co.* [1938] A.C. 452 (P.C.). See also *Goldsbrough Mort & Co., Ltd. v. Hall* [1948] V.L.R. 145, especially at pp. 152-153. In *Bain v. Field* (1920) 5 Ll.L.R. 16 (C.A.), the place of payment was either in London or in New York, but 'dollars' were held to connote Canadian dollars.

There is a conflict of authorities with regard to the determination of the currency in which damages for breach of contract are to be assessed, and there is practically no authority on the corresponding question in the law of tort.⁸⁵ In the law of contract the question must probably be answered by the proper law of the contract, which does not mean that the damages must be assessed in the currency of the country the law of which is the proper law. It appears that, according to English law, damages payable by the purchaser of goods for non-acceptance are ascertained in the currency in which the price is expressed,⁸⁶ and that, generally, in the absence of evidence of a countervailing intention, damages must be calculated in the currency in which the loss was incurred,⁸⁷ but there is also authority to the effect that the claimant is entitled to damages in the currency of the place where he carries on his business.⁸⁸

Illustrations

1. X is a company incorporated in England and carrying on business in Australia. By a special resolution passed in 1921 its shareholders decide that in future all dividends are to be declared in Australia and to be paid in or from Australia. The dividends continue to be declared in 'pounds' and are paid in Australian pounds. A, a company incorporated and carrying on business in England, are holders of cumulative preference shares in X. They claim to be entitled to the nominal amount of the dividends in United Kingdom pounds, *i.e.*, to the payment either of that amount in United Kingdom currency or of as many pounds of Australian currency as will buy the nominal amount of the dividends in United Kingdom currency. The House of Lords decides that, as between the company and its shareholders, the word 'pounds' must be construed as meaning 'Australian pounds' and that A's claim fails.⁸⁹

2. A New Zealand local authority issues in 1920 £1,250,000 debenture bonds in denominations of 100 'pounds' repayable in 1940 at holder's option in England or in New Zealand, at a rate of interest of £5 5s. per annum and secured by a charge on the city revenues. Interest coupons are attached to the bonds by which the holder is entitled, semi-annually, 'to receive £2 12s. 6d.' at his option either in New Zealand or in England. A holder of interest coupons can claim payment of the interest promised therein on the basis that the 'pounds' mentioned in the documents are meant to refer to the currency in existence at the place of payment, *i.e.*, he can, if he exercises his option to be paid in England, demand payment of the nominal amount in United Kingdom currency.⁹⁰

3. By an agreement made in 1932 in London X, a company incorporated and carrying on business in New Zealand, engage the services of A for three years at a remuneration of '£700 sterling per annum'. The services are to be

⁸⁵ The only direct authority in the law of tort appears to be *The Canadian Transport* (1932) 43 Ll.L.R. 409 (C.A.). See also *S.S. Celia v. S.S. Volturno* [1921] 2 A.C. 544.

⁸⁶ *Bain v. Field* (1920) 5 Ll.L.R. 16 (C.A.). See also *Ottoman Bank v. Chakarian* (No. 1) [1930] A.C. 277 (P.C.).

⁸⁷ This seems to have been the view of the Court of Appeal in *Di Ferdinando v. Simon, Smits & Co., Ltd.* [1920] 3 K.B. 409. See *per* Scrutton, L.J., at p. 414.

⁸⁸ *Re British American Continental Bank, Ltd., Goldzieher and Penso's Claim* [1922] 2 Ch. 575; *Lisser and Rosenkranz's Claim* [1923] 1 Ch. 276 (C.A.).

⁸⁹ *Adelaide Electricity Supply Co. v. Prudential Assurance Co.* [1934] A.C. 122.

⁹⁰ *Auckland City Council v. Alliance Assurance Co., Ltd.* [1937] A.C. 587 (P.C.).

performed and the salary is to be paid in New Zealand. Here the presumption that the parties intend to refer to the currency prevailing at the place of payment is rebutted by the use of the word 'sterling' which connotes the currency of the United Kingdom. A is therefore entitled to be paid such amounts in New Zealand currency as will, on each occasion, be the equivalent of the same nominal amount in the currency of the United Kingdom.⁹¹
Semble: English law is the proper law of the contract.⁹²

4. X, a fruit merchant in London, agrees to buy from A, a merchant at Winnipeg, 3,200 cases of condensed milk f.o.b. New York at a price of 5.25 'dollars' per case. X wrongfully repudiates the contract and refuses acceptance of the goods. In view of the fact that the price was quoted by a Canadian seller in London, the Court of Appeal holds that the 'dollars' referred to in the contract are intended to be Canadian dollars, despite the facts that the goods were in New York and that the freight was calculated in United States dollars. It follows, in the view of the Court of Appeal, that the damages which A can claim from X must be assessed in Canadian dollars.⁹³
Quære: if A had been in breach, would the damages recoverable by X for non-delivery, short delivery, or bad quality also have been assessed in Canadian dollars or would they have been assessed in United States dollars if X had been compelled to buy goods against A in New York? Or would they have been assessed in sterling?

5. X, who carries on business in England but has a branch office in Holland, employs A as his representative in Amsterdam. A's salary is expressed and payable in Dutch guilders. *Semble*: if X dismisses A without notice in breach of the contract, the damages which A can claim must be assessed in guilders, even if A is a British subject domiciled in England.⁹⁴

6. A is a Frenchman carrying on business in France. He is the owner of a cargo bought in Argentina for Argentinian pesos. The ship in which A's cargo is carried founders in the River Parana owing to a collision with a vessel owned by X, caused by the negligence of X's servants. In the view of the Court of Appeal A's damages must be assessed in Argentinian pesos, not in French francs.⁹⁵

7. A is an Italian carrying on business in Italy. He is the owner of a ship which suffers damage owing to the negligence of X, an English shipowner. The ship has to undergo temporary repairs in the United States for which A has to pay in United States dollars which he acquires for a price in lire. *Semble*: the damages must, in so far as these repairs are concerned, be assessed in dollars.⁹⁶

8. A is a banker carrying on business at Brussels. B is a banker carrying on business at Hamburg. Both buy from X, a banker carrying on business in London, an amount of United States dollars, A for a price in Belgian francs, and B for a price in German marks. A and B pay the price, but X fails to deliver the dollars. A and B buy dollars against X, A in Belgium for a price in Belgian francs, B in Germany for a price in German marks. *Semble*: The damages which A can recover from X must be assessed in Belgian francs, and those which B can claim must be assessed in marks, but in neither case are they to be assessed in dollars.⁹⁷

⁹¹ *De Bueger v. Ballantyne & Co., Ltd.* [1938] A.C. 452 (P.C.).

⁹² See the concluding sentences of Lord Wright's judgment.

⁹³ *Bain v. Field* (1920) 5 Ll.L.R. 16 (C.A.). 'In the absence of very strong evidence to the contrary, I assume that the seller was quoting a price in the currency of his own country': *per* Bankes, L.J., at p. 17. The case is not very fully reported.

⁹⁴ See *Ottoman Bank v. Chakarian* [1930] A.C. 277 (P.C.).

⁹⁵ *The Canadian Transport* (1932) 43 Ll.L.R. 409 (C.A.).

⁹⁶ *Per* Lord Sumner in *S.S. Celia v. S.S. Volturno* [1921] 2 A.C. 545 at p. 553.

⁹⁷ *Re British American Continental Bank, Goldzieher and Penso's Claim* [1923] 2 Ch. 575; *Lisser and Rosenkranz's Claim* [1928] 1 Ch. 276 (C.A.).

(5) *Discharge of Foreign Currency Obligations.*

RULE 164.—Irrespective of the currency in which a debt is expressed or damages are calculated (money of account), the currency in which the debt or liability can and must be discharged (money of payment) is determined by the law of the country in which such debt or liability is payable, but (*semble*) the rate of exchange at which the money of account must be converted into the money of payment is determined by the proper law of the contract or other law governing the liability.⁹⁸

If a sum of money expressed in a foreign currency is payable in England, it may be paid either in units of the money of account or in sterling⁹⁹ at the rate of exchange at which units of the foreign legal tender can, on the day when the money is payable, be bought in London in a recognised and accessible market, irrespective of any official rate of exchange between that currency and sterling.¹ *Quære*, whether this rate of exchange also applies if English law is not the proper law of the contract.²

Comment

This Rule deals with the question whether the debtor of a monetary obligation has, by making a payment in a given currency, discharged the debt. The effect of proceedings in an English court on foreign currency obligations is not considered in this Rule, but in Rule 165.

The question what money tokens the debtor must or may tender to the creditor is one concerning the mode of performance and is therefore governed by the *lex loci solutionis*,^{2a} whether or not it is the law applicable to the substance of the obligation. The *quantum* of the money tokens to be tendered is, however, always a

⁹⁸ Wolff, s. 447; Mann, pp. 46 ff., pp. 234 ff., and 8 M.L.R. 177 ff.; Nussbaum, p. 422 ff. The currency in which a debt *may* be discharged is not necessarily identical with that in which it *must* be discharged.

⁹⁹ *Marrache v. Ashton* [1943] A.C. 311 (P.C.), per Lord Macmillan, at pp. 317 f.; *Anderson v. Equitable Life Assurance Society* (1926) 134 L.T. 557 at p. 562, per Bankes, L.J.; *Adelaide Electricity Supply Co. v. Prudential Assurance Co.* [1934] A.C. 122 at p. 145. That the debtor *may* tender his debt in the currency of the place of payment is uncontroverted, but some judges have taken the view that he *must* do so, while others have adopted the principle here submitted.

¹ *Marrache v. Ashton* [1943] A.C. 311 (P.C.).

² See *Graumann v. Treitel* (1940) 162 L.T. 383.

^{2a} See Rule 142, *ante*, p. 645.

matter of substance and not a question of the manner of performance. Hence, it should always be governed by the proper law, irrespective of the place of payment. One of the matters determining this *quantum* is the rate of exchange to be used when converting the money of account into the money of payment.

If a debt or other liability expressed in a foreign currency is payable in England, the debtor may tender pounds in discharge.³ Despite a number of dicta to the contrary, he may also discharge his liability by tendering the foreign currency in specie, but the creditor cannot compel him to do so.⁴ The rate of exchange to be applied is that of the day when the debt is payable.⁵ Owing to the blocking of accounts and to prohibitions directed against the import of banknotes in many countries, several rates of exchange may exist side by side, and much may depend on the choice of the proper rate.⁶ The rate to be chosen is that which signifies the 'commercial equivalent' in sterling of the foreign currency, i.e., the 'current rate of exchange'.⁷ This is the market rate at which notes being legal tender according to the *lex monetæ*⁸ can in fact be obtained at the place of payment. The rule that the rate for sight drafts must be applied⁹ does not extend beyond the law of negotiable instruments.¹⁰ To permit the creditor to insist on the use of the official rate of exchange would, in many cases, be equivalent to conferring upon him the uncovenanted benefit of the overvaluation of their currencies by foreign governments.¹¹

³ This is laid down for bills and notes in s. 72 (4) of the Bills of Exchange Act, 1882, but it is a principle of general application. See *per* Lord Wright in *Khouri v. Khayat* [1943] A.C. 507 (P.C.).

⁴ See above, note 99. It is submitted, with respect, that the most recent judicial pronouncement on this issue, that of Lord Macmillan in *Marrache v. Ashton* [1943] A.C. 311, should be followed. The view taken by Lord Macmillan would appear to be the only one compatible with the principle of nominalism: Rule 160, above. See Wolff, s. 447; *alter* Mann, p. 246, who quotes a dictum of Lord Wright in *Rhokana Corporation v. Inland Revenue Commissioners* [1937] 1 K.B. 788 at p. 797.

⁵ *Syndic in Bankruptcy of Khouri v. Khayat* [1943] A.C. 507. In *Marrache v. Ashton* [1943] A.C. 311, the rate of exchange of the date of the issue of the writ was applied by agreement between the parties, and in *Apostolic Throne of St. Jacob v. Said* [1940] 1 All E.R. 54 (P.C.), that of the date of actual payment, but this principle which, from the point of view of justice, is the most desirable one, is not part of English law.

⁶ In *Graumann v. Treitel* (1940) 162 L.T. 383, the official rate was 12 reichsmarks to the pound, but the defendant could have bought reichsmarks in London on the foreign exchange market at the rate of 36 or 37 to the pound. In *Marrache v. Ashton* [1943] A.C. 311, the official rate was 42.25 Spanish pesetas to the pound, the rate at which pounds were bought by the Spanish frontier authorities was 53, and the rate at which peseta notes could be obtained in Gibraltar was 132.

⁷ *Atlantic Trading and Shipping Co. v. Louis Dreyfus & Co.* (1922) 10 Ll.L.R. 703 (H.L.), esp. *per* Lord Buckmaster at p. 704, and *per* Lord Sumner at p. 705.

⁸ This is essential: *Pyrmont, Ltd. v. Schott* [1939] A.C. 145 (P.C.).

⁹ Bills of Exchange Act, 1882, s. 72 (4).

¹⁰ *Marrache v. Ashton* [1943] A.C. 311 (P.C.).

¹¹ This, it is submitted, is what happened in *Graumann v. Treitel* (1940) 162 L.T. 383. Unless the case can be explained by the fact that German law was the proper law of the contract, it must now, in view of *Marrache v. Ashton*

These principles of English domestic law are fairly well established. It is clear that English law applies to the questions in what currency a foreign money obligation governed by English law and payable in England may and must be discharged, and what rate of exchange must be used in converting the foreign money of account into sterling. But it has never been decided whether English law applies to payments in this country under an English contract as the proper law of the contract or as the law of the place of payment, *i.e.*, whether the principles summarised above have to be applied to payments in England of debts expressed in foreign currency and governed by foreign law. The better view appears to be that a debt payable in England may be discharged in sterling whatever be the proper law, but that the proper law should apply to the choice of the rate of exchange, including the date for conversion.¹²

It follows that the *lex loci solutionis* should govern the question in what currency a debt can and must be discharged which is based on an English contract but payable abroad.¹³ On the other hand, English law should, in this case, determine the proper rate for converting the money of account into the money of payment. If, therefore, under an English contract a debt is payable in Australia, Australian law decides whether Australian pounds may be tendered in discharge,¹⁴ irrespective of the currency (United Kingdom or Australian pounds) in which the debt is expressed. If a debt, expressed in whatever currency, pounds, dollars or francs, is governed by English law and payable in France, French law should determine whether it can be discharged by tendering French francs. But in these cases it should be for English law to say how many Australian pounds or French francs must be paid, *i.e.*, at what rate of exchange the money of account, whatever it is, must be converted into the money of payment. The rate of exchange would be that at which notes of the money of account can be obtained on the day of the maturity of the debt at the place of payment. There is, however, no authority on these points, and the solution here put forward is based on what are thought to be conclusions from general principles.¹⁵

It is further submitted that the validity of an agreement for 'effective' payment in a given currency, *i.e.*, for payment *in specie* without conversion into the currency of the place of payment, should

[1948] A.C. 811, be regarded as decided on a wrong principle. For a case in which there was no 'recognised and accessible' market and no available rate of exchange with reference to the day of maturity see *Re Parana Plantations, Ltd.* [1946] 2 All E.R. 214 (C.A.).

¹² Wolff, s. 447, p. 469; Mann, pp. 250 f.

¹³ *Per* Lord Tomlin in *Adelaide Electricity Supply Co. v. Prudential Assurance Co.* [1934] A.C. 122 at p. 145; *per* Lord Wright in *Auckland City Council v. Alliance Assurance Co.* [1937] A.C. 587 at p. 606, where this principle is set forth as the true explanation of the *Adelaide Case*.

¹⁴ *Adelaide Electricity Supply Co. v. Prudential Assurance Co.* [1934] A.C. 122.

¹⁵ See on 'substance of the obligation' and 'mode of performance' above, Rule 136, Sub-Rule 3, *Second Presumption*, *ante*, p. 593.

be tested by the law of the place of payment and that, if the place of payment is in England, such an agreement is valid, unless it violates the provisions of the Exchange Control Act, 1947. It is, however, of little value in this country since it cannot be specifically enforced in an English court.¹⁶

There is authority for stating that the proper law governing an obligation applies to the question whether payment can be made in a particular form, especially by payment into court. If the debt or liability is governed by English law, *e.g.*, if damages are claimed for a tort committed on the high seas, English law determines the effect of a payment into court abroad, even if it is made in the country in which the claimant carries on his business and if he claims damages calculated in the currency of that country.¹⁷

Illustrations

1. X, who is resident in Gibraltar, borrows in 1931 from A, who is also resident in Gibraltar, the sum of 50,000 pesetas on the security of a mortgage of premises in Gibraltar. The debt is repayable in Gibraltar in 1936. The contract is governed by the law of Gibraltar. The proper rate of exchange for the purpose of ascertaining the sterling amount which A can claim from X in Gibraltar is the rate at which Spanish peseta notes can in fact be bought in Gibraltar, irrespective of the official rate of exchange for Spanish currency and irrespective of the rate at which the Spanish frontier authorities are prepared to buy pounds against pesetas from persons entering Spain. The Spanish notes circulating in Gibraltar are Spanish legal tender despite the fact that their import into Spain is prohibited and that the buying and selling of these notes is, from the Spanish point of view, illegal. 'The only necessary reference to Spanish law was for the purpose of ascertaining what in Spain was legal tender for so many Spanish units of account'.¹⁸

2. By a contract governed by English law X, a shipowner, is liable to refund in England to A, the charterer of the ship, an amount in sterling, spent by A on behalf of X. X remits to A in Argentina an amount in Argentine currency. This amount has to be converted into sterling at the current rate of exchange and not at the rate for sterling fixed by Argentine legislation, and the amount thus ascertained must be deducted from the debt.¹⁹

3. By a contract made in 1938 and governed by German law X, a company incorporated and carrying on business in England, owes A the amount of 20,600 reichsmarks. The money was paid by A, then resident in Germany, to X with the view to financing the acquisition of land in Brazil from one of X's subsidiary companies, and according to the contract the money became repayable when in 1939 the object of the contract was frustrated by the outbreak of the war. According to German law the money was payable in Germany. After the termination of the war and the revival of the debt which had been suspended by the war A, now resident in England, can claim in X's liquidation the amount of the debt translated into sterling not at the official pre-war rate of exchange, but at the rate of exchange of 40 reichsmarks to the pound fixed for the purposes of the British Forces of Occupation in Germany, regarded by the Court of Appeal as 'the fairest and most satisfactory method of

¹⁶ *Manners v. Pearson* [1898] 1 Ch. 581 (C.A.); see below, Rule 165.

¹⁷ *The Baarn* (No. 1) [1933] P. 251 (C.A.); *The Baarn* (No. 2) [1934] P. 171 (C.A.).

¹⁸ *Marrache v. Ashton* [1943] A.C. 311 (P.C.).

¹⁹ *Atlantic Trading and Shipping Co. v. Louis Dreyfus & Co.* (1922) 20 Ll.L.R. 703 (H.L.).

arriving at a valuation' of X's contingent liability at the commencement of the winding up, *i.e.*, on March 31, 1944.²⁰

4. X and A were partners of a German firm. In 1938 they concluded in Germany an agreement to terminate the partnership by which X, still resident in Germany, became liable to pay to A, then resident in England, a sum in reichsmarks which, however, X was prevented by German law from paying to A. Subsequently X emigrated to England as well, and is sued by A in the English court for the payment of the sterling equivalent of the reichsmark debt. On the assumption that, by German law, the place of performance has shifted to England,²¹ X is held to be liable to pay to A the sterling equivalent of the reichsmark debt according to the official rate of exchange.²² *Quære*: what would be the proper rate of exchange if the place of performance was held to be in Germany and it was shown that A could not have disposed of any reichsmark balance standing to his credit, except at a heavy discount?

5. A Chilean ship belonging to A, who carries on business in Chile, is damaged in a collision on the high seas²³ with a Dutch ship belonging to X owing to the latter's negligence. In proceedings *in rem* against the Dutch ship in England A seeks to recover, by way of damages, the sterling equivalent of an amount he had to spend on repairs in Chilean pesos. While this action is pending X pays into court in Chile an amount in depreciated Chilean pesos nominally equivalent to the amount claimed by A. This payment cannot discharge X's liability²⁴ and cannot even be taken into account in assessing the damages, especially in view of the fact that, as a result of Chilean exchange restrictions, the amount paid into court in Chile cannot be remitted out of Chile.²⁵

(6) *Proceedings in an English court.*

RULE 165.—(1) An English court cannot give judgment for the payment²⁶ of an amount in foreign currency.²⁷

²⁰ *Re Parana Plantations, Ltd.* [1946] 2 All E.R. 214 (C.A.).

²¹ This assumption must be made because it was made by Atkinson, J.; whether or not this was a correct view of German law is here irrelevant. It should be noted that the proper law of the contract was and remained German law, although the court found that the place of performance had shifted to London.

²² *Graumann v. Treitel* (1940) 162 L.T. 383. The case is here given as an illustration. The decision, it is submitted, is at variance with the law as laid down in *Marrache v. Ashton* [1943] A.C. 311, and should not be followed as a precedent on English law.

²³ See *per* Scrutton, L.J. [1933] P. at p. 262; [1934] P. at p. 176.

²⁴ *The Baarn* (No. 1) [1933] P. 251 (C.A.). See, for a discussion of the case, Mann, pp. 256-8, whose analysis is convincing and has been followed in the text.

²⁵ *The Baarn* (No. 2) [1934] P. 171 (C.A.).

²⁶ This does not necessarily apply to judgments for a declaration and for the redemption of a mortgage. See below, note 32. It seems that, on general principles, a decree of specific performance for the payment of foreign money will not be granted in any circumstances.

²⁷ *Manners v. Pearson* [1898] 1 Ch. 581 (C.A.). In Canada and in the United States the corresponding principle rests on a statutory basis. On the Continent of Europe the courts can generally give judgments for payment in foreign currency or for payment of an amount of the *moneta fori* equivalent to a sum in foreign currency converted with reference to the date of actual payment, *i.e.*, of the satisfaction of the judgment. Mann, Chap. 9, pp. 278 ff., esp. pp. 280 ff.; Wolff, s. 447; Nussbaum, pp. 427 ff., who shows that the common law rule 'developed in the Middle Ages', that it rests on a purely historical basis, and that it is apt to override the intention of the parties.

A debt which is expressed and damages which are calculated in a foreign currency must therefore be converted into sterling for the purposes of litigation in England, irrespective of the place at which they are payable and irrespective of the law governing the substance of the obligation.²⁸

(2) For the purpose of litigation in England damages for breach of contract must be converted into sterling with reference to the rate of exchange prevailing on the day when the contract was broken,²⁹ and damages for tort with reference to the rate of exchange prevailing on the day when the loss was incurred for which compensation is claimed.³⁰

(3) Whether a debt expressed in a foreign currency must, for the purpose of litigation in England, be converted into sterling with reference to the rate of exchange prevailing on the day when the debt was payable or with reference to the day of the judgment is an open question.³¹

Comment

The first two paragraphs of this Rule embody established principles of the English law of procedure which apply to litigation in an English court as part of the *lex fori* irrespective of the *lex causæ*, whether it be the proper law of a contract or, e.g., the law of the place where a tort has been committed. A judgment by which an English court orders a person to pay a sum of money must

²⁸ *Manners v. Pearson* [1898] 1 Ch. 581 (C.A.), and cases quoted in notes, 29, 30, 36 and 37 below.

²⁹ *Di Ferdinando v. Simon, Smuts & Co.*, [1920] 3 K.B. 409 (C.A.); *Bain v. Field* (1920) 5 Ll.L.R. 16 (C.A.); *Re British American Continental Bank, Ltd., Lissner and Rosenkranz's Claim* [1923] 1 Ch. 276 (C.A.); *Ottoman Bank v. Chakarian* [1930] A.C. 277 (P.C.); *Barry v. Van den Hurk* [1920] 2 K.B. 709; *Lebeaupin v. Crispin* [1920] 2 K.B. 714; *Re British American Continental Bank, Ltd., Goldzueher and Penso's Claim* [1922] 2 Ch. 575; *McDonald v. Wells* (1931) 45 C.L.R. 506. The decisions in *Kirsch v. Allen, Harding & Co.* (1920) 123 L.T. 105, and *Cohn v. Boulken* (1920) 36 T.L.R. 767, were overruled in the *Di Ferdinando Case*, *supra*. See Mann, p. 290.

³⁰ *S.S. Celia v. S.S. Volturmo* [1921] 2 A.C. 545. The decisive date is not the date at which the tort was committed, but that at which the loss was incurred.

³¹ Compare *Bertram v. Duhamel* (1838) 2 Moo.P.C. 212, and *Société des Hôtels Le Touquet Paris-Plage v. Cummings* [1922] 1 K.B. 451 (C.A.), with *Lloyd Royal Belge v. Louis Dreyfus & Co.* (1927) 27 Ll.L.R. 288 (C.A.), and *Madeleine Vionnet et Cie v. Wills* [1940] 1 K.B. 73 (C.A.). If, as in *Bois-sevain v. Weil* [1948] 1 All E.R. 893, the rate of exchange is fixed by agreement, no question arises and the agreed rate will be applied by the court.

be expressed in sterling, but it is doubtful whether this applies to judgments for a declaration and for the redemption of a mortgage.³²

That damages for tort must be converted into sterling with reference to the rate of exchange prevailing on the day when the loss was incurred and not with reference to the rate of exchange on the day when judgment is rendered, was laid down by the House of Lords in *S.S. Celia v. S.S. Volturno*³³ against the powerful dissent of Lord Carson.³⁴ In the same case the majority of the Law Lords expressed their approval of the decision of the Court of Appeal in *Di Ferdinando v. Simon, Smits & Co., Ltd.*,³⁵ in which the court decided that damages for breach of contract must be converted into British currency with reference to the date at which the contract was broken.

While, therefore, the law applicable to the conversion of damages into British currency is laid down by authority, there are still doubts concerning the proper rate of exchange to be applied to liquidated debts. The Court of Appeal has, on two occasions,³⁶ decided that the relevant date is that on which the debt was payable, and judges of first instance have frequently acted on this principle.³⁷ On the other hand, the Court of Appeal has also decided that the defendant in an action for the recovery of a debt expressed in French francs, payable in France and governed by French law, can, after the issue of the writ in the English action, discharge the debt by paying in France the amount of the debt in francs.³⁸ It is true that in the case in which this was decided the court left open the question of the proper date for the determination of the rate of exchange,³⁹ but it is submitted that the decision is incompatible with the principle that the debt must be converted into British currency with reference to the date when it was payable.⁴⁰ If the plaintiff has a right to obtain judgment for a sterling amount representing the equivalent of a sum in francs on a day in 1914 when the debt was due, how can he be deprived of that right by the payment in 1921 of a francs sum representing a much smaller amount in sterling? Is it conceivable that an action in an English court must be dismissed on the ground that, while the action was pending, the defendant paid to the plaintiff a sum smaller than that for which the

³² *British Bank for Foreign Trade v. Russian Commercial and Industrial Bank* (1921) 38 T.L.R. 65. See Mann, p. 289.

³³ [1921] 2 A.C. 545.

³⁴ At pp. 564 ff.

³⁵ [1920] 3 K.B. 409.

³⁶ *Lloyd Royal Belge v. Louis Dreyfus & Co.* (1927) 27 Ll.L.R. 288; *Madeleine Vionnet et Cie v. Wills* [1940] 1 K.B. 72.

³⁷ *Re British American Continental Bank, Crédit Général Liégeois Claim* [1922] 2 Ch. 589; *Uliendahl v. Pankhurst, Wright & Co.* (1928) 39 T.L.R. 628; *Peyrae v. Wilkinson* [1924] 2 K.B. 166. For Scottish, Canadian and Australian cases, see Mann, p. 291.

³⁸ *Société des Hôtels Le Touquet v. Cummings* [1922] 1 K.B. 451.

³⁹ *Per Bankes, L.J.*, at p. 455; *per Atkin, L.J.*, at p. 465.

⁴⁰ See Mann, pp. 292 ff.

plaintiff, but for such payment, would have obtained judgment? And, if the defendant can discharge the debt by paying, *pendente lite*, the nominal amount of the debt in foreign currency, why should a payment into the English court of the sterling equivalent of that amount not be regarded as a discharge? ⁴¹ Either the plaintiff has the right to recover the sterling equivalent of the debt with reference to the day when the debt was payable, and nothing short of the payment of that sterling amount discharges the debt, or else the proper date for conversion is that of the date of the judgment and, consequently, while the action is pending, the plaintiff can claim no more than the nominal amount of the debt or its sterling equivalent at the time of payment. It is submitted that the decisions of the Court of Appeal in *Lloyd Royal Belge v. Louis Dreyfus & Co.*⁴² and in *Madeleine Vionnet et Cie v. Wills*⁴³ cannot stand with the decision of the Court of Appeal in *Société des Hôtels Le Touquet Paris-Plage v. Cummings*.⁴⁴ Hence, it is still open to the Court of Appeal to adopt the principle of the *Cummings Case* and to refuse to be bound by the decisions in the *Lloyd Royal Belge* and *Vionnet Cases*, i.e., to adopt the judgment-date rule.⁴⁵

In these circumstances it is permissible to submit that the principle underlying the *Cummings* decision is sound law and that, in accordance with what appears to have been the opinion of Atkin, L.J. (as he then was),⁴⁶ the judgment-date rule should be preferred to the rule that the date of the maturity of the debt is the relevant date. The Supreme Court of the United States, whose judgment was delivered by Holmes, J., decided by a majority in favour of the judgment-date rule with reference to debts payable outside the United States.⁴⁷ It did so partly under the influence of the *Cummings* decision, but mainly on the ground that the 'maturity-date rule' is incompatible with the principle of nominalism and that if the foreign currency depreciates between the date of maturity and that of the judgment, it imposes upon the defendant a liability which he never contracted to bear. On the other hand, if the foreign currency appreciates during that period, the plaintiff gets less than is his due. The language of Holmes, J., cannot be improved upon: 'An obligation in terms of the currency of a country takes the risk of currency fluctuations and whether creditor or debtor profits by the change the law takes no account of it. . . . If the debt had been due here and the value of the dollars had dropped before suit was brought, the plaintiff could recover no more dollars on that account. A foreign debtor should be no worse off'.⁴⁸

⁴¹ *Madeleine Vionnet et Cie v. Wills* [1940] 1 K.B. 72 (C.A.).

⁴² [1927] 27 Ll.L.R. 288.

⁴³ [1940] 1 K.B. 72.

⁴⁴ [1922] 1 K.B. 451.

⁴⁵ *Young v. Bristol Aeroplane Co., Ltd.* [1944] K.B. 718 (C.A.).

⁴⁶ [1922] 1 K.B. at p. 465.

⁴⁷ *Deutsche Bank Filiale Nuernberg v. Humphreys* (1926) 272 U.S. 517.

⁴⁸ At p. 519.

It is fallacious to argue that the judgment-date rule allows the debt to 'fluctuate' during the proceedings. The debt is a debt in foreign currency, and if the judgment-date rule is adopted it remains stable until it is merged in the judgment, stable, that is, in terms of the currency in which it was incurred. The maturity-date rule, on the other hand, enables the parties to speculate in sterling, a currency alien to the contract, and connected with the case merely through the fortuitous circumstance that the plaintiff was able to invoke the jurisdiction of the English court. If the debt is payable in this country and governed by English law, the debtor should pay the amount of sterling corresponding to the nominal sum of foreign currency on the day when he should have paid, and this was also the view adopted by the United States Supreme Court and by Holmes, J.⁴⁹ This, however, is due to the operation of English substantive law to which the parties were content to submit. It is hard to justify the intrusion of English law upon the substantive rights and liabilities of parties who have contracted for the payment in a foreign currency abroad under a foreign law. If, by a French contract, X promises to pay in Paris 8,100 French francs to A, A should obtain 8,100 French francs, no more and no less. An English court should not, it is respectfully submitted, give him what is the equivalent of a judgment for 18,000 French francs, merely because the French franc happened to depreciate in terms of sterling, a currency no more connected with the rights and liabilities of the parties than the American dollar or the Japanese yen. This, however, it must be admitted, is precisely what the Court of Appeal did in *Madeleine Vionnet et Cie v. Wills*.⁵⁰ Conversely, if sterling had depreciated in terms of French francs between the date of maturity and the date of the judgment, the plaintiff would have recovered less than the equivalent of 8,100 French francs. Thus, if the maturity-date rule is adopted, A, having lent X 1,000 United States dollars payable in New York on January 1, 1981, recovers in an English court in 1982 no more than the sterling equivalent of 1,000 dollars with reference to the rate of exchange on January 1, 1981. As a result of the devaluation of sterling in September, 1981, he, therefore, recovers in 1982 no more than the equivalent of roughly 725 dollars.

Whether an action for the recovery of a debt expressed in a foreign currency is, from the point of view of the English law of procedure, an action for debt in the technical sense or an action for damages, is a question of purely academic interest. There are

⁴⁹ *Hicks v. Guinness* (1925) 269 U.S. 71. This case is the principal American authority for the principle corresponding to Rule 164 above. If the parties agree for payment in a given country, and especially if the law of that country is the proper law of the contract, neither of them has a legitimate complaint if the substantive law of that country affects their mutual rights and liabilities.

⁵⁰ [1940] 1 K.B. 72.

judicial dicta either way.⁵¹ Even if the latter view is adopted, the decision of the House of Lords in the *Volturmo Case*⁵² and that of the Court of Appeal in the *Di Ferdinando Case*⁵³ have nothing to do with the rate of conversion applicable to a fixed amount in foreign currency. On this there is general agreement.⁵⁴ The matter is therefore still *res integra*.

The judgment-date rule has been embodied in the Carriage by Air Act, 1932,⁵⁵ and in the Foreign Judgments (Reciprocal Enforcement) Act, 1933.⁵⁶

Illustrations

1. X & Co. contract to carry goods for A from England to Italy and to deliver them there on February 10, 1919. They do not carry out their contract, but convert the goods. A sues X & Co. in England for damages for breach of contract. The damages are to be assessed, and the rate of exchange for their conversion into sterling is to be fixed, as at February 10, 1919, and not as at the date of judgment.⁵⁷

2. X is the owner of a British ship. Owing to the negligence of X's servants his ship collides on the high seas with an Italian ship owned by A and A's ship suffers damage. She is laid up for repairs for thirty-two days in December, 1917, and in January and February, 1918. During that period A loses 304,000 lire by way of hire which would have been payable by the Italian Government. A sues X in an English court for damages. For the purpose of assessing damages the hire lost by A has to be converted into sterling with reference to the rate of exchange as on the days for which hire would have been payable but for the repairs.⁵⁸

3. By an agreement contained in the settlement of an action in a French court and governed by French law, X promises to pay to A 18,000 French francs. When X is sued upon that promise by A in an English court, it is held by the Court of Appeal that the sum of French francs must be converted into sterling with reference to the rate of exchange at the date on which the debt was payable in France, *i.e.*, that there must be judgment for a sterling amount which at that date would have bought 18,000 francs, irrespective of the amount of francs which the awarded sterling amount will buy on the day of the judgment.⁵⁹

⁵¹ See, on the one hand, *per* Bankes, L.J., in *Société des Hôtels v. Cummings* [1922] 1 K.B. at pp. 450 f.; *per* Scrutton, L.J., *ibid* at pp. 459 f.; *per* Atkin, L.J., at p. 464; *per* Greer, L.J., in *The Baarn* (No. 1) [1933] P. at p. 271; *per* Lord Wright, M.R., delivering the judgment of the Court of Appeal in *Rhokana Corporation, Ltd. v. Inland Revenue Commissioners* [1937] 1 K.B. 788 at pp. 807 f. See, on the other hand, *per* Lord Atkin in *Rhokana Corporation, Ltd. v. Inland Revenue Commissioners* [1938] A.C. 380 at p. 388; *per* Lord Macmillan in *Marrache v. Ashton* [1943] A.C. 311 (P.C.); *per* Lord Wright in *Syndic in Bankruptcy of Khoury v. Khayat* [1943] A.C. 507 (P.C.); *per* Romer, J., in *Lloyd Royal Belge v. Louis Dreyfus & Co.* (1927) 27 Ll.L.R. at p. 294; Bankes and Scrutton, L.J.J., left the question open.

⁵² [1921] 2 A.C. 545.

⁵³ [1920] 3 K.B. 409.

⁵⁴ In *Madeleine Vionnet et Cie v. Wills* [1940] 1 K.B. 72, Clauson, L.J., delivering the judgment of the Court of Appeal, treated the matter as *res integra*. See, however, the doubts expressed by Greer, L.J., in *The Baarn* (No. 1) [1933] P. at p. 271.

⁵⁵ Section 1 (5).

⁵⁶ Section 2 (3).

⁵⁷ *Di Ferdinando v. Simon, Smits & Co., Ltd.* [1920] 3 K.B. 409 (C.A.).

⁵⁸ *S.S. Celia v. S.S. Volturmo* [1921] 2 A.C. 545.

⁵⁹ *Lloyd Royal Belge v. Louis Dreyfus & Co.* (1927) 27 Ll.L.R. 288 (C.A.).

4. Mrs. X, who is a British subject resident in England, owes A, a Frenchman carrying on business in Paris, the sum of 8,100 French francs for clothes supplied by him. The amount is payable in Paris on September 24, 1936, when its equivalent in British currency is £105. On December 1, 1938, A sues Mrs. X in England. On December 19, 1938, Mrs. X pays into the English court the amount of £65, being the equivalent of 8,100 francs on the day of the issue of the writ. The Court of Appeal holds that A is entitled to recover the difference between £105 and £65.⁶⁰

5. Mrs. X, who is a British subject resident in England, owes A, a Frenchman carrying on business at Le Touquet, the sum of 18,035 French francs for money lent and services rendered. The amount is payable at Le Touquet at the end of 1914. In 1919 A sues Mrs. X in England. In 1921 Mrs. X goes to Le Touquet and there pays to A's manager the sum of 18,035 francs. This sum represents in 1921 a much smaller amount in sterling than at the end of 1914. The Court of Appeal holds that Mrs. X has discharged her debt, and that no payment is due from her for the difference in sterling value between 18,035 francs in 1914 and 18,035 francs in 1921.⁶¹

(7) *Exchange Control Legislation.*

RULE 166.—A contractual obligation may be invalidated or discharged by exchange control legislation if—

- (1) such legislation is part of the proper law of the contract⁶²; or
- (2) it is part of the law of the place of performance⁶³; or
- (3) it is part of English law and the relevant statute or statutory instrument is intended to apply to the transaction in question⁶⁴; or
- (4) (*semble*) its enforcement is required by British interests of State, especially if it was enacted in a foreign country by virtue or in fulfilment of an obligation imposed by a Treaty to which the United Kingdom is a party.

(*Semble*) Foreign currency restrictions will not be enforced in England if their enforcement would be

⁶⁰ *Madeleine Vionnet et Cie v. Wills* [1940] 1 K.B. 72 (C.A.).

⁶¹ *Société des Hôtels Le Touquet v. Cummings* [1922] 1 K.B. 451 (C.A.).

⁶² *De Béeche v. South American Stores, Ltd.* [1935] A.C. 148; *Boissevain v. Weil* [1949] 1 All E.R. 146 (C.A.); *Frankman v. Anglo-Prague Credit Bank* [1948] 2 All E.R. 1025, 1030, 1031 (C.A.). On exchange control in the conflict of laws, see Nussbaum, Chap. 8 pp. 475 ff., esp. pp. 487 ff.; Mann, pp. 259-277, and 10 M.L.R. 411; Wolff, ss. 456-460; Cohn, 55 L.Q.R. 552.

⁶³ *Per MacKinnon, L.J.*, in *Kleinwort, Sons & Co. v. Ungarische Baumwolle Aktien-Gesellschaft* [1939] 2 K.B. 678; *Frankman v. Anglo-Prague Credit Bank* [1948] 2 All E.R. 1025 (C.A.).

⁶⁴ *Boissevain v. Weil* [1949] 1 All E.R. 146. See Rule 137, above.

equivalent to a confiscation of property situated outside the territory in which the restrictions are enforced.⁶⁶

The mere fact that such currency restrictions form part of the law of the country in which the debtor resides or carries on business or of which he is a national does not invalidate or discharge his obligation.⁶⁷

Comment

Exchange control is of great and perhaps of growing practical importance. It may, and usually does, prohibit payments in a currency foreign to that of the enacting authority, and payments outside the country of a person's residence or place of business, except with the permission of the competent authority. So far the English courts have had only few opportunities of pronouncing upon the effect of such currency restrictions in the conflict of laws. The Rule is an attempt to summarise the principles laid down by these decisions and to supplement them by a few conclusions drawn from the rules laid down by the courts with respect to the validity and effect of contracts in general.⁶⁸

An English court will clearly refuse to enforce a contract the making or performance of which is prohibited by the Exchange Control Act, 1947, or by any statutory instrument made by virtue of that Act. The question whether the Act or instrument applies to the transaction must be examined in each case.⁶⁹ Thus a British subject resident in Monaco during the war has been held to have violated British exchange control legislation by drawing in favour of a Dutch citizen resident in Monaco a sterling cheque on an English bank for a loan in French francs received from the latter.⁷⁰

An English court will also refuse to enforce a contractual obligation the performance of which would violate a prohibition contained in such currency restrictions as form part of the proper law of the contract. This follows from general principles and was decided by the House of Lords in *De Béeche v. South American Stores, Ltd.*,⁷¹ where the House refused to compel the defendants to

⁶⁶ See Rule 22, p. 152.

⁶⁷ *Kleinwort, Sons and Co. v. Ungarische Baumwolle Aktien-Gesellschaft* [1939] 2 K.B. 678 (C.A.).

⁶⁸ See Rules 137 and 141, above. In case (1) the foreign exchange restrictions are enforced in an English court as a result of the operation of rules of the conflict of laws. In cases (3) and (4) these restrictions invalidate or discharge the obligation either, if the contract is English or the place of performance is in England, by virtue of English domestic law (statute or public policy), or, if the contract is foreign and the place of performance outside England, by virtue of the conflicts rule summarised in Rule 137, above. Whether and to what extent case (2) is a rule of the conflict of laws or a rule of English domestic law is doubtful. See Rule 141, Exception, *ante*, p. 637.

⁶⁹ Difficulties may arise from s. 33 of the Act. See Mann, 10 M.L.R. 415.

⁷⁰ *Boisserevain v. Weil* [1949] 1 All E.R. 146 (C.A.).

⁷¹ [1935] A.C. 148. That the proper law was Chilean, and that this fact supplies the explanation of the case has been shown by Mann, p. 264.

remit to London from Chile rent for premises leased to them by the plaintiffs, such remittance being prohibited by Chilean law which was the proper law of the contract.

That exchange restrictions will excuse performance if they are part of the *lex loci solutionis*, though that law be not the proper law of the contract, results from the principle laid down by the Court of Appeal in *Ralli Bros. v. Sota y Aznar*.⁷² This principle must evidently be applied to a case in which the legislation prohibiting performance consisted of currency restrictions.⁷³ It was clearly the opinion of MacKinnon, L.J.,⁷⁴ and, it seems, also that of the other members of the Court of Appeal in *Kleinwort, Sons & Co. v. Ungarische Baumwolle Industrie Aktien-Gesellschaft*,⁷⁵ that it should be so applied.

Under the Bretton Woods Agreement⁷⁶ 'exchange contracts which involve the currency of any member and which are contrary to the exchange control regulations of any member maintained or imposed consistently with this agreement shall be unenforceable in the territories of any member'. This provision is part of English law.⁷⁷ As a result there may be cases in which an English court will have to refuse to enforce a contract as a result of currency restrictions which form part neither of the proper law nor of the *lex loci solutionis*. Even where the Bretton Woods Agreement does not apply it may be against English public policy to assist a party in violating the exchange control legislation of a foreign country, if the protection of the balance of payments of that country is a matter of vital interest to this country.

Difficulties are likely to arise if foreign currency legislation purports to restrict the right of a person to dispose of property situated in England. These difficulties, it is submitted, can be overcome by applying the principles (a) that property rights are governed by the *lex situs*,⁷⁸ and (b) that the rights and liabilities of the parties to an English contract to be performed in England cannot normally be affected by foreign exchange control laws. Thus, if A, under a contract of bailment governed by English law, deposits securities with the London branch of X, a Czechoslovak bank, his right to demand delivery of the securities from X cannot be affected by Czechoslovak legislation which prohibits such delivery without the consent of the relevant Czechoslovak authorities. It is immaterial whether A himself was resident in Czechoslovakia at the

⁷² [1920] 2 K.B. 287. See above Rule 141, Exception, for the doubts concerning the nature and scope of this principle.

⁷³ *Frankman v. Anglo-Prague Credit Bank* [1948] 2 All E.R. 1025 (C.A.).

⁷⁴ *Kleinwort, Sons & Co. v. Ungarische Baumwolle* [1939] 2 K.B. at p. 694.

⁷⁵ [1939] 2 K.B. 678.

⁷⁶ Articles of Agreement of the International Monetary Fund, Washington, December 27, 1945, Art. VIII, s. 2 (b).

⁷⁷ Bretton Woods Agreements Order, 1946, S.R. & O., 1946, No. 36, s. 3, made under the Bretton Woods Agreements Act, 1945.

⁷⁸ See Rule 180, *ante*, p. 560.

time when he deposited the securities.⁷⁹ Nor, it is submitted, would it have made any difference if X, acting as A's agent, had deposited these securities with an English bank in London. Even if (which is most unlikely) the contract of bailment with the English branch of the foreign bank or with the English bank was intended to be governed by the law of a foreign country, any exchange restrictions forming part of that law could not, it is further submitted, impair the right of the depositor to demand delivery of his property in England, because no foreign country can effectively legislate with regard to property outside its jurisdiction. Although, in this event, the contractual claim of the depositor may be defeated, his claim *in rem* should succeed.⁸⁰ It is difficult to see why the depositor should be prevented from exercising this right of ownership by reason of the fact that the foreign bank, when depositing the securities in England on his behalf, purported to act as principal and not as agent.⁸¹

Moreover, in cases of this kind, the question must always be examined whether the foreign exchange control law does not amount to a confiscatory measure. If it does, English principles of public policy prevent an English court from enforcing it.⁸² Where its enforcement is required by British interests of State, the courts may be faced with the difficult task of having to choose between two conflicting principles of public policy.

The principle summarised in the last paragraph of the Rule was laid down by the Court of Appeal in *Kleinwort, Sons & Co. v. Ungarische Baumwolle Industrie Actien-Gesellschaft*,⁸³ where, the proper law of the contract being English law and London being the place of performance, the defendants tried in vain to rely on the exchange restrictions forming part of the law of Hungary, their place of business, as an excuse for performance in England.

⁷⁹ *Frankman v. Anglo-Prague Credit Bank* [1948] 2 All E.R. 1025 (C.A.).

⁸⁰ *Kahler v. Midland Bank, Ltd.* [1948] 1 All E.R. 811 (C.A.), is, it is submitted, irreconcilable with recognised principles of the conflict of laws and with the subsequent decision of the Court of Appeal in *Frankman's Case*, above.

⁸¹ See, however, *Kahler v. Midland Bank, Ltd.*, above. See 11 M.L.R. 479.

⁸² See Rule 22, *ante*, p. 152.

⁸³ [1939] 2 K.B. 678.

QUASI-CONTRACT¹

RULE 167.—The rights and obligations of the parties to a quasi-contractual relationship are determined in accordance with the proper law of the quasi-contractual relationship. *Seemle*, the proper law of the quasi-contractual relationship is determined as follows:—

- (1) if the claim arises out of a contract, the proper law is the proper law of the contract;
- (2) if the claim arises in relation to an immovable (land), the proper law is the law of the country where the immovable is situate (*lex situs*);
- (3) if the claim arises in any other circumstances, the proper law is the law of the country where the enrichment giving rise to such a claim occurs.

Comment

Quasi-contract has been defined as ‘liability, not exclusively referable to any other head of the law, imposed upon a particular person to pay money to another particular person on the ground of unjust benefit’.² Its object has been described in these words: ‘... any civilised system of law is bound to provide remedies for cases of what has been called unjust enrichment or unjust benefit, that is to prevent a man from retaining the money of or some benefit derived from another which it is against conscience that he should keep. Such remedies in English law are generically different from remedies in contract or in tort, and are now recognised to fall within a third category of the common law which has been called quasi-contract or restitution’.³ It is a claim outside the contract, arising out of an obligation imposed by law.⁴ The growing importance

¹ Wolff, ss. 480, 481, pp. 505–508; Westlake, s. 235, p. 325; Wharton, *Conflict of Laws* (2nd ed., 1881), par. 424, p. 484; Beale, II, p. 1429; Restatement ss. 452, 453, pp. 543, 544; Gutteridge and Lipstein (1939) 7 Camb.L.J. 80; Falconbridge (1945) 23 Can Bar Rev 469, 471; *Conflict of Laws* (1947) p. 364; Morris (1946) 62 L.Q.R. 170, at pp. 180–182; McNair (1944) 60 L.Q.R. 160, 161–162; Gutteridge (1945) 61 L.Q.R. 97, 98; Williams, *Law Reform (Frustrated Contracts) Act, 1948* (1944) pp. 18–20.

² Winfield, *Province of the Law of Tort* (1931) p. 119.

³ *Fibrosa Spolka Akcyjna v. Fairbairn Lawson Combe Barbour, Ltd.* [1948] A.C. 32, 61, per Lord Wright.

⁴ *Ibid.*, pp. 63, 70, per Lord Wright, p. 46, per Lord Simon.

of this branch of the law would appear to justify a separate treatment in the conflict of laws, although the courts have seldom been confronted with cases of this kind, and writers have offered little guidance.

As in domestic law so in the conflict of laws, quasi-contractual claims have usually been discussed in connection with contract or tort. Yet it was questioned by Dicey whether the rules relating to torts applied 'to an action grounded not on a tort or wrong in the strict sense of that term committed in a foreign country, but upon the breach in such country of a quasi-contract existing under the law of such country'. Dicey concluded, 'the reply must (*semble*) be in the negative. X may be sued in England for the breach in a foreign country of a quasi-contract existing under the law thereof, though no such quasi-contract is known to the law of England. But it may often be a difficult matter to determine whether an action brought in respect of an act done in a foreign country is in truth grounded upon a tort or upon the breach of a quasi-contract existing under the law of such country'.⁵

Again, it would appear that the rules relating to contracts do not necessarily apply to quasi-contractual relationships. If the test based on the presumed intention of the parties is applied—and this is the test upon which at present the courts rely when dealing with a contract which does not include an express choice of law—the result is highly artificial. It involves a cumulation of fictions: first quasi-contract must be assimilated to contract and, second, the intention must be presumed that restitution should take place.⁶

These difficulties disappear if it is assumed that a quasi-contractual relationship has its own proper law, seeing that the duty of restitution arises by operation of law independently of any contract, and that the proper law is the law of the country with which this duty is most closely connected.⁷ An analysis of quasi-contractual relationships shows, it is believed, that they arise either (1) in connection with a contract, or (2) in relation to an immovable (land), or (3) in connection with an enrichment which is unrelated to any previous contract or to an immovable (land). It is believed that each of these relationships is governed by its proper law, which is the law governing the original contract (case (1)),⁸ the law of the *situs* (case (2)),⁹ or the law of the place where the enrichment accrued (case (3)).¹⁰

Illustrations

1. A & Co., an Italian shipping firm, places a contract for the construction of a vessel with X & Co., an English firm of shipbuilders, and pays

⁵ 5th ed., p. 783.

⁶ Gutteridge and Lipstein, *loc. cit.*, p. 90.

⁷ Compare Morris (1946) 62 L.Q.R. 170, at p. 183.

⁸ Wolff, s. 481; Morris, *loc. cit.*

⁹ Compare *Bathhyany v. Walford* (1887) 36 Ch.D. 269.

¹⁰ Beale, II, p. 1429; Restatement, s. 452; Gutteridge and Lipstein (1939) 7 Cambridge L.J. 80, at p. 92.

£10,000 in advance. The contract is to be governed by Italian law. The contract is frustrated by the outbreak of war. After the conclusion of peace A & Co. sue for the return of the £10,000. (*Semble*), Italian law applies.¹¹

2. A in England is indebted to B in France under a contract governed by English law. X in Belgium and Y in Holland are his sureties under a contract of suretyship governed by French law. X pays the debt in Belgium and tries to obtain contribution from Y. (*Semble*), French law applies.¹²

3. A is the holder of a bill of exchange drawn by B in London upon X in Basle who accepted it there. Having lost his remedy owing to absence of protest, A sues X in England in virtue of section 1052 of the Swiss Code of Obligations,¹³ which allows a claim for unjustifiable enrichment after the holder's remedies arising out of the bill of exchange have been lost. (*Semble*), Swiss law applies.¹⁴

4. X in Denmark is the bailee of goods owned by A in England. X sells the goods for 1,000 kroner. Upon the arrival of X in England A sues him in an English court for the return of the money on the ground that he is liable to return it according to Danish law as unjustifiable enrichment. (*Semble*), the proper law of the contract between bailor and bailee applies.¹⁵

5. X was the tenant for life of land in Hungary under a *fideicommissum*. His personal representative in England is sued by the remainderman for waste. Hungarian law applies.¹⁶

6. A is the lessee of a building in France. At the expiry of the lease he sues the landlord in England in respect of improvements and for compensation in respect of goodwill. (*Semble*), French law applies.¹⁷

7. X, while mountaineering in Switzerland, meets with an accident and is

¹¹ It is the proper law of the contract. It has been suggested that the *lex loci actus* should apply. See Gutteridge and Lipstein (1939) 7 Cambridge L.J. 80, at p. 89; Williams, *Law Reform (Frustrated Contracts) Act*, 1943, p. 19. But see Morris (1946) 62 L.Q.R. 170, at pp. 180, 182; Falconbridge, *Conflict of Laws*, p. 365. In the present case the application of English law as the *lex actus* would appear to create difficulties, seeing that the Law Reform (Frustrated Contracts) Act, 1943, s. 1 (1), applies only to contracts governed by English law. Unless it can be said that the term 'contract' includes quasi-contracts, s. 1 (1) of the Act does not apply and the case must be decided in accordance with the common law. Compare *Cantiare San Rocco v. Clyde Shipbuilding and Engineering Co., Ltd.*, [1924] A.C. 226, where the House of Lords applied Scottish law to the claim for restitution, apparently on the ground that Scottish law governed the contract. It would appear that for the same reason English law was applied in *Fibrosa Spolka Akcyjna v. Fairbairn Lawson Combe Barbour, Ltd.* [1943] A.C. 32 in respect of a claim for money had and received which arose out of a contract the proper law of which seems to have been English. Compare also *Durra v. Bank of New South Wales* [1940] V.L.R. 170, where in an action for money had and received service of a writ out of the jurisdiction was granted under Order XI, r. (e), which envisaged a breach within the jurisdiction of a contract, wherever made, to be performed within the jurisdiction. And see *Boissevain v. Weil* [1949] 1 All E.R. 146.

¹² French law is the proper law of the contract.

¹³ See also s. 67 of the Italian Bills of Exchange Act, 1933; s. 89 of the German Act of 1933 and of the Austrian Act of 1932.

¹⁴ Swiss law, being the *lex actus*, governs the liability of the acceptor. See Bills of Exchange Act, 1882, s. 72 (2).

¹⁵ The claim, as presented under Danish law, is of a quasi-contractual character and is not unlike that of following or tracing in English law. If the claim were conceived as brought in tort, it would probably fail, notwithstanding that it would be actionable in England, seeing that it might not be regarded as 'not justifiable' abroad. See *post*, Rule 174.

¹⁶ *Batthyany v. Walford* (1887) 36 Ch.D. 269, 278. Hungarian law is the *lex situs*. The action for waste was classified as quasi-contractual and not as a claim in the nature of a tort.

¹⁷ French law is the *lex situs*.

rescued by a search party arranged by A. Upon his return to England X is sued by A for the payment of expenses incurred by A in effecting the rescue. Under Swiss law such expenses can be recovered in virtue of a quasi-contractual claim for *negotiorum gestio*. *Semble*, Swiss law applies.¹⁸

8. A, a Frenchman, in the mistaken belief that he owes £100 to X, a Dutchman, makes a payment in Paris into X's bank account in London. *Semble*, English law applies.¹⁹

¹⁸ Swiss law is the *lex loci actus* and the place where the benefit is conferred. It is impossible to refer to the proper law of the contract because there is no agreement in the nature of a contract.

¹⁹ England is the place where the enrichment occurs. It is doubtful whether the *lex actus* is English or French, but this question is probably irrelevant. See Morris (1946) 62 L.Q.R. 170, at pp. 180-182; Restatement, ss. 452, 453.

MARRIAGE

1. VALIDITY OF MARRIAGE ¹

RULE 168.—Subject to the Exceptions hereinafter mentioned, a marriage is valid when

- (1) each of the parties has, according to the law of his or her respective domicile, the capacity ² to marry the other; and
- (2) any one of the following conditions as to the form of celebration is complied with (that is to say):
 - (i) if the marriage is celebrated in accordance with the local form ³; or
 - (ii) if the parties enjoy the privilege of extritoriality, and the marriage is celebrated in accordance with any form recognised as valid by the law of the State ⁴ to which they belong ⁵; or
 - (iii) if the marriage [being between British subjects?] ⁶ is celebrated as nearly as

¹ Cheshire, pp. 266-292, 417-434; Wolff, pp. 327-354; Westlake, ss. 17-34; Johnson, Vol. 1, pp. 274-327; Falconbridge, pp. 634-648; Restatement, ss. 121-133; Story, ss. 79-81, 107, 124 (b); Goodrich, ss. 113-115; 1938 Jo. Comp. Leg. 55 (3rd series, Vol. 20); Savigny, s. 379, p. 290, s. 381, pp. 318-325. For the continental jurisprudence see Arminjon, II, 200-205; Reape, Einführungsgesetz, pp. 230, 246, 247, 255-258. As to polygamous marriages see *ante*, pp. 222-228. For proof of marriage in matrimonial causes generally see *ante*, p. 221; and Montrose, 11 M.L.R. 326 (1948).

² *Re Bozzelli's Settlement* [1902] 1 Ch. 751; *Re Green* (1909) 25 T.L.R. 222, and see cases supporting the negative proposition stated in the next Rule.

³ *Berthiaume v. Dastous* [1930] A.C. 79; *Scrimshire v. Scrimshire* (1752) 2 Hagg.Cons. 395; *Butler v. Freeman* (1756) Amb. 301; *Dalrymple v. Dalrymple* (1811) 2 Hagg.Cons. 54; *Herbert v. Herbert* (1819) 2 Hagg.Cons. 263; *Swift v. Kelly* (1835) 3 Knapp. 257; *Ward v. Dey* (1849) 1 Rob.Ecc. 759; *Simonin v. Mallac* (1860) 2 Sw. & Tr. 67; *Rooker v. Rooker* (1864) 3 Sw. & Tr. 526; *Lightbody v. West* (1903) 19 T.L.R. (C.A.) 319; *Ogden v. Ogden* [1908] P. 46; *Re Green* (1909) 25 T.L.R. 222; *Apt v. Apt* [1948] P. 83.

⁴ As to the difficulty of applying this sub-clause where a State, e.g., the British Empire, consists of several countries, see p. 771, *post*.

⁵ *Pertreis v. Tomdear* (1790) 1 Hagg.Cons. 136; *Lloyd v. Petitjean* (1839) 2 Curt. 251, and *O'Connor v. Ommanney*, *ibid.* 259; *Baillet v. Baillet* (1901) 17 T.L.R. 817; *Higgs v. Higgs* (1920) 37 T.L.R. 670.

⁶ All the reported cases appear to concern British subjects, but see p. 772, *post*.

possible in accordance with the requirements of the English common law in a country where the use of the local form is impossible⁷; or

- (iv) if the marriage is celebrated in accordance with the provisions of the Foreign Marriage Act, 1892, s. 22, between parties of whom at least one is a member of His Majesty's Forces serving in any foreign^{7a} territory or employed in such territory in such other capacity as may be prescribed by Order in Council⁸; or
- (v) if the marriage, being between parties, one of whom at least is a British subject, is celebrated outside the United Kingdom in accordance with the provisions of, and the form required by, the Foreign Marriage Acts, 1892-1947.

Comment

The validity of a marriage under this Rule depends on the fulfilment of two conditions: first, on the capacity of the parties to marry each other; secondly, on the celebration of the marriage in due form: the word 'form' includes all the formalities necessary to the validity of a marriage. The above conditions were not distinguished in the earlier decisions, according to which compliance with the *lex loci celebrationis* seems to have been the only criterion.⁹

⁷ *Ruding v. Smith* (1821) 2 Hagg.Cons. 371; *Lord Cloncurry's Case* (1811) cited 6 S.T.N.S. 87; *Lautour v. Teesdale* (1816) 8 Taunt. 830; *Cruise on Dignities*, 276; *Limerick v. Limerick* (1863) 32 L.J.P. & R. 92; *The Lauderdale Peerage Case* (1885) 10 App.Cas. 692; *Phillips v. Phillips* (1921) 38 T.L.R. 150; *Wolfenden v. Wolfenden* [1946] P. 61; and see discussion of *R. v. Millis* (1844) 10 Cl. & F. 534, *post*, p. 770.

^{7a} The term 'foreign territory' is defined in the section (as amended) so as to exclude any part of British territory. The term 'foreign' is thus used in this Rule in a sense different from, and less extensive than, the sense given it in other Rules of this Digest.

⁸ Foreign Marriage Act, 1947, s. 2, substituting a new section for s. 22 of the Act of 1892. The Act of 1947 has been in force since February 1, 1948; see 1947 S.R. & O. No. 2875 to which reference should be made for details regarding the operation of the Act.

⁹ *Scrimshire v. Scrimshire* (1752) 2 Hagg.Cons. 395; *Dalrymple v. Dalrymple* (1811) 2 Hagg.Cons. 54; *Jones v. Robinson* (1815) 2 Phill. 285.

(1) *Capacity.*

From 1859 onwards, the courts began to distinguish between the two conditions referred to above, holding that fulfilment of the first depended on compliance with the law of the domicile of each of the parties to the marriage. This result was only achieved gradually, for the nationality¹⁰ and intended matrimonial residence¹¹ of the parties were treated as a material factor in the first cases which distinguished between questions of capacity for and the formal validity of marriage. It must be remembered, however, that the doctrine of the exclusive application of the law of the domicile to matters affecting status was then only in its infancy. For instance, nationality¹² and matrimonial residence¹³ were then treated as a sufficient basis of jurisdiction in divorce.¹⁴

In 1877, in *Sottomayor v. De Barros*,¹⁵ the Court of Appeal held that a marriage celebrated in England, and valid by English law, was void on the ground that the parties were within the prohibited degrees of relationship by the law of Portugal, their common antenuptial domicile. Although this case has not escaped judicial criticism,¹⁶ the judgments in subsequent cases¹⁷ have treated it, together with the first decisions which distinguished the questions of form and capacity in relation to marriage, as laying down a general principle in the terms of Rule 168 (1).

With one exception,¹⁸ these subsequent decisions all illustrate the negative application of the doctrine, and they are accordingly best discussed in relation to the next Rule. It may be observed here, however, that the manner in which the law on the topic under consideration has developed has led to two somewhat illogical consequences.

In the first place, the consents of and notices to parents or others, rendered necessary by many systems of laws, to the validity of a marriage, have been considered as part of the form or ceremony of marriage,¹⁹ and a person's inability, under the law of his domicile, to marry without them has not been treated as affecting his capacity to marry. This is because the validity of marriages celebrated in Scotland without parental consent was established by a series of decisions given at a time when the courts did not distinguish between capacity and form in relation to marriage, and brought

¹⁰ *Mette v. Mette* (1859) 1 Sw. & Tr. 416.

¹¹ *Brook v. Brook* (1861) 9 H.L.C. 193, at p. 207, and pp. 212-213.

¹² *Deck v. Deck* (1860) 2 Sw. & Tr. 90.

¹³ *Niboyet v. Niboyet* (1878) 4 P.D. 1.

¹⁴ Rule 31, *ante*.

¹⁵ (1877) 3 P.D. 1.

¹⁶ *Sottomayor v. De Barros* (1879) L.R. 5 P.D. 94, at p. 100; *Ogden v. Ogden* [1908] P. 46, at pp. 73-76.

¹⁷ *Re De Wilton* [1900] 2 Ch. 481; *Re Bozzelli's Settlement* [1902] 1 Ch. 751; *Re Paine* [1940] Ch. 46.

¹⁸ *Re Bozzelli's Settlement* [1902] 1 Ch. 751, *stated post*, Illustration 1, p. 776.

¹⁹ *Post*, p. 765.

both within the principle that the validity of a contract depends upon the *lex loci contractus*.²⁰ When this distinction was adopted, the effect of these decisions could only have been reversed by legislation, and the courts were thus driven to adopt the logically doubtful theory that the question of parental consent belongs to the marriage ceremony.

Secondly, an anomalous exception to the negative application of the doctrine under consideration was, as we shall see, established by the decision of Sir James Hannen, P., on the second hearing of the case of *Sottomayor v. De Barros*.²¹ Although it may have been justified by some remarks of the Court of Appeal on the previous hearing of the case,²² the decision was largely based on the judgments in earlier cases which stressed the predominance of the *lex loci contractus* in all matters affecting the validity of marriage. The learned judge appears to have failed to appreciate the significance of the first decisions which differentiated questions of capacity from those of formal validity, and his judgment in favour of the validity of a marriage celebrated in England between parties one of whom was domiciled there, and the other of whom was incapable of inter-marrying with him by the law of her domicile, gives a national bias to English Private International Law which is logically indefensible.

Subject to the above anomalies, the rule that capacity to marry depends upon the law of the ante-nuptial domicile of each of the parties is borne out to the full by the authorities, and it is submitted that it is consistent with sound principle because a person's status is determined by the law of his domicile, the incidence of status cannot be affected by the intention of the parties, and the question of a person's capacity to marry is a matter of public concern to the country of the domicile.²³

The irrelevance of a woman's intentions to the question of her capacity to marry when she is under age, or within the prohibited degrees of relationship to her intended spouse, precludes any exclusive reference to the law of the husband's domicile which is, as we have seen, decisive in determining whether the marriage is voidable.²⁴ The public concern of the law of the ante-nuptial domicile as to the marriages of those who are subject to it may justify a distinction in the matter of capacity between marriage and other contracts,²⁵ but it certainly does not justify any distinction

²⁰ *Compton v. Bearcroft* (1769) 2 Hagg.Cons. 430, 443, 444; *Grierson v. Grierson* (1781) 2 Hagg.Cons. 86, 98, 99; *Beamish v. Beamish* (1788) 2 Hagg.Cons. 83; *Bell v. Graham* (1859) 13 Moo.P.C. 242; *Brook v. Brook* (1861) 9 H.L.C. 193 at p. 218.

²¹ (1879) L.R. 5 P.D. 94; see first Exception to Rule 169, *post*.

²² (1877) 3 P.D. 1, at pp. 6-7.

²³ *Graveson, Jo.Comp.Leg.*, Vol. 20, Part I, p. 62 (1938).

²⁴ *De Reneville v. De Reneville* [1948] P. 100, *ante*, p. 259, Rule 36 (2).

²⁵ *Ante*, p. 619.

such as that which is sometimes suggested ²⁶ between an incapacity affecting a woman and one affecting a man. Moreover, such a distinction is certainly not countenanced by the authorities.²⁷

It would ignore the fact that laws with regard to capacity to marry may be based on views as to the immorality of certain marriages such as those between uncle and niece as well as their social inexpediency from the point of view of eugenics.²⁸ The latter may possibly be treated as the concern of the husband's domicile alone,²⁹ as it is essentially post-matrimonial; the former is, however, essentially a pre-matrimonial matter and it would be anomalous for English law to give effect to the moral principles prevailing in a foreign country when the transaction in question concerns a male domiciliary, and to ignore them where a female alone is involved.

It has been thought desirable to deal generally with the subject of capacity to marry at this stage, although the cases are mainly concerned with the negative application of the rule under consideration, because Professor Cheshire has severely criticised Dicey's views.³⁰ He submits that the governing law in questions of capacity to marry should be that of the intended matrimonial home, which is *prima facie* the domicile of the husband at the time of the marriage, but which may be some other country if the requisite intention to settle there is proved to have existed at the time of the marriage, and to have been followed by residence in such country.³¹ This view is submitted by its author to be consistent with the majority of the decisions, although it can only be adjusted with the most recent one ³² by ignoring the judge's finding as to domicile, and it is perhaps supported by some dicta, although, as Dicey pointed out,³³ the references to matrimonial residence in the principal one appear to have been incidental.³⁴ As Professor Cheshire admits,³⁵ his views do not accord with the reasons given for many of the relevant judgments, the most recent of which expressly adopts our Rules.³⁶

So far as the sociological desirability of these is concerned, 'an ingenious mind can always suggest circumstances in which a rule will be difficult to apply or will operate unfairly or clumsily',³⁷ and Professor Cheshire gives instances of undeniably hard cases arising

²⁶ See discussion of Professor Cheshire's views below.

²⁷ Cf. *Mette v. Mette* (1859) 1 Sw. & Tr. 416, and *Re Paine* [1940] Ch. 46.

²⁸ This distinction is suggested in the 5th edition of this work at p. 748, n. (h).

²⁹ See Cheshire, p. 271.

³⁰ Cheshire, p. 266 *et seq.*

³¹ *Ibid.*, p. 277.

³² *Re Paine* [1940] Ch. 46; see Schmitthoff, 56 L.Q.R. 514 (1940).

³³ 5th ed., p. 753, note (b); see *post*, p. 782, note 66.

³⁴ *Brook v. Brook* (1861) 9 H.L.C. 198, at p. 212-213, *per* Lord Campbell, L.C.; see also *ibid.*, at p. 207; *Warrender v. Warrender* (1835) 2 Cl. & F. 488, at p. 536; *De Reneville v. De Reneville* [1948] P. 100, at p. 114.

³⁵ Cheshire, p. 291.

³⁶ *Re Paine* [1940] Ch. 46.

³⁷ Cheshire, p. 278.

from the negative application of the Rule under consideration.³⁵ It is submitted, however, that these are more the result of such rules as to domicile as the revival of the domicile of origin and the impossibility of acquiring a domicile of choice by intention alone, than the outcome of the application of the law of the domicile to questions of capacity to marry.

It is also submitted that a consistent application of Professor Cheshire's rule would produce some curious consequences. Thus, H and W who are first cousins marry in England, where they are both domiciled, with the intention of settling forthwith in Spain. The marriage is valid according to English law, but void in the sense that no decree of any court is required to invalidate it according to the law of Spain.³⁹ X is entitled to claim property situate in England on W's marriage, and the property is transferred to him on the day of the marriage. The next day H and W go to Spain. According to Professor Cheshire, the marriage would then be void and X would presumably be liable to retransfer the property.

Any rule under which it is impossible to predicate at the date of the marriage with knowledge of all material facts whether it is void or valid is, it is submitted, undesirable. Any rule which gives preference in matters of capacity to the law of the domicile of the husband is, as has been seen, dubious on general principles, and our Rules 168 and 169 at least have the merit of avoiding these pitfalls.⁴⁰

(2) Form.

(i) Local form.⁴¹ A marriage celebrated in the mode, or according to the rites or ceremonies, held requisite by the law of the

³⁸ Cheshire, at p. 271-2. *E.g.*, W, whose domicile of origin is Spanish, acquires a Swedish domicile of choice which she retains for twenty years; she then abandons her Swedish domicile and tours the continent. She marries H, her first cousin in Paris. H is domiciled in England where the couple intend to settle. The marriage is void by Spanish law, and according to the rules which are being discussed it would therefore be held void in England; it would, of course, be valid on Professor Cheshire's principle.

³⁹ If a marriage is merely voidable in the sense that a decree is necessary to invalidate it according to the law of the wife's antenuptial domicile, as was the case, for instance, with marriages within the prohibited degrees of relationship under English law prior to the Marriage Act, 1835, different considerations might apply for the wife may have forfeited her right to apply to the courts of her domicile on her marriage. There is, however, no English authority on this point, but see *Sutton v. Warren* (1845) 10 Metc. 451, where the court of Massachusetts held valid a marriage of nephew and aunt celebrated in England before the Act of 1835.

⁴⁰ Falconbridge, p. 641, describes Cheshire's views as 'clearly untenable'. Moreover, having regard to their tendency to ignore the personal law of one of the parties in the case of marriage, it is curious that on p. 524, Professor Cheshire argues that adoption is governed by the personal law of both parent and child on the ground that 'adoption alters the status of both parties.'

⁴¹ The courts will sometimes, when some evidence is given that persons who have lived as reputed husband and wife have gone through some marriage ceremony in a foreign country, presume, on very slight grounds, that the local form of

country where the marriage takes place, is (as far as formal requisites go) valid. Our courts in this matter give effect to the principle that the form of a contract⁴² is governed by the law of the place where the contract is made, and hold that, though under certain circumstances other forms may be sufficient, yet the local form always suffices, and that in general 'the law of a country where a marriage is solemnised must alone decide all questions relating to the validity of the ceremony, by which the marriage is alleged to have been constituted'.⁴³ 'If a marriage is good by the laws of the country where it is effected, it is good all the world over, no matter whether the proceeding or ceremony which constituted marriage according to the law of the place would not constitute marriage in the country of the domicile of one or other of the spouses'.⁴⁴ Whether a religious ceremony is requisite or not, depends entirely on the local law, and a marriage valid thereunder cannot be questioned on the ground that it violates religious principles binding on one or even both parties to the marriage.⁴⁵ On the other hand a religious marriage is treated as void if it does not receive recognition under the local law.⁴⁶

If the local law recognises marriage by cohabitation and repute, a union so constituted will be recognised in England.⁴⁷ Similarly, if a marriage may be validly constituted *per verba de presenti* under the law of the place where it is celebrated, a marriage so constituted will be recognised in England.⁴⁸

If the local law recognises marriages by proxy, such a union will be treated as valid in England even if one of the parties is domiciled and resident in England, and the power of attorney authorising the proxy to act is executed in England. The transaction is not contrary to public policy, and 'the method of giving consent, as distinct from the fact of consent, is essentially a matter for the *lex loci celebrationis* and does not raise a question of capacity or . . . essential validity'.⁴⁹

marriage was followed: *Re Shephard* [1904] 1 Ch. 656, where the alleged marriage was asserted to have been celebrated in France, but can hardly have been in any event valid by French law. The decision illustrates the tendency to assume that foreign law is in its operation similar to English law with its fondness to presume legal origins for relations existing *de facto*. It is quite different when it is a case of proving bigamy; contrast *R. v. Naguib* [1917] 1 K.B. 359; *R. v. Moscovitch* (1927) 20 Cr.App.R. 121, with *Spivack v. Spivack* (1930) 46 T.L.R. 243; and see *ante*, p. 221.

⁴² As to formal validity of contract, see Rule 140, p. 624, *ante*.

⁴³ *Sottomayor v. De Barros* (1877) 3 P.D.(C.A.) 1, 5, *per curiam*.

⁴⁴ *Berthiaume v. Dastous* [1930] A.C. 79 at p. 83.

⁴⁵ *Despatie v. Tremblay* [1921] 1 A.C. 702; *Ussher v. Ussher* [1912] 2 Ir.R. (C.A.) 445; contrast *Re Alison's Trusts* (1874) 31 L.T. 874.

⁴⁶ *Re De Wilton* [1900] 2 Ch. 481; *Berthiaume v. Dastous* [1930] A.C. 79; *Johnstone v. Godet* (1813) Ferg. Cons. Rep. 8.

⁴⁷ *Rooker v. Rooker* (1864) 3 Sw. & Tr. 526; *Re Green* (1909) 25 T.L.R. 222.

⁴⁸ *Compton v. Bearcroft* (1769) 2 Hagg.Cons. 430 and other authorities cited in note 20, p. 761, *ante*. Such a marriage has been rendered ineffective in Scotland as from January 1, 1940, by s. 5 of the Marriage (Scotland) Act, 1939,

⁴⁹ *Apt v. Apt* [1948] P. 83, 88 (C.A.).

The form need not necessarily be the form required by the *lex loci in ordinary cases*. All that is essential in order to bring a marriage within sub-clause (1) of the Rule is that it should be contracted in a form which, according to the law of the country where the marriage takes place, is sufficient, under the circumstances of the particular case, to constitute a valid marriage. Suppose, for example, that the law of France were that marriages between British subjects might be validly contracted in France if celebrated in accordance with the rites of the Church of England without any further ceremony. Then a marriage in Paris between H and W, British subjects, celebrated according to the rites of the Church of England, would probably be valid here, as being celebrated according to the form required by the *lex loci contractus*. There is, however, no authority exactly in point, for in *Re Alison's Trusts*⁵⁰ neither the local form proper nor the form recognised by the local law as applicable to foreigners in Persia was observed, and the marriage was accordingly held to be invalid.

In two respects, an extremely wide extension has been given to the principle embodied in sub-clause (1) of the Rule under consideration.

In the first place, the consents of and the notices to parents or others, necessary by many laws to the validity of a marriage, have been considered as part of the form or ceremony of the marriage.⁵¹

In the second place, the validity of a marriage is in no degree affected by the fact that the object of the parties in marrying away from their own country is to evade the requirements of the law of their domicile as to consents, publicity, etc., or that no regular ceremony is required by the law of the country where the marriage takes place.⁵²

Hence, on the one hand, marriages without parental consent

⁵⁰ (1874) 31 L.T. 638.

⁵¹ *Simonin v. Mallac* (1860) 2 Sw. & Tr. 67; *Sottomayor v. De Barros* (1877) 3 P.D.(C.A.) 1, 7, *per curiam*; *Chetti v. Chetti* [1909] P. 67, 81-87; *Ogden v. Ogden* [1908] P.(C.A.) 46, 75, *per curiam*. Compare the Irish case, *Steele v. Braddell* (1838) Milw. 1. In Quebec capacity is regulated strictly by domicile, and consent affects capacity: Lafleur, *Conflict of Laws*, pp. 59, 60; Johnson, 256-289; *McLure v. McLure* [1946] R.L. 126. Ontario claims power to deal with consent as avoiding a marriage if not duly given; thus holding that consent falls under the head of solemnisation of marriage, on which alone Provincial Legislatures may pass laws. See Keith, *Jo.Comp.Leg.*, vi, 198-200; *Re Marriage Legislation in Canada* [1912] A.C. 880; 6 Can.Bar Rev. 570-574. The case of *Ogden v. Ogden* has been followed in New Zealand; see *Carter v. Carter* [1932] N.Z.L.R. 1104.

⁵² The following cases concern marriages which apparently have this object: *Dalrymple v. Dalrymple* (1811) 2 Hagg.Cons. 54; *Serimshire v. Serimshire* (1752) 2 Hagg.Cons. 395; *Swift v. Kelly* (1835) 3 Knapp. 257; *Simonin v. Mallac* (1860) 2 Sw. & Tr. 67; *Ogden v. Ogden* [1908] P.(C.A.) 46; *Stathatos v. Stathatos* [1918] P. 46; *De Montagu v. De Montagu* [1913] P. 154. See remarks of Lord Brougham in *Warrender v. Warrender* (1835) 2 Cl. & F. 488, 548. This may result in conflict with foreign laws, e.g., France; Arminjon, ii, 204, n. 2, where such action constitutes a *fraude à la loi*; *ibid.*, i, 248-280, ii, 449-454.

between domiciled English persons, celebrated in a foreign country, are valid if solemnised according to the forms required by the law of the country (*e.g.*, Scotland) where the marriage takes place although the object of resorting to such other country was to evade the requirements of English law⁵³; and on the other hand, the marriage in England of foreigners (*e.g.*, French subjects domiciled in France) duly celebrated according to the forms of English law, has been held valid here, although it may be voidable under French law, either for want of parental consent or else because the parties wanted to evade its operations.⁵⁴

With reference to a case of the latter type,⁵⁵ the Court of Appeal thus expressed itself:—

‘The objection to the validity of the marriage in that case, which was solemnised in England, was the want of the consent of parents required by the law of France, but not, under the circumstances, by that of this country. In our opinion, this consent must be considered a part of the ceremony of marriage, and not a matter affecting the personal capacity of the parties to contract marriage.’⁵⁶

The fact that the above quotation is from the judgment of the Court of Appeal in the first and only case which distinguishes between questions of capacity and questions of form so far as marriages celebrated in England are concerned, may account for this explanation of the earlier decision of the Divorce Court in *Simonin v. Mallac*.⁵⁷ In that case a marriage in England of persons domiciled in France without the parental consents required by French law was held valid mainly on the old theory of the general predominance of the *lex loci celebrationis* in matters affecting marriage. It could, of course, have been overruled by the Court of Appeal when they relied upon the new distinction between form and capacity in *Sottomayor v. De Barros*,⁵⁸ but, as we have seen, there were reasons of an historical nature, resting on the recognition of clandestine marriages celebrated in Scotland between persons domiciled in England, why this should not have been done.⁵⁹

From the analytical point of view, there may be good reason for characterising the requirements of English law as to parental

⁵³ *Compton v. Bearcroft* (1769) 2 Hagg.Cons. 430 and other cases cited p. 761, n. 20, *ante*, but residence of one of the parties in Scotland for twenty-one days prior to the ceremony has been required since the Marriage (Scotland) Act, 1856, s. 1, and marriages *per verba de presenti* have been impossible in Scotland since January 1, 1940 (Marriage (Scotland) Act, 1939, s. 6).

⁵⁴ *Simonin v. Mallac* (1860) 2 Sw. & Tr. 67; *Ogden v. Ogden* [1908] P. 46. A French nullity decree, pronounced while the parties are domiciled in France, will, however, be recognised in England: *ante*, p. 381.

⁵⁵ *Simonin v. Mallac* (1860) 2 Sw. & Tr. 67.

⁵⁶ *Sottomayor v. De Barros* (1877) 3 P.D. 1, 7, *per curiam*.

⁵⁷ (1860) 2 Sw. & Tr. 67.

⁵⁸ (1877) 3 P.D. 1; but see *Brook v. Brook* (1861) 9 H.L.C. 193, at p. 218, where Lord Campbell, L.C., treated *Simonin v. Mallac*, *supra*, as a decision turning on the form of the marriage ceremony.

⁵⁹ *Ante*, pp. 760-761.

consents as matters of form because they do not affect the validity of the marriage, while there is less reason for doing so in the case of a foreign law which may have this effect, such as that with which the court was concerned in *Simonin v. Mallac*.⁶⁰ There was, however, an additional consideration which may have influenced the Court of Appeal, when deciding *Sottomayor v. De Barros*,⁶¹ to characterise the prohibition with which *Simonin v. Mallac*⁶² was concerned as a matter of form. It was not absolute, but subject to dispensation provided the procedure laid down in Articles 151-2 of the French Civil Code was followed. In this respect, it differed from the prohibitions against marriage without parental consent imposed by Article 148 of the French Civil Code on sons under the age of 25 with which the Court of Appeal was concerned in the later case of *Ogden v. Ogden*.⁶³ Nevertheless, the provisions of Article 148 were characterised as matters of form,⁶⁴ and Dicey's opinion was that consent either affects capacity or else it does not, and to mix the two views would merely confuse the issue.⁶⁵

In *Ogden v. Ogden*⁶⁶ the respondent to a nullity petition on the ground of her bigamy alleged as a defence that her first marriage, which was celebrated in England, was void on the ground of the absence of the consent of the parents of her first husband who was domiciled in France. The French court had annulled the first marriage, but its decree was not recognised as effective in England, although such a decree would now almost certainly be treated as valid by the English courts.⁶⁷ For the purpose of the present discussion, the case can therefore be treated as one in which the marriage had not been annulled in France.

It seems that the marriage was only voidable under French law in the sense that it was valid unless and until a decree of nullity was pronounced.⁶⁸ In these circumstances the decision of the Court of Appeal in favour of the validity of Mrs. Ogden's first marriage appears to have been inevitable, for they could hardly have pronounced a decree of nullity in proceedings to which the first husband was not a party. Therefore it is submitted that the

⁶⁰ (1860) 2 Sw. & Tr. 67; 15 B.Y.B.I.L. 55-56, 77-81.

⁶¹ (1877) 3 P.D. 1.

⁶² (1860) 2 Sw. & Tr. 67.

⁶³ [1908] P. 46. See the discussion in Cheshire, p. 288 *et seq.*; Westlake, s. 23, and Falconbridge, pp. 48-53. Contrast *Compton v. Bearcroft* (1769) 2 Hagg. Cons. 430, with the *Sussex Peerage Case* (1844) 11 Cl. & F. 85, at p. 151, *per* Lord Brougham. It is submitted that the latter decision is not in point because the Royal Marriage Act, 1772, imposes a private status on the descendants of George II and its provisions are not analogous to a foreign law with regard to parental consent which is applicable to the entire community; see First Exception to the Rule, *post*, p. 777.

⁶⁴ [1908] P. 61, 66-7, 75.

⁶⁵ 5th ed., pp. 966-7, n. (2); cf. *Macdougall v. Chitnavis* [1937] S.C. 390 at pp. 405-6, *per* Lord Moncreiff.

⁶⁶ [1908] P. 46.

⁶⁷ *Ante*, p. 382.

⁶⁸ *Ogden v. Ogden* [1908] P. 46, at p. 57.

case cannot be treated as having established a general principle that the requirements of foreign law as to parental consents to marriage must always be treated as a matter of form, for the remarks as to characterisation were strictly unnecessary to the decision.

In these circumstances it seems that, subject to the dicta quoted above⁶⁹ concerning *Simonin v. Mallac*,⁷⁰ in which case the problem of characterisation was not discussed, the question as to how such requirements as those which have been considered should be characterised is an entirely open one, and the answer may well vary from case to case according to the provisions of the relevant foreign law.

(ii) *Exterritoriality*. The subjects of a State are, under certain circumstances, when in fact not residing within the limits of such State, considered by a fiction of law to be resident there, and to be subject to its laws. This fiction is termed *exterritoriality*.⁷¹

The effect of exterritoriality as regards marriage is, that where it applies a marriage is valid though not celebrated according to the ordinary local forms of the place of celebration, and is treated as though it had been in fact celebrated in the country in which it is supposed by a fiction of law to have been solemnised.

The principle of exterritoriality applies to marriages celebrated in the mansion of an ambassador; and it formerly applied to marriages celebrated at foreign factories and certain places, mainly in the East, in which Europeans enjoyed the privileges of exterritoriality; and possibly also to marriages on board ship, and to marriages within the lines of a British army which have been held good at common law, although as these cases may equally well be covered by sub-clause (iii) of the Rule under consideration they are discussed later. As the first class of marriage is now subject to English Marriage Regulations, which generally render compliance with the local form essential, and as there are now practically no places in which the privileges of extra-territoriality are enjoyed, while marriages on board a British ship and within the lines of a British army will usually fall within sub-clause (iv), the cases coming within sub-clause (ii) thereof are now of little importance.

(a) *Marriages at Embassies*.⁷²—Marriages celebrated at the mansion of an ambassador between subjects of the state he represented were good if celebrated according to forms held valid by its laws; and it seems that a marriage between British subjects at the British embassy in a foreign country according to the rites of the

⁶⁹ *Ante*, p. 766.

⁷⁰ (1860) 2 Sw. & Tr. 67.

⁷¹ See Oppenheim, *International Law* (6th ed.), Vol. I, Pt. III, Chap. II, § 9.

⁷² *Lloyd v. Petitjean* (1839) 2 Curt. 251; *Este v. Smyth* (1854) 18 Beav. 112; *Baillet v. Baillet* (1901) 17 T.L.R. 317.

Church of England would have been valid although it did not comply with the local law as to form.⁷³

This privilege of extritoriality probably extended apart from statute⁷⁴ only to cases where *both parties* were subjects of the ambassador's sovereign, as in *Bailet v. Bailet*,⁷⁵ or were members of the ambassador's suite. It certainly did not extend to cases where neither of the parties were his subjects. Thus, in *Pertreis v. Tondear*,⁷⁶ the marriage between H, a foreigner, in the suite of the Spanish ambassador, and W, who was not a Bavarian subject, was celebrated at the chapel of the Bavarian ambassador in London, and it was held invalid.

(b) Marriage at foreign factories.⁷⁸—It was at one time common, particularly in the East, for the government of the country to allow to foreigners, at any rate within the limits of factories or trade settlements, the use of their own laws. In this case the settlement was regarded as part of the country to which it belonged, and persons marrying there might make a valid marriage by celebrating it according to the law of that country.

(iii) *Use of the local form impossible.* Sub-clause (iii) applies to marriages in countries where it is strictly impossible for the parties to use a local form.

The impossibility may arise from the country being one where no local form of marriage recognised by civilised States exists, as where the marriage takes place in a land inhabited by savages, or it may arise from the form being one which it is morally or legally impossible for the parties to use. On this ground, a marriage between Protestants, celebrated at Rome by a Protestant clergyman, was admitted to be valid by Lord Eldon, on its being sworn that two Protestants could not there be married in accordance with the *lex loci*, as no Roman Catholic priest would be allowed to marry them.⁸¹ On the same ground, marriages in heathen or Mahomedan countries would be held valid, even though not in accordance with the local form.

That sub-clause (iii) may apply, there must be an impossibility amounting to an insuperable difficulty in complying with the local form. 'Where persons [are] married abroad, it [is] necessary to show that they were married according to the *lex loci*, or that they could not avail themselves of the *lex loci*, or that there was no *lex loci*.'⁸² Mere difficulty in fulfilling the conditions imposed by

⁷³ *Este v. Smyth* (1854) 18 Beav. 112; see Foreign Marriage Act, 1892, s. 23, *post*, p. 775.

⁷⁴ *Lloyd v. Petitjean* (1839) 2 Curt. 251.

⁷⁵ (1901) 17 T.L.R. 317, where, however, the marriage was at a consulate.

⁷⁶ (1790) 1 Hagg.Cons. 136.

⁷⁸ *Higgs v. Higgs* (1920) 36 T.L.R. 690.

⁸¹ *Lord Cloncurry's Case* (1811); Cruise on *Dignities*, p. 276; Westlake, s. 26.

The Roman law was, as Westlake points out, incorrectly stated: see *Sussex Peerage Case* (1844) 11 Cl. & F. 84, 152.

⁸² *Per Eldon, C.*; Cruise on *Dignities*, p. 276.

the local law is not enough. Thus the fact that the law of a country does not allow persons to intermarry who have not resided there for six months does not enable British subjects who have resided there for a shorter period to make a valid marriage without complying with the requirements of the local law.⁸³

Where the impossibility of complying with the local form does amount to an insuperable difficulty, the question arises as to what form is necessary in order that the ceremony may be held to constitute a valid marriage according to English law. It was decided in *R. v. Millis*⁸⁴ that the presence of an episcopally ordained priest was essential to the validity of a marriage celebrated in Ireland and a similar decision was again reached by the House of Lords in *Beamish v. Beamish*⁸⁵ in which it was held that the fact that the husband was himself in Holy Orders was not sufficient.

The conclusion does not appear to be justified historically, because it seems that, prior to the Council of Trent, 1545-63, it was sufficient, so far as the canon law of marriage was concerned, for the parties to take each other as man and wife. The decrees of the Council of Trent were not promulgated in England, where the canon law applied prior to Lord Hardwicke's Marriage Act of 1753.⁸⁶

*R. v. Millis*⁸⁷ was not followed in the Canadian courts⁸⁸ or in the Supreme Court of Bombay,⁸⁹ and it was severely criticised in the Ecclesiastical Courts.⁹⁰ The decision has now been held to have been confined to marriages celebrated in England and Ireland,⁹¹ and the principle under consideration can hardly apply to such a marriage.

Accordingly, it is clear that where sub-clause (iii) is applicable, firstly the marriage need not be celebrated in a church or chapel,⁹² secondly, although the marriage is valid if celebrated without banns or licence before an episcopally ordained priest, either of the Church of England⁹³ or of the Church of Rome,⁹⁴ or presumably of the Greek Church, it is also valid if celebrated before a clergyman who is not episcopally ordained, for example, a Methodist

⁸³ *Kent v. Burgess* (1840) 11 Sim. 361.

⁸⁴ (1844) 10 Cl. & F. 534.

⁸⁵ (1861) 9 H.L.C. 274; see also *Du Moulin v. Drutt* (1860) 13 Ir.C.L.R. 212.

⁸⁶ Pollock and Maitland, *Hist. of Eng. Law*, ii, 370-372; Cheshire, p. 428, n. 3.

⁸⁷ (1844) 10 Cl. & F. 534.

⁸⁸ *Breakey v. Breakey*, 2 U.C.Q.B. 349.

⁸⁹ *MacLean v. Cristall* (1849) Perry's Oriental Cases 75.

⁹⁰ *Catterall v. Catterall* (1847) 1 Robb.Ecc. 580; see also *Catherwood v. Caslon* (1844) 13 M. & W. 261.

⁹¹ *Wolfenden v. Wolfenden* [1946] P. 61; approved by the Court of Appeal in *Apt v. Apt* [1948] P. 83, 86.

⁹² *Ruding v. Smith* (1821) 2 Hagg.Cons. 371; *Smith v. Maxwell* (1824) Ry. & M. 80.

⁹³ *Phillips v. Phillips* (1921) 38 T.L.R. 150.

⁹⁴ *Lautour v. Teesdale* (1816) 8 Taunt. 830.

minister,⁹⁵ or a minister of the Scottish mission in China,⁹⁶ and thirdly, the marriage need not be celebrated in the presence of witnesses.⁹⁷ After the decision in *Wolfenden v. Wolfenden*,⁹⁸ and in view of the English law prior to Lord Hardwicke's Act, it seems to follow that it should be sufficient in such a case if the parties take each other for man and wife *per verba de præsenti*, but there is no case directly in point, as the decisions which accord recognition to such marriages have all turned on the local law,⁹⁹ and it is just possible that the court might require to be satisfied that there was no suitable person to celebrate the marriage, or that it was impossible for the parties to take advantage of the provisions of the Foreign Marriage Act, 1892.¹

The principle applied in *Wolfenden v. Wolfenden*² is that British subjects who settle in a newly discovered country or a country whose marriage laws are obviously inapplicable to them only take so much of English law with them as can be applied in the circumstances, and there seems to be no reason why such a rule should not be held to validate marriages on British ships which do not comply with the requirements of English law as to form. A similar principle may explain the validity at common law of marriage within the British lines.³ But marriages on board a British ship and marriages within the lines of a British Army will now normally fall within sub-clause (iv) of the Rule.

In the former editions of this work, however, marriages on board ship and within the British lines were dealt with under the principle of extritoriality. So far as the former are concerned, the only relevant English authority appears to be *Culling v. Culling*,⁴ in which a marriage celebrated by a clergyman of the Church of England on a British man-of-war on a foreign station without banns or licence was held valid. If the principle of extritoriality is treated as applicable to such a case, difficulties at once arise as to what law is applicable to marriages on a British ship. Should it be English law? The law prevailing in the port of registration? Or that of the domicile of the parties? There is no authority on this problem, and it is submitted that it would be avoided by the application of the principle laid down in *Wolfenden v. Wolfenden*⁵ and that a marriage *per verba de præsenti*

⁹⁵ *Lightbody v. West* (1908) 19 T.L.R. 319.

⁹⁶ *Wolfenden v. Wolfenden* [1946] P. 61.

⁹⁷ *Ussher v. Ussher* [1912] 2 Ir.R. 445.

⁹⁸ [1946] P. 61.

⁹⁹ *Ante*, p. 764.

¹ But see s. 23 of that Act, *post*, p. 775.

² [1946] P. 61.

³ *R. v. Brampton* (1808) 10 East 282; *Burn v. Farrar* (1819) 2 Hagg.Cons. 369; cf. the *Waldegrave Peerage Case* (1837) 4 Cl. & F. 649 which turned upon the construction of a statute.

⁴ [1896] P. 116; cf. *Du Moulin v. Druiitt* (1860) 13 Ir.C.L.R. 212 where the principle of *R. v. Mills* (1844) 10 Cl. & F. 534 was applied.

⁵ [1946] P. 61; see also Cheshire, p. 433.

on a ship on the High Seas should be treated as valid under sub-clause (iii).

So far as marriages within the British lines are concerned, these will now generally fall within sub-clause (iv), but it was laid down in *R. v. Brampton*,⁶ in which the marriage actually took place before a priest, that *verba de præsenti* would suffice in such a case, and, in view of the restrictions which are now placed on the extent of the decision in *R. v. Millis*,⁷ this case can be treated as illustrative of sub-clause (iii).

The cases as to marriages held valid on account of the impossibility of complying with the local form are not numerous, and refer to the marriages of British subjects. It may, however, be assumed that, when compliance with the local form is impossible, our courts will hold the marriages of foreigners valid, at any rate if held good by the law of the country where the foreigners are domiciled. If, for example, H and W, Italian subjects domiciled in Italy, intermarry in China in accordance with a form held under the circumstances valid by the Italian tribunals, our courts will probably hold the marriage good.

(iv) *Marriages of members of the Forces serving abroad.* Section 22 of the Foreign Marriage Act, 1892,⁸ as originally enacted, provided that all marriages celebrated within the British lines by any chaplain or other person acting under the orders of the commanding officer of a British Army serving abroad should be as valid in law as if solemnised within the United Kingdom with all requisite formalities. Section 1 of the Foreign Marriage Act, 1947, provides that section 22 of the Act of 1892 shall be deemed always to have had effect as though the 'Army' included the Navy and Air Force, and 'British lines' included any place at which any part of the forces serving abroad was stationed.⁹

Section 2 of the Act of 1947 substitutes a new section 22 for the original one in the Act of 1892. It provides that marriages between persons of whom at least one is a member of His Majesty's Forces serving in foreign territory, or otherwise employed in such

⁶ (1808) 10 East 282.

⁷ (1844) 10 Cl. & F. 534.

⁸ Substantially re-enacting part of 4 Geo. IV, c. 91, s. 1.

⁹ Section 1 (2) provides that where parties to a marriage validated by s. 1 have remarried prior to April 24, 1947, the first marriage shall be deemed to have been dissolved immediately before the solemnisation of the second. It is interesting to speculate (i) why the first marriage should be notionally dissolved and not annulled for it would presumably be a void marriage (see *ante*, p. 245); and (ii) as to the extent to which the principle discussed under sub-clause (iii) above might render valid marriages which did not come within s. 22 of the Act of 1892 (see *ante*, p. 769). Section 12 of the Act of 1892 (repealed by s. 4 of the Act of 1947), provided for marriages on board His Majesty's ships on a foreign station by or before the commanding officer. The new s. 22 of the Act of 1947 now applies to such marriages (see Foreign Marriage Act, 1947, s. 2 (3)).

territory as may be directed by Order in Council, may be celebrated by a chaplain serving with the naval, military or air forces in such territory or by anyone authorised by the commanding officer of such forces. Such marriages shall be as valid in law as if solemnised in the United Kingdom with a due observance of all forms required by law. The section does not apply to Dominion Forces,¹⁰ and the term 'foreign territory' does not include any part of British territory.¹¹

The operation of the section depends, as does that of the other provisions of the Foreign Marriage Act, 1892, very largely on Orders in Council,¹² but it may apply to marriages of persons of whom neither is a British subject, and, like the original section 22 of the Act of 1892, it is largely declaratory of the common law, and that is why it requires separate treatment. The other provisions of the Act of 1892 are not declaratory of the common law, for they cover a number of cases in which it would be perfectly possible for the parties to avail themselves of some local form of marriage.

(v) *Marriages*¹³ *under the Foreign Marriage Act, 1892.* 'All marriages between parties of whom one, at least, is a British subject, solemnised in the manner in this Act [Foreign Marriage Act, 1892] provided, in any foreign country or place, by or before a marriage officer within the meaning of this Act, shall be as valid in law as if the same had been solemnised in the United Kingdom with a due observance of all forms required by law.'¹⁴

These words give the effect of the Foreign Marriage Act, 1892. It provides modes in which (independently of the local form) a British subject may contract a valid marriage in a country outside the United Kingdom. The marriages to which it applies fall in substance under three heads:—

(a) A marriage solemnised by or before a British ambassador¹⁵ residing in a foreign country to the Government of which he is accredited at his official residence.

(b) A marriage solemnised by or before a British consul at his official residence.¹⁶

(c) A marriage solemnised by or before a Governor, High Commissioner, Resident, consular or other officer, at his official residence.¹⁷

The marriages under heads (a) and (b) must, apparently, be

¹⁰ Foreign Marriage Act, 1947, s. 3.

¹¹ *Ibid.*, s. 2 (2).

¹² *Post*, p. 775, n. 25.

¹³ *I.e.*, other than a marriage within s. 22 of the Foreign Marriage Act, 1892.

¹⁴ Foreign Marriage Act, 1892, s. 1.

¹⁵ Or any officer prescribed as an officer for solemnising marriage in the official house of such ambassador. Compare Foreign Marriage Act, 1892, ss. 1, 8, 11 (1) (a) and (b), and (2) (a); *Watts v. Watts* (1922) 38 T.L.R. 430.

¹⁶ Foreign Marriage Act, 1892, ss. 1, 8, 11 (2) (b).

¹⁷ *Ibid.*, ss. 1, 8, 11 (2) (c).

solemnised outside British territory. A marriage under head (c) (*e.g.*, by a Governor) may be solemnised at a place within British territory.¹⁸

For all details, the reader should consult the Foreign Marriage Act, 1892, and the Orders in Council made thereunder, but the following general points deserve notice :—

(1) Although it might appear at first sight that a marriage duly solemnised under the Foreign Marriage Act, 1892, is valid as regards form (in the wide English sense of the term) even though the local form be not observed,¹⁹ in practice it is normally essential that the requirements of the *lex loci celebrationis* should be complied with on account of the provision of the Marriage Regulations referred to below.

(2) The Foreign Marriage Act, 1892, has no bearing upon the capacity of the parties to intermarry. A marriage solemnised under that Act (*e.g.*, at a British consul's official residence) is 'as valid in law as if the same had been solemnised in the United Kingdom with a due observance of all forms required by law',²⁰ but a marriage so solemnised in the United Kingdom may be invalid if the parties are incapable of intermarriage under the law of their domicile.²¹ Hence a marriage (*e.g.*, before a British consul) would also be invalid if the parties were under an incapacity to intermarry by the law of their domicile.

(3) A marriage under the Foreign Marriage Act, 1892, is subject to the provisions of the Act as to the authority of the marriage officer by or before whom the marriage is celebrated, as to the due observance of the required formalities, and the like.²² And generally the right to solemnise, and the solemnisation of any marriage within the Act, is subject to 'marriage regulations', to be made by Order in Council.²³ But once solemnised the marriage cannot be impugned by reason of failure to reside for such time as may be prescribed or by reason of lack of due consent, nor can any proof be given of want of authority on the part of the officer who solemnised the marriage.²⁴

¹⁸ Foreign Marriage Act, 1892, s. 11 (2) (c).

¹⁹ In *Hay v. Northcote* [1900] 2 Ch. 262 it was held that a marriage celebrated in accordance with the provisions of the Consular Marriage Act, 1849, remained valid notwithstanding a foreign nullity decree pronounced by the court of the husband's domicile; *sed quare* whether this case should be followed in view of the decision of the House of Lords in *Salvesen v. Administrator of Austrian Property* [1927] A.C. 641; see *ante*, p. 382.

²⁰ Foreign Marriage Act, 1892, s. 1.

²¹ *Sottomayor v. De Barros* (1877) 3 P.D. (C.A.) 1. See Rule 168 (1), p. 758, *ante*, and Rule 169, p. 779, *post*. Note that the consents necessary are to be those of *English* law. Foreign Marriage Act, 1892, s. 4 (1), as amended by s. 5 of the Foreign Marriage Act, 1947.

²² Foreign Marriage Act, 1892, ss. 13–16, see also Foreign Marriage Act, 1947, s. 4 (2).

²³ Foreign Marriage Act, 1892, s. 21, as amended by the Foreign Marriage Act, 1947, s. 4 (2).

²⁴ Foreign Marriage Act, 1892, s. 13.

Upon these regulations, which may be made either generally or with reference to any particular case, or class of cases,²⁵ depends to a great extent the operation of the Act.

(4) It is an aim of the Act to prevent conflicts of law.

Marriage regulations may prohibit or restrict the exercise by marriage officers of their powers under the Act 'where the exercise of those powers appears to Her Majesty to be inconsistent with international law or the comity of nations'.²⁶

'A marriage officer [it is further provided] shall not be required to solemnise a marriage, or to allow a marriage to be solemnised in his presence, if in his opinion the solemnisation thereof would be inconsistent with international law or the comity of nations'.²⁷

Against his refusal to do so there is an appeal to a Secretary of State.²⁸

The above section of the Foreign Marriage Act, 1892, would, it may be conjectured, hinder the marriage under the Act (e.g., in Portugal) of persons, such as first cousins, held by Portuguese law to be incapable of intermarriage.

(5) 'Nothing in this Act,' it is provided, 'shall confirm or impair or in anywise affect the validity in law of any marriage solemnised beyond the seas, otherwise than as herein provided, and this Act shall not extend to the marriage of any of the Royal family.'²⁹

It appears that under this section any marriage whether celebrated before or after January 1, 1893,³⁰ which would have been legally valid if the Act had not been passed, still remains valid. Hence, not only is any marriage valid which is celebrated according to the local form, but also any marriage which is valid under the principle of extraterritoriality or under sub-clause (iii) of this Rule.

Dicey suggested, however,³¹ that it is a possible interpretation of the Foreign Marriage Act, 1892, that it makes invalid marriages which ought to be celebrated in accordance with its provisions and are not so celebrated; but, as he pointed out, this construction of the Act is not required by its general scope, and is hardly consistent with s. 23, or with subsequent authorities.³²

²⁵ The principal Orders in Council now in force are: S.R. & O. (1913) 1270; (1925) 92; (1933) 975; and (1947) 2875. For previous S.R. & O. see Eversley and Craies, *Marriage Laws of the British Empire* (1910), 126-133.

²⁶ Foreign Marriage Act, 1892, s. 21 (1) (a).

²⁷ *Ibid.*, s. 19. Note the provisions of the Marriage with Foreigners Act, 1906, designed to ascertain whether any proposed marriage in England or abroad between a British subject and an alien will be held valid by the courts of the latter's country are ineffective because no Order in Council has been made under the Act. See Cheshire, pp. 424-427.

²⁸ Foreign Marriage Act, 1892, s. 19.

²⁹ *Ibid.*, s. 23.

³⁰ The date when the Act came into operation.

³¹ 5th ed., p. 747 n. (g).

³² *Culling v. Culling* [1896] P. 116; *Phillips v. Phillips* (1921) 38 T.L.R. 150 and *Wolfenden v. Wolfenden* [1946] P. 61. In all of these cases resort might have been had to the provisions of the Act, but it was not, and the marriage was nevertheless held good.

(6) Nevertheless the provisions of the Foreign Marriage Act, 1892, lessen the importance of the other forms in which a marriage may be duly celebrated, enumerated in sub-clauses (i), (ii) and (iii) of Rule 168.

Illustrations

(1) *Capacity.*

1. In 1871, W, domiciled in England, married an Italian subject domiciled in Italy. After the death of her first husband, W, being still domiciled in Italy, married H, the brother of her deceased husband, in 1880. H was also an Italian subject domiciled in Italy. The dispensation required for the marriage by Italian law was obtained both from the civil and from the ecclesiastical authorities, and the second marriage was celebrated in Milan both civilly and in church, according to Roman Catholic rites. The marriage is valid in England because it is valid by Italian law although it was invalid by the then English law.³³

2. H and W are Portuguese subjects domiciled in England. Being first cousins, they are, by the law of Portugal, incapable of contracting a valid marriage with each other. They are duly married in London, according to the forms required by English law. Their marriage is valid in England.³⁴

(2) (i) *Local Form*

3. H and W, British subjects domiciled in England, are married at Madrid without banns or licence by a Roman Catholic priest. The marriage, if valid by Spanish law, is valid here, although not celebrated according to the forms required by English law.³⁵

4. H, an English infant domiciled in England, wished to marry W who was also domiciled in England. To evade the opposition of his guardian, H went to Scotland, and resided there for four weeks. W then joined H in Scotland, and they were privately married there in 1939 *per verba de presenti*, i.e., by the mere statement in the presence of witnesses that they are man and wife. The marriage is valid in England.³⁶

5. H and W are French subjects domiciled in France. H cannot obtain his father's consent to the marriage. To avoid the necessity of such consent, H and W come to England, and are there married by licence in accordance with English law. The marriage is voidable in France for want of due consent, but it is valid in England.³⁷

6. W, domiciled and resident in England, executes a power of attorney authorising X to act as her proxy at the ceremony of her marriage to H, who is domiciled and resident in the Argentine. The marriage is duly celebrated by proxy in the Argentine, and is valid in England because proxy

³³ *Re Bozzelli's Settlement* [1902] 1 Ch. 751. The marriage would now be valid in England under the Deceased Brother's Widow's Marriage Act, 1921, but the principle of the decision would still apply to marriage with a divorced husband's brother celebrated during the lifetime of the former husband.

³⁴ Compare *Sottomayor v. De Barros* (1877) 3 P.D. (C.A.) 1 with *Sottomayor v. De Barros* (1879) 5 P.D. 94. The marriage would be valid if only one party were domiciled in England under the anomalous first Exception to Rule 169, *post*, p. 784.

³⁵ *Swift v. Kelly* (1885) 3 Knapp 257.

³⁶ *Compton v. Bearcroft* (1769) 2 Hagg.Cons. 444 n.; cf. *Dalrymple v. Dalrymple* (1811) 2 Hagg.Cons. 54. Residence of one party was required by the Marriage (Scotland) Act, 1856. A marriage *per verba de presenti* cannot now take place in Scotland (Marriage (Scotland) Act, 1939, s. 5).

³⁷ *Simonin v. Mallac* (1860) 2 Sw. & Tr. 67; *Ogden v. Ogden* [1908] P. (C.A.) 46.

marriages are valid according to the law of the Argentine although they are invalid if they take place in England³⁸

(iii) *Local form impossible.*

9. H and W, who are domiciled in England, are married without banns or licence in a remote part of China by a minister of the Scottish missionary church, who is not a person authorised to perform marriages under the Foreign Marriage Act, 1892. The marriage is valid because it is a good common law marriage notwithstanding the fact that the minister was not episcopally ordained, although it would have been invalid for this reason quite apart from the absence of banns or licence had it been celebrated in England or Ireland⁴¹

10. H and W, British subjects domiciled in England, are married by a clergyman of the Church of England without banns or licence on a man-of-war on a foreign station. The marriage is valid although it does not come within the provisions of the Foreign Marriage Act, 1892.⁴²

11. H and W, British subjects domiciled in England, are passengers on board a British ship. The ship is wrecked on a desert island. The crew and the passengers are saved but have no means of leaving the island. H and W wish to marry. There is no local form of marriage to follow. There is no minister in Holy Orders or otherwise among the shipwrecked persons. H and W marry *per verba de presenti* in the presence of their companions. (*Semble*) the marriage is valid.⁴³

Exception 1.⁴⁴—A marriage is not valid if either of the parties, being a descendant of George II, marries in contravention of the Royal Marriage Act, 1772.

Comment

The Royal Marriage Act enacts in substance that, subject to certain exceptions⁴⁵ and limitations, no descendant of George II shall be capable of contracting matrimony without the previous consent of the sovereign and that any marriage of such descendant, without such consent shall be null and void.

In the *Sussex Peerage Case*,⁴⁶ H, a descendant of George II, married W at Rome, in accordance with the form required by the *lex loci*, without having obtained the consent required by the Act. He was, however, under no disability, either by English or by Roman law, except that which might arise from the contravention

³⁸ *Apt v. Apt* [1948] P. 83.

⁴¹ *Wolfenden v. Wolfenden* [1946] P. 61.

⁴² *Culling v. Culling* [1896] P. 116.

⁴³ *Ante*, p. 771; see Fraser, *Husband and Wife*, 2nd ed., p. 312.

⁴⁴ 'There is no necessity to make an exception, as is sometimes done, for marriages regarded as incestuous by the general consent of Christendom, because no country with which the communion of private international law exists has such marriages': Westlake, s. 21. Dicey regarded this observation as sound and it led to the omission of the Exception referred to which, taken from Story, ss. 113 (a), 114, appeared in the first edition of this work.

⁴⁵ See especially, s. 2. as to marriage of descendant of George II, when above twenty-five years of age.

⁴⁶ (1844) 11 Cl. & F. 85.

of the Royal Marriage Act. His marriage was held by our courts to be absolutely void and the offspring illegitimate.

The case gives rise to two remarks :—

(1) Though H was in fact domiciled in England and a British subject, his marriage would, in all probability, have been held invalid had he been domiciled at Rome, and probably even had he been an alien. The Act appears intended to apply to all the descendants (with a limited exception)⁴⁷ of George II; and, if this be the intention of the legislature, all courts administering English law must, of course, give effect to it.

(2) It is probable that foreign courts would not give effect to the provisions of the Royal Marriage Act in the case of persons who were not British nationals at any rate unless they were domiciled in England, and that our courts on the other hand, would refuse to give effect to a similar law passed (e.g., by the Swedish Parliament) in the case of a person not domiciled in Sweden. The incapacity, in short, produced by such a law would be regarded as constituting a privative status, which was not entitled to recognition by the courts of any other State.⁴⁸ It is submitted that this is overlooked by those who use the decision in the *Sussex Peerage Case*⁴⁹ in support of an argument for the differentiation between absolute and qualified prohibitions on marriage without parental consent.⁵⁰

Exception 2.—A marriage is, probably, not valid if *either* of the parties is, according to the law of the country where the marriage is celebrated, under an incapacity to marry the other.

Comment

Westlake⁵¹ says 'it is . . . indispensable to the validity of a marriage that the lex loci actus be satisfied so far as regards the capacity of the parties to contract it, whether in respect of the prohibited degrees of consanguinity or affinity, or in respect of any other cause of incapacity, absolute or relative'.

Although the cases he cites do not necessitate the adoption of

⁴⁷ Viz., the issue of princesses marrying into foreign families. It is from this exception that the inference may be drawn that the Act applies to descendants of George II, who may not be British subjects. But see 4 & 5 Anne, c. 16, regarding the naturalisation of Sophia of Hanover and her descendants (now repealed by the British Nationality Act, 1948).

⁴⁸ See Rule 111, p. 465, *ante*, and Exception 2 to Rule 169, *post*.

⁴⁹ (1844) 11 Cl. & F. 85.

⁵⁰ Cheshire, p. 288, *ante*, p. 767, n. 68.

⁵¹ Section 19, citing *Scrimshire v. Scrimshire* (1752) 2 Hagg.Cons. 395; *Middleton v. Janverin* (1802) 2 Hagg.Cons. 437, and *Dalrymple v. Dalrymple* (1811) 2 Hagg.Cons. 54.

this doctrine, Dicey treated it as essentially reasonable,⁵² and it is accepted by Professor Cheshire.⁵³

In *Re Alison's Trusts*⁵⁴ it was held in the case of a marriage in Persia that the incapacity of the wife, an Armenian Protestant, to contract marriage under the law of her church while she was pregnant invalidated her marriage to an English Protestant which was celebrated by a Roman Catholic priest. Under the *lex loci celebrationis*, the religious matrimonial law of the parties was applicable, and, although the marriage was invalid because the form of celebration was not in accordance with the *lex loci*, the case is to some extent an authority for the proposition under discussion, because it was in part decided on the question of capacity.

Illustrations

1 H and W are British subjects. They are both domiciled in Ontario. W is the niece of H's deceased wife. In 1910 H marries W in a church in London in accordance with all the formalities required by English law. According to the law of Ontario the marriage, if celebrated in the province, would be valid.⁵⁵ The marriage between H and W is probably not valid in England.

2. H, and W his first cousin, are British subjects domiciled in England. While travelling in Portugal, where first cousins are legally incapable of marrying one another,⁵⁷ they are married in a Portuguese Church, in accordance with the formalities required by Portuguese law. The marriage is (probably) not valid.

3. The circumstances are the same as in Illustration 2, except that H and W are married not in a Portuguese Church, but at an English consulate in Lisbon, in accordance with the provisions of the Foreign Marriage Act, 1892. The marriage is (probably) not valid.⁵⁸

RULE 169.—Subject to the Exceptions hereinafter mentioned, no marriage is valid which does not comply, as to *both* (1) the capacity⁵⁹ of the parties, *and* (2) the form⁶⁰ of the marriage, with Rule 168.

⁵² Referring to *Simonin v. Mallac* (1860) 2 Sw. & Tr. 67; cf. *Fenton v. Livingstone* (1859) 3 Macq. 497, and *Beattie v. Beattie* (1866) 5 M. 181.

⁵³ Cheshire, pp. 277-78.

⁵⁴ (1874) 31 L.T. 638.

⁵⁵ Revised Statutes, 1906, Chap. 105, s. 2. Such a marriage was in 1910 illegal in England, being legalised only by the Marriage (Prohibited Degrees of Relationship) Act, 1931. The Illustration would still be true of a marriage between an uncle, and his own niece, though valid in the place of their domicile.

⁵⁷ *Sottomayor v. De Barros* (1877) 3 P.D. (C.A.) 1.

⁵⁸ For the Act applies only to *Form*, ante, p. 774.

⁵⁹ *Mette v. Mette* (1859) 1 Sw. & Tr. 416; *Brook v. Brook* (1861) 9 H.L.C. 193; *Sottomayor v. De Barros* (1877) 3 P.D. 1; *Re De Wilton* [1900] 2 Ch. 920; *Westlake v. Westlake* [1910] P. 167; *Peal v. Peal* [1931] P. 97; *Re Paine* [1940] Ch. 46; *Müller v. Allison* [1917] 2 W.W.R. 231; *Dejardin v. Dejardin* [1932] 2 W.W.R. 237.

⁶⁰ *Kent v. Burgess* (1840) 11 Sim. 361; *Re McLoughlin* (1878) 1 L.R.Ir. (Ch.) 421; *Lacon v. Higgins* (1822) 3 Stark. 178; *Butler v. Freeman* (1756) Amb. 301; *Re Alison* (1874) 31 L.T. 874; *Catherwood v. Caslon* (1844) 13 M. & W. 261; *R. v. Byrne* (1867) 6 N.S.W. 302.

are domiciled, in another country, is not to be held valid if, by contracting it, the laws of their own country are violated. This proposition is more extensive than the case before us requires us to act upon, but I do not dissent from it.⁶⁴

The principle that legal capacity to marry depends upon a person's *lex domicilii* may be applied by our courts either to marriages prohibited by English law and celebrated in a foreign country, or to marriages prohibited by a foreign law and celebrated in England or in a foreign country.

(1) *Marriages prohibited by English law.* Prior to the passing of the Marriage (Prohibited Degrees of Relationship) Acts, 1907-31, marriages within the prohibited degrees of affinity were void under the Marriage Act, 1835, and, on the principle under consideration, a marriage which contravened the provisions of this Act was held void, if one of the parties was domiciled in England at the time of the marriage, even if it was valid under the law of the place of celebration. The principle would still be applicable to marriages within the prohibited degrees of consanguinity or to marriages within the prohibited degrees of affinity in cases in which a divorced spouse was still alive at the date of the marriage.⁶⁵

The grounds of the invalidity of such marriages were thus stated in a case decided before the rule that capacity to marry generally depends on the law of the domicile was fully developed :—

‘It is quite obvious that no civilised State can allow its domiciled subjects or citizens, by making a temporary visit to a foreign country, to enter into a contract, to be performed in the place of domicile, if the contract is forbidden by the law of the place of domicile as contrary to religion or morality, or to any of its fundamental institutions.

‘A marriage between a man and the sister of his deceased wife, being Danish subjects domiciled in Denmark, may be good all over the world, and this might likewise be so, even if they were native-born English subjects, who had abandoned their English domicile and were domiciled in Denmark. But I am by no means prepared to say that the marriage now in question ought to be, or would be, held valid in the Danish courts, proof being given that the parties were British subjects domiciled in England at the time of the marriage, that England was to be their matrimonial residence, and that by the law of England such a marriage is prohibited as being contrary to the law of God. The doctrine being established that the incidents of the contract of marriage celebrated in a foreign country are to be determined according to the law of the country in which the parties are domiciled and mean to reside,

⁶⁴ *Brook v. Brook* (1861) 9 H.L.C. 193, 234, 235, per Lord St. Leonards.

⁶⁵ *Westlake v. Westlake* [1910] P. 67; Supreme Court of Judicature (Consolidation) Act, 1925, s. 184 (1), proviso, as substituted by the Marriage (Prohibited Degrees of Relationship) Act, 1981, s. 2.

the consequence seems to follow that by this law must its validity or invalidity be determined.'⁶⁶

The reported cases establish that a marriage prohibited by English law will be void, although celebrated abroad, not only if both⁶⁷ parties are domiciled in England at the time of the marriage, but also if either the man⁶⁸ or the woman⁶⁹ is domiciled in England at the time of the marriage. At one time it may have been possible to take the view that the prohibitions of English law applied to all persons whomsoever, whether they were British subjects or aliens, and wherever they might be domiciled,⁷⁰ or to all British subjects, irrespective of their domicile,⁷¹ but the view that they apply only to persons domiciled in England,⁷² is now accepted by the courts⁷³ and, it has been said, by Parliament.⁷⁴

As we have seen,⁷⁵ the actual decisions in the cases may be consistent with the view that capacity to marry depends upon the law of the matrimonial home of the parties, but the reasons given for these decisions do not support this view. Thus, in *Re Paine*,⁷⁶ the wife's domicile at the date of her marriage to her deceased sister's husband (prior to the Deceased Wife's Sister's Marriage Act, 1907) was English; the husband's domicile was German and such marriages were valid under German law. England may have been the intended matrimonial home of the parties,⁷⁷ but the marriage was held to be void because English law was the law of the lady's domicile at the time of her marriage, and 'by English law the lady had not the capacity to contract it'.⁷⁸

⁶⁶ *Brook v. Brook* (1861) 9 H.L.C. 193, 212, 213, *per* Campbell, C. The reference to matrimonial residence is clearly incidental, and does not imply that the decision would have been otherwise if the matrimonial residence had been Denmark, so long as the domicile was English. Of course, if the intending spouses go to Denmark to settle and marry there, they may at once, before marriage, acquire a domicile there. But see Cheshire, pp. 280-81; Professor Cheshire's views are discussed *ante*, at pp. 762-763.

⁶⁷ *Brook v. Brook* (1861) 9 H.L.C. 193; *Re De Wilton* [1900] 2 Ch. 481; see also *Peal v. Peal* [1931] P. 97, which involved the application of English law although the domicile was assumed to be Indian.

⁶⁸ *Mette v. Mette* (1859) 1 Sw. & Tr. 416

⁶⁹ *Re Paine* [1940] Ch. 46.

⁷⁰ *Brook v. Brook* (1861) 9 H.L.C. 193 at p. 230, 234, *per* Lord St. Leonards; for criticism see *Commonwealth v. Lane* (1873) 113 Mass. 458; the view is inconsistent with *Re Bozzelli's Settlement* [1902] 1 Ch. 751.

⁷¹ *Mette v. Mette* (1859) 1 Sw. & Tr. 416.

⁷² *Brook v. Brook* (1861) 9 H.L.C. 193, at pp. 212-218, *per* Lord Campbell, L.C., and pp. 226-228, *per* Lord Cranworth.

⁷³ *Re De Wilton* [1900] 2 Ch. 481; *Re Bozzelli's Settlement* [1902] 1 Ch. 751; *Chapman v. Bradley* (1863) 33 Beav. 61; (1865) 4 De G.J. & S. 71; *Re Paine* [1940] Ch. 46.

⁷⁴ 5th ed. p. 753, n. (d), citing the Deceased Wife's Sister's Marriage Act, 1907, and subsequent statutes. For a discussion of the application of the Age of Marriage Act, 1929, see Morris, 62 L.Q.R. p. 170 (1946).

⁷⁵ *Ante*, p. 762.

⁷⁶ [1940] Ch. 46.

⁷⁷ 56 L.Q.R. 514; Cheshire, p. 283.

⁷⁸ [1940] Ch. 49.

(2) *Marriages prohibited by Foreign Law.* A marriage prohibited by the law of the country where both the parties are domiciled and celebrated in England or in a foreign country, is, though valid by English domestic law, invalid in England.

So far as marriages celebrated in England are concerned, this was decided by the Court of Appeal in *Sottomayor v. De Barros*⁷⁹ and, although there does not appear to be a reported case in which a marriage abroad which was prohibited by a foreign law has been considered, it is hardly conceivable that a different principle from that which regulates such marriages when celebrated in England should apply.

Where only one of the parties is domiciled in a foreign country according to the law of which the marriage is prohibited, if the marriage is celebrated abroad, or if the other party is not domiciled in England, it seems that the general principle under consideration will invalidate the marriage. Although there is no authority precisely in point there is the analogy of cases dealing with marriages prohibited by English law which have already been discussed. The Rule under consideration is, however, subject to an Exception where the marriage is celebrated in England and one of the parties is domiciled there, which is discussed below.

It should perhaps be added that it has been suggested that the case of *Sottomayor v. De Barros*⁸⁰ was not so much concerned with capacity as with illegality, but the point seems to be merely a verbal one, as, in either case, the impediment to marriage is one which operates independently of the intention of the parties and is accordingly rightly referred to the law of the antenuptial domicile of each.

(2) *Want of Form.*

No marriage is valid which, in respect of form, does not fall within the provisions of Rule 168 (2). As the validity of this Rule, together with that of its converse operation, has never been disputed, no further comment is called for here.

Illustrations

(1) *Want of Capacity.*

1. H, domiciled in England, but resident in Rhode Island, marries there W, who is also domiciled in England and is the daughter of H's sister. Such marriage is lawful in Rhode Island. The marriage is invalid in England.⁸¹

2. H, domiciled and resident in Rhode Island, marries there W, his own niece. She is at the moment of the marriage domiciled in England. The marriage is invalid in England, and would also have been invalid in England had H been domiciled there and W been domiciled in Rhode Island.⁸²

3. H and W, Portuguese subjects domiciled in Portugal, were first cousins,

⁷⁹ (1877) 3 P.D. (C.A.) 1; see Illustration 3 and n. 83, *post*.

⁸⁰ *Supra*. See *Ogden v. Ogden* [1908] P. 46 at p. 74, and Foote, pp. 90-100.

⁸¹ Cf. *Brook v. Brook* (1861) 9 H.L.C. 193, and *Re De Wilton* [1900] 2 Ch. 481.

⁸² *Re Paine* [1940] Ch. 46; *Mette v. Mette* (1859) 1 Sw. & Tr. 416.

and on that account incapable by the law of Portugal of intermarrying without the dispensation of the Pope. While residing in England, but not domiciled there, they were married according to the forms required by English law. The marriage was held invalid in England.⁸³

4. H and W, domiciled in Washington, are first cousins, incapable there of marriage, as 'marriages between parties so nearly related are prohibited in nearly all civilised states'. They intermarried in British Columbia. Such a marriage is void by the law of their domicile, and would be held void in England, though such marriages are valid both in Canada and the United Kingdom and in most other civilised countries.⁸⁴

5. The facts are as in Illustration 4, except that one of the parties was, at the time of the marriage, domiciled in British Columbia. (*Semble*) the marriage would be held void in England.

(2) *Want of Form.*

6. In 1838,⁸⁵ H and W, English persons domiciled in England, are married at the English Church at Antwerp by a clergyman of the Church of England, in the presence of the British Consul. Formalities required in respect of residence and otherwise by Belgium law are omitted. The marriage is invalid.⁸⁶

7. In 1833, H and W, Irish persons domiciled in Ireland, go in England through a ceremony of marriage celebrated by a Roman Catholic priest. The marriage is invalid.⁸⁷

8. H and W, persons domiciled in Scotland, marry in England by acknowledging themselves to be man and wife in the presence of third parties. The marriage is invalid.⁸⁸

9. H, a Frenchman, marries W, an Englishwoman and British subject, at the chapel of the French Embassy in London, without complying with the requirements of English law as to banns, licence, etc. The marriage is invalid.⁸⁹

Exception 1.—The validity of a marriage celebrated in England between persons of whom the one has an English, and the other a foreign, domicile is not affected by any incapacity which, though existing under the law of such foreign domicile, does not exist under the law of England.⁹⁰

⁸³ *Sottomayor v. De Barros* (1877) 3 P.D. (C.A.) 1. Though in the judgment of the court stress is laid on the marriage being by Portuguese law 'incestuous', and on the fact that the parties were Portuguese 'subjects', these matters are almost certainly immaterial.

⁸⁴ See *Johnson v. Johnson* (1910) 57 Wash. 89.

⁸⁵ And therefore prior to the Consular Marriage Act, 1849.

⁸⁶ *Kent v. Burgess* (1840) 11 Sim. 361. Compare *Catherwood v. Caslon* (1844) 13 M. & W. 261.

⁸⁷ *Re McLoughlin* (1878) 1 L.R.Ir. (Ch.) 421. In each of the foregoing cases the marriage, but for its not conforming to the *lex loci contractus*, would be valid by English domestic law.

⁸⁸ It would be held invalid in Scotland as well as in England: *Fraser, Husband and Wife*, 2nd ed., pp. 1309, 1310; *Johnstone v. Godet* (1813) Ferg.Cons. Rep. 8.

⁸⁹ Compare *Pertreus v. Tondear* (1790) 1 Hagg.Cons. 136.

⁹⁰ *Sottomayor v. De Barros* (1879) 5 P.D. 94; *Chetti v. Chetti* [1909] P. 67, 81-88; and see *Ogden v. Ogden* [1908] P. (C.A.) 46, 74-77, *per curiam*; *Friedman v. Friedman's Executors* (1922) 43 N.P.D. 259; *Pezet v. Pezet* (1947) 47 S.R. (N.S.W.) 45.

Comment

From the principle that capacity depends on the law of a person's domicile, it would seem to follow that the disability of either party,⁹¹ under the law of his or her domicile, to contract a marriage with the other, invalidates the marriage. In the case, however, establishing this doctrine, the suggestion was judicially made that the application of the principle should be limited, as regards marriages celebrated in England, to cases in which both of the parties are domiciled in a country by the laws of which they are incapable of intermarriage.

'Our opinion [that parties cannot make a valid marriage who are under an incapacity by their *lex domicilii*] . . . is confined to the case where both the contracting parties are, at the time of their marriage, domiciled in a country the laws of which prohibit their marriage. All persons are legally bound to take notice of the laws of the country where they are domiciled. No country is bound to recognise the laws of a foreign State when they work injustice to its own subjects, and this principle would prevent the judgment in the present case being relied on as an authority for setting aside a marriage between a foreigner and an English subject domiciled in England, on the ground of any personal incapacity not recognised by the law of this country.'⁹²

The suggested limitation has been acted upon, and has been approved (*obiter*) by the Court of Appeal,⁹³ and must be assumed, in spite of its illogical character, to be good law.

The Exception is not confined to cases in which the husband is domiciled in England,⁹⁴ and the way in which it is formulated appears to be the only method whereby the decision on the second hearing of the case of *Sottomayor v. De Barros*⁹⁵ can be reconciled with the decisions in *Mette v. Mette*⁹⁶ and *Re Paine*.⁹⁷ The last two cases indicate that it is generally insufficient for the validity of a marriage that it should be valid as regards capacity by the law of the country where it is celebrated, even if one of the parties is domiciled in such country. The Exception under consideration was, as we have seen,⁹⁸ established by a judgment which failed to take account of the distinction (then recently drawn) between questions of form and capacity, and its national bias has led to its being stigmatised as 'unworthy of a place in a respectable system of the Conflict of Laws', because of its failure to deal with

⁹¹ See *Mette v. Mette* (1859) 1 Sw. & Tr. 416; *Re Paine* [1940] Ch. 46.

⁹² *Sottomayor v. De Barros* (1877) 3 P.D. (C.A.) 1, 6, 7, *per curiam*.

⁹³ *Ogden v. Ogden* [1908] P. 46 at pp. 74-77.

⁹⁴ *Chetti v. Chetti* [1909] P. 67. Savigny would have approved of the Exception if it had been thus limited (Savigny, s. 379, pp. 291-2).

⁹⁵ (1879) 5 P.D. 94; see following Illustration.

⁹⁶ (1859) 1 Sw. & Tr. 416; Falconbridge, pp. 637 *et seq.*

⁹⁷ [1940] Ch. 46.

⁹⁸ *Ante*, p. 761.

the converse situation without showing an undue preference for the domestic law of the forum and one of the parties' domicile.⁹⁹

Illustration

H and W are first cousins. H is domiciled in England. W, the woman, is domiciled in Portugal, and is, under the law of her Portuguese domicile, incapable of marrying H. They marry in England. The marriage is valid,¹ and would equally be valid if W had been domiciled in England and H in Portugal.²

Exception 2.³—A marriage celebrated in England is not invalid on account of any incapacity which, though imposed by the law of the domicile of both or of either of the parties, is penal.

Comment

For example, H, a negro, domiciled in a country where marriages between whites and negroes are prohibited, and W, a white woman, also there domiciled, come to England, and without having acquired an English domicile are married here. The marriage is valid.⁴

So the marriage of a monk or a nun would be held valid here, even though he or she might be incapable of marriage by the law of his or her domicile.⁵ So also no rule of caste affecting a British Indian subject is recognised as rendering invalid a marriage otherwise duly celebrated in England.⁶ In other words, English law will not recognise a penal status affecting a particular class of persons although it may be recognised by the law of their domicile.

Exception 3.—Any marriage is valid which is made valid by Act of Parliament.⁷

⁹⁹ Falconbridge, pp. 640-1.

¹ *Sottomayor v. De Barros* (1879) 5 P.D. 94. See, however, Westlake's cogent criticism on the judgment in *Sottomayor v. De Barros* (1879) 5 P.D. 94: Westlake, s. 21. But contrast *Ogden v. Ogden* [1908] P. (C.A.) 46, 74-77; *Chetti v. Chetti* [1909] P. 67, 85, 87.

² *Chetti v. Chetti* [1909] P. 67; *Friedman v. Friedman's Executors* (1922) 48 N.P.D. 259.

³ See Rule 111, p. 465, *ante*, and Rule 93, p. 430, *ante*; *Scott v. Att.-Gen.* (1886) 11 P.D. 128; *Chetti v. Chetti* [1909] P. 67; *MacDougall v. Chitmaris* [1937] S.C. 390; *Lundgren v. O'Brien* [1921] V.L.R. 361.

⁴ In Massachusetts, where marriage of black and white was illegal, none the less marriages contracted in Rhode Island, even by persons domiciled in Massachusetts, were recognised: *Medway v. Needham* (1819) 16 Mass. 157. The decision is severely censured in *Brook v. Brook* (1861) 9 H.L.C. 193, but defended, with some just criticism of *Brook v. Brook*, in *Commonwealth v. Lane* (1873) 113 Mass. 458; again impugned in *Kinney v. Commonwealth* (1878) 30 Grattan (Va.) 858, but evidently approved in *Ogden v. Ogden* [1908] P. 46, 77.

⁵ See Co.Litt. p. 136 a; 2 Co.Inst. p. 687. See as to the principle of this Exception, Intro., General Principle No. 2, p. 17, *ante*, and Rule 111, p. 465, *ante*.

⁶ *Chetti v. Chetti* [1909] P. 67, 78; *Papadopoulos v. Papadopoulos* [1930] P. 55.

⁷ See Rule 137, p. 604, *ante*.

Comment

Acts are often passed rendering valid⁸ marriages, or, rather, attempted marriages, which are invalid on account of the omission of some necessary formality. The necessary validity in England, at any rate as far as form is concerned, of marriages which comply with the requirements of the Foreign Marriage Act, 1892, is another application of the Exception.

2. ASSIGNMENT OF MOVABLES IN CONSEQUENCE OF MARRIAGE⁴²

RULE 170.⁴³—Where there is a marriage contract or settlement, the terms of the contract or settlement govern the rights of husband and wife in respect of all movables within its terms which are then possessed or are afterwards acquired.⁴⁴

Comment

Marriage may make substantial changes in the proprietary rights of the spouses. The effect of marriage is widely different according to the laws of different countries.⁴⁵ At common law the effect of marriage was virtually to vest the wife's property in the husband.

⁸ See, for example, the Marriage Validation Act, 1888; Marriages in Japan (Validity) Act, 1912; Greek Marriages Act, 1884.

⁴² Story, ss. 148-199; Foote, pp. 348-355; Westlake, pp. 69-82; Goodrich, Chap. 9; Restatement, ss. 289-293; Cheshire, pp. 650-665; Wolff, ss. 334-346; Falconbridge, Chap. 4, s. 5; Johnson, Vol. 1, Chap. 6. *Ashcomb's Case* (1674) 1 Cas. in Ch. 282.

⁴³ On the dissolution of a marriage by the English court, the court has full power to vary the terms of the contract or settlement as it thinks fit, even if made according to the law of a foreign domicile: *Forsyth v. Forsyth* [1891] P. 363; *Nunneley v. Nunneley* (1890) 15 P.D. 186; Supreme Court of Judicature Act, 1925, ss. 191, 192. The power, however, cannot be exercised if after the dissolution of the marriage the respondent has married, and is domiciled in a foreign country, and has no property in the jurisdiction, and it is proved that no effect would be given to an order by the court in the country of domicile: *Tallack v. Tallack* [1927] P. 211; *Goff v. Goff* [1934] P. 107. See also *Lett v. Lett* [1906] 1 Ir.R. 618, and compare *Montgomery v. Zarifi* [1918] S.C.(H.L.) 128; *Drummond v. Bell-Irving* [1930] S.C. 704. How far a similar power is conceded to foreign courts is uncertain: the circumstances of *Colliess v. Hector* (1875) L.R. 19 Eq. 334, are too unusual to afford ground for any deduction. See also pp. 222, 372, *ante*.

⁴⁴ Story, s. 148; *Feaubert (Foubert) v. Turst* (1702) Prec.Ch. 207; 1 Br.P.C. 129; *Anstruther v. Adair* (1834) 2 My. & K. 513; *Williams v. Williams* (1841) 3 Beav. 547; *Este v. Smyth* (1854) 18 Beav. 112; *Duncan v. Cannan* (1854) 18 Beav. 128; *Watts v. Shrimpton* (1856) 21 Beav. 97; *De Serre v. Clarke* (1874) L.R. 18 Eq. 588; *Van Grutten v. Digby* (1862) 31 Beav. 561; *Byam v. Byam* (1834) 19 Beav. 58; *De Nicols v. Curlier* [1900] A.C. 21. The clause against anticipation annexed to a gift to an Englishwoman whose husband was domiciled in a foreign country was valid, and could not be got rid of even though by the law of the country where the husband was domiciled it was invalid: *Peillon v. Brooking* (1858) 25 Beav. 218; see *Public Trustee v. Wolf* [1923] A.C. 544.

⁴⁵ See Wolff, pp. 361-364.

Under the French system of community all movables are enjoyed in common. Both rules could be excluded by an express contract or settlement. It is clear, therefore, that the effect of marriage on the proprietary rights of the spouses may involve difficult questions in the conflict of laws. By English law the position differs in accordance with whether there is or is not a marriage settlement or contract. Most of the English cases deal with the former situation, most of the American with the latter.

Parties to a marriage contract may regulate their mutual rights to property on whatever terms they think fit, and our courts will, in general, enforce the terms which the parties have agreed upon, so far as they are not inconsistent with English public policy.

The marriage contract or settlement need not be embodied in a document formally entered into between the parties, but may be imposed on them by operation of law. Thus, in *De Nicols v. Curlier*,⁴⁶ two domiciled French persons married in France without an antenuptial contract. The effect was, according to evidence of French law accepted by the House of Lords,⁴⁷ that the provisions of the Code Napoleon as to community of goods applied to them as effectually as if they had made an express contract incorporating the provisions of the Code. The House of Lords held that the contract thus implied by French law continued to bind the parties after they had acquired an English domicile. The decision has been much criticised by American writers on the ground that 'a failure to choose (between the French community and dotal regimes), even if deliberate, and *a fortiori* if not deliberate, cannot be tortured into a choice, and there is therefore no contract'.⁴⁸ But the decision was undoubtedly consistent with sound principle⁴⁹ if the French law placed implied contracts on the same footing as express contracts. Whether it did so or not was entirely a question of fact, to be decided in accordance with the evidence of French law. It does not follow that the decision would be the same if the spouses had married when domiciled in another community country, *e.g.*, South Africa or Quebec, or even that it would be the same on another occasion if they were domiciled in France.⁵⁰

Illustrations

1. In 1803 H and W, British subjects domiciled in England, married in Paris. Their marriage contract stipulated that their rights over property should be regulated in accordance with French law. Under this law a wife has a power of making a will. It was held by our courts that such a contract was to be enforced, and that the rights of the parties were the same that French

⁴⁶ [1900] A.C. 21, distinguished (but on very slender grounds) in *Beaudoin v. Trudel* [1937] 1 D.L.R. 216.

⁴⁷ But probably it was erroneous. See *Bartin, Principes de Droit International Privé*, Vol. 2, pp. 249-250; Wolff, p. 367.

⁴⁸ Beale, p. 1015; cf. Goodrich, p. 279.

⁴⁹ See Sub-Rule 4, *post*, p. 794.

⁵⁰ *Baty, Polarized Law*, p. 96.

subjects would have had under such a contract, and that, therefore, a will by the wife was valid.⁵¹

2. In 1846 H, a domiciled Englishman, marries W, a German domiciled in Prussia at Cologne. Before marriage they enter into a marriage contract in the Prussian form. By Prussian law the effect of the contract is that W is entitled to all immovable and movable property belonging to her at the time of her marriage, and to all property which after her marriage accrues to her by donation or inheritance. Hence certain goods become under the contract the separate property of W. H becomes bankrupt in England. He holds such goods as trustee for W, and the goods, though in his possession, do not pass to his creditors.⁵²

3. H and W, French subjects domiciled in France, marry in Paris without an ante-nuptial contract. It is proved in evidence that by French law the effect is the same as though H and W had made an express contract incorporating the system of community of goods. H and W acquire an English domicile and amass a fortune. By his will H leaves all his property to trustees upon trust for W for life with remainders over. W is entitled to her share of all H's movables in accordance with French law.⁵³

SUB-RULE 1.—The marriage contract or settlement will be construed with reference to the proper law of the contract, i.e., in the absence of reason to the contrary, with reference to the law of the matrimonial domicile.⁵⁴

Comment

The search for the proper law of a marriage contract or settlement is generically similar to the search for the proper law of an ordinary commercial contract.⁵⁵ Owing to the nature of the subject-matter, however, the factors to be taken into consideration are specifically different. The most important factor is undoubtedly the matrimonial domicile of the parties. The leading presumption, then, is that the law of the matrimonial domicile is the proper law of the contract. But this is only a presumption, and can be rebutted by proof that the parties contracted expressly or by implication with reference to some other law. The circumstances which have been held sufficient to rebut the presumption in favour of the matrimonial domicile are considered in the Comment to Sub-Rule 2 below. The matrimonial domicile of the parties means, according to the better opinion, the husband's actual domicile at the time of the marriage.⁵⁷

⁵¹ *Este v. Smyth* (1854) 18 Beav. 112.

⁵² *Ex p. Sibeth* (1885) 14 Q.B.D. 417.

⁵³ *De Nicols v. Curlier* [1900] A.C. 21. As to the immovables, see *Re De Nicols* [1900] 2 Ch. 410, and Exception 2 to Rule 127, *ante*, p. 541.

⁵⁴ For meaning of 'proper law of a contract', see Rule 136, p. 579, *ante*.

⁵⁵ See *Duncan v. Cannan* (1854) 18 Beav. 128; 23 L.J.Ch. 265; *Byam v. Byam* (1854) 19 Beav. 58; *Lansdowne v. Lansdowne* (1820) 2 Bli. 60; *Vidits v. O'Hagan* [1900] 2 Ch. 87; *Chamberlain v. Napier* (1880) 15 Ch.D. 614; *Anstruther v. Adair* (1834) 2 My. & K. 513. For meaning of 'matrimonial domicile' see Exception 2 to Rule 127, p. 541, *ante*.

⁵⁶ See Rule 136, *ante*, p. 579.

⁵⁷ See Rule 127, Exception 2, *ante*, p. 541.

Material or essential validity. The material or essential validity of the marriage settlement is governed by its proper law.⁵⁸

Formalities. The marriage settlement will be held to be formally valid if it complies with the formalities prescribed by either the *lex loci contractus* or its proper law.⁵⁹

Capacity. The question what law governs the capacity of the parties to enter into a marriage settlement contract is a matter of some difficulty, and it is necessary to speak with hesitation. On principle capacity should be governed by the same law as that which governs material or essential validity, namely, the proper law of the contract, which is usually (but not necessarily) the law of the matrimonial domicile. It is usually asserted, however, that capacity is governed by the law of each party's domicile at the time of the contract. According to this view, the capacity of an English girl under 21 to make an antenuptial marriage settlement prior to her marriage with a domiciled foreigner would be governed by English law. The cases usually cited for this proposition are *Re Cooke's Trusts*,⁶⁰ *Cooper v. Cooper*,⁶¹ and *Viditz v. O'Hagan*.⁶² It is submitted that properly considered these cases lay down no such proposition but, on the contrary, decide that capacity is governed by the proper law of the contract.⁶³

In *Re Cooke's Trusts*⁶⁴ a domiciled English girl under twenty-one made a notarial contract in French form prior to her marriage with a domiciled Frenchman. She died domiciled in New South Wales having by her will given all her property to X. Her children attacked her will on the ground that the contract gave them vested rights in her property. Stirling, J., rejected their claim on the ground that her capacity to make the contract was governed by English law as the law of her domicile and that by English law the contract was 'void'. But the contract merely excluded the French doctrine of community of goods and expressly gave the intended wife 'the entire administration of her property and the free enjoyment of her income'. It is hard to see in what way it restricted her testamentary capacity, or how the decision could possibly have been otherwise even if she had been of full age. Moreover, by English law marriage settlements made by infants are not 'void' but voidable in the sense that they are binding on the infant unless the infant repudiates within a reasonable time

⁵⁸ *Re Bankes* [1902] 2 Ch. 333; *Re Fitzgerald* [1904] 1 Ch. 573.

⁵⁹ *Van Grutten v. Digby* (1862) 31 Beav. 561; *Guépratte v. Young* (1851) 4 De G. & Sm. 217; *Watts v. Shrimpton* (1855) 21 Beav. 97; *Re Barnard* (1887) 56 L.T. 9; *Viditz v. O'Hagan* [1899] 2 Ch. 569; *Re Bankes* [1902] 2 Ch. 333.

⁶⁰ (1887) 56 L.T. 737.

⁶¹ (1888) 13 App.Cas. 88.

⁶² [1900] 2 Ch. 87. Compare *Guépratte v. Young* (1851) 4 De G. & Sm. 217; *Sawrey-Cookson v. Sawrey-Cookson's Trustees* [1905] S.C. 157.

⁶³ See Morris, 'Capacity to make a Marriage Settlement Contract in English Private International Law', 54 L.Q.R. 78 (1938).

⁶⁴ (1887) 56 L.T. 737.

after attaining 21,⁶⁵ unless, of course, they are made under the Infants Settlements Act, 1855, in which case they are valid.

In *Cooper v. Cooper*⁶⁶ a domiciled Irish girl under twenty-one married a domiciled Scotsman. By an antenuptial contract made in Scottish form the husband covenanted to pay her an annuity if she survived him and the wife accepted this in full satisfaction of her rights as a Scottish widow. Thirty-six years later the husband died domiciled in Scotland and the wife claimed to repudiate the contract. The House of Lords held that she was entitled to do so. It is true that Lord Halsbury and Lord Macnaghten gave as their reasons for this conclusion that the wife was an infant by Irish law when she made the contract. But it is impossible to accept these statements at their face value. For Lord Halsbury said that by English (and Irish) law an infant's marriage settlement contracts are 'void'⁶⁷; and Lord Macnaghten said that they are 'voidable'.⁶⁸ Yet the wife was allowed to repudiate the contract thirty-three years after she attained twenty-one. The decision would appear to be quite impossible to reconcile with *Edwards v. Carter*,⁶⁹ unless we assume that Scots law must also have been taken into consideration. The true position would appear to be that by Irish law the contract was voidable, and by Scots law it remained voidable because any ratification would have been revocable as a donation between husband and wife: therefore the wife never had capacity to make a binding contract.⁷⁰

In *Viditz v. O'Hagan*⁷¹ the Court of Appeal expressly adopted this view of *Cooper v. Cooper*. A domiciled Irish girl under twenty-one married a domiciled Austrian. She made an antenuptial settlement in English form, settling her property upon the usual trusts of an English marriage settlement. Twenty-nine years later the husband and wife, now domiciled in Austria, purported to revoke the settlement by a notarial act made in Austrian form. By Austrian law such revocation was valid notwithstanding the birth of children. It was held that the revocation was valid, because the wife never possessed capacity to make an irrevocable settlement either before or after her marriage. After referring to *Cooper v. Cooper*⁷² Lindley, M.R., said⁷³: 'In that case a lady did succeed in repudiating a marriage settlement made when she was an infant after the lapse of much more than a reasonable time, if you shut out of consideration the change of her domicile between the

⁶⁵ *Edwards v. Carter* [1893] A.C. 360.

⁶⁶ (1888) 13 App.Cas. 88.

⁶⁷ At p. 99.

⁶⁸ At pp. 107-108.

⁶⁹ [1893] A.C. 360.

⁷⁰ See *per* Lord Watson at p. 106.

⁷¹ [1900] 2 Ch. 87.

⁷² (1888) 13 App.Cas. 88.

⁷³ At p. 98.

execution of the settlement and the repudiation'. The clear inference from the concluding words is that in the opinion of Lindley, M.R., the House of Lords in *Cooper v. Cooper* did not shut out of consideration the law of Scotland. If so, *Cooper v. Cooper* is no authority for the proposition for which it is usually cited. It is submitted, therefore, that capacity to make a marriage settlement is governed by the proper law of the contract.

Illustrations

1. H and W, persons domiciled in Scotland, marry in London. A marriage contract or settlement is made between them in the Scottish form. H and W afterwards become domiciled in England. The rights of the parties are nevertheless to be decided with reference to Scottish law; for 'this contract, though prepared in England and a valid English contract, is to be governed by the Scotch law, and the construction and operation of it must be the same whether in or out of Scotland'.⁷⁴

2. H, a domiciled Scotsman, marries W, a domiciled Englishwoman. A settlement in Scottish form is made between H and W whereby funds belonging to H are settled in accordance with Scottish law. A contemporaneous settlement in English form is made between W's father, W herself, and H, whereby funds belonging to W are settled in trust for W for life for her separate use, but without power of anticipation. The settlement in Scottish form is to be governed by Scottish law, the settlement in English form is to be governed by English law. W can dispose freely by will of savings from separate property included in the English settlement as against the husband's claim to *ius relicti* and the children's to legitime.⁷⁵

3. H, domiciled in France, marries in France W, domiciled in England. An antenuptial marriage settlement is made in France in English form whereby property belonging to W, which is invested in English securities, is vested in English trustees. The proper law of the contract is English law (see Sub-Rule 2, *post*). The settlement not having been executed before a notary public, is formally invalid by French law (*lex loci contractus*). The settlement is formally valid.⁷⁶

4. H, domiciled in Austria, marries in Switzerland W, domiciled in Ireland. An antenuptial settlement in English form is made between them. At the date of the settlement and of the marriage W is aged eighteen. Twenty-nine years later H and W, now domiciled in Austria, purport to revoke the settlement by a notarial act in Austrian form. By Austrian law, such revocation is valid. The settlement is revoked.⁷⁷

5. H, domiciled in England, marries in New York W, domiciled in New York. An antenuptial settlement is made in English form whereby property belonging to W's father, which is and remains invested in American securities, is vested in trustees, one of whom is English and the other American. The management of the trust takes place in New York. The settlement contains ancillary clauses which are meaningless (but not invalid) by New York law. The proper law of the contract is (*semble*) English law.⁷⁸

⁷⁴ *Duncan v. Cannan* (1854) 23 L.J.Ch. 265, 273, *per* Romilly, M.R.

⁷⁵ *Re Mackenzie* [1911] 1 Ch. 578.

⁷⁶ *Van Grutten v. Digby* (1862) 31 Beav. 561.

⁷⁷ *Viditz v. O'Hagan* [1900] 2 Ch. 87.

⁷⁸ *Duke of Marlborough v. Att.-Gen.* [1945] Ch. 78, with which contrast *Re Cloncurry's Estate* [1982] Ir.R. 687, stated *post*, p. 794, Illustration 4. Perhaps the Court of Appeal attached too much weight to the ancillary clauses and too little weight to the place of management of the trust: see 61 L.Q.R. 223-224.

SUB-RULE 2.—The parties may either explicitly or implicitly make it part of the contract or settlement that their rights shall be subject to some other law than the law of the matrimonial domicile,⁷⁹ in which case their rights will be determined with reference to such other law.

Comment

If the settlement contains an express clause stating that it is to be governed by some law other than the law of the matrimonial domicile, and the selected law has a substantial connection with the transaction, no doubt the clause would be held effective.⁸⁰ Very frequently, however, no such express clause is included, and it then becomes necessary to determine whether the presumption in favour of the matrimonial domicile has been displaced. Circumstances which, singly or together, have been held sufficient to rebut the presumption are: the fact that the settled property belonged to the wife or her family⁸¹; the language and form of the settlement⁸²; the fact that its provisions are invalid by the law of the matrimonial domicile⁸³; the place of management of the trust⁸⁴; the place of residence of the trustees⁸⁵; the place of investment of the securities.⁸⁶ The relevant date for giving effect to the last two factors is the date of the settlement⁸⁶; it is obvious that changes may occur in the trusteeship or in the situation of the investments after the settlement is made, but such changes ought not to affect its construction or validity. The language and form of the settlement are no doubt more decisive factors when the choice is between (say) English and Italian law or English and Scottish law, than when the choice is between (say) English and Irish law or English and New York law.

Illustrations

1. H and W, domiciled in England, make it part of their marriage contract that their rights shall be regulated in accordance with the law of France. Our courts will, as far as possible, give effect to the contract in accordance with French law.⁸⁷

⁷⁹ For the meaning of this term, see Rule 127, Exception 2, p. 541, *ante*.

⁸⁰ For the extent to which parties to a contract may select the proper law, see *ante*, Rule 136, Sub-Rule 1, p. 584.

⁸¹ *Van Grutten v. Digby* (1862) 31 Beav. 561; *Re Mégret* [1901] 1 Ch. 547; *Re Bankes* [1902] 2 Ch. 333; *Re Fitzgerald* [1904] 1 Ch. 573.

⁸² *Re Mégret* [1901] 1 Ch. 547; *Re Bankes* [1902] 2 Ch. 333; *Re Fitzgerald* [1904] 1 Ch. 573; *Re Hewitt's Settlement* [1915] 1 Ch. 228; *Revenue Commissioners v. Pelly* [1940] Ir.R. 222; *Re Cloncurry's Estate* [1932] Ir.R. 687.

⁸³ *Re Bankes* [1902] 2 Ch. 333; *Re Fitzgerald* [1904] 1 Ch. 573.

⁸⁴ *Re Cloncurry's Estate* [1932] Ir.R. 687.

⁸⁵ *Van Grutten v. Digby* (1862) 31 Beav. 561; *Re Mégret* [1901] 1 Ch. 547; *Re Cloncurry's Estate* [1932] Ir.R. 687.

⁸⁶ *Duke of Marlborough v. Att.-Gen.* [1945] Ch. 78.

⁸⁷ *Este v. Smyth* (1854) 18 Beav. 112; *Duncan v. Cannon* (1854) 18 Beav. 128; *Chamberlain v. Napier* (1890) 15 Ch.D. 614; *Re Barnard* (1887) 56 L.T. 9; *Lister's Judicial Factor v. Syme* [1914] S.C. 204; *Battye's Trustee v. Battye* [1917] S.C. 385.

2. H, domiciled in England, marries W, domiciled in Scotland. They enter into a marriage settlement in Scottish form, under which H acquires a life interest in property of W. It is part of the settlement that all payments to H in respect of this interest 'shall be strictly alimentary, and shall not be assignable nor liable to arrestment or any other legal diligence at the instance of his creditors'. Such an interest is invalid by English law but valid by the law of Scotland. H continues during life domiciled in England, and mortgages his life interest under the settlement to English creditors. Though the matrimonial domicile was English, the construction and the effect of the contract depend upon Scottish law, and the mortgage of H's life interest to creditors is invalid.⁸⁸

3. H, domiciled in Italy, marries W, domiciled in England. A marriage settlement in English form is made whereby property belonging to W, which is invested in English securities, is vested in English trustees. By Italian law, the settlement is invalid (a) because it was not executed before a notary (a question of form), (b) because it altered Italian rules of succession (a question of material or essential validity). The proper law of the settlement is English law, and the settlement is valid.⁸⁹

4. H, domiciled in Eire, marries W, domiciled in England. A marriage settlement in English form is made between them. The trustees are resident in England. The settled property is invested in American securities. The investment clause permits investment in land in England and Wales but not in Ireland. The management of the trust is in England. The proper law of the settlement is English law.⁹⁰

SUB-RULE 3.—The proper law of the contract will, in general, decide whether any particular movable (e.g., any future acquisition) is included within the terms of the marriage contract or settlement.

Comment

The law with reference to which the marriage contract or settlement is construed, which is in general the law of the matrimonial domicile, must, it is conceived, as far as the question is a matter of law, determine whether any particular class of movable property, e.g., goods and chattels acquired after the marriage, are included within the terms of the contract.

Property not included expressly or by implication within the terms of the contract will be regulated by the Rules applicable to cases where there is no marriage contract.⁹¹

SUB-RULE 4.—The interpretation or effect of the marriage contract or settlement is not varied by a subsequent change of domicile.⁹²

⁸⁸ *Re Fitzgerald* [1904] 1 Ch. (C.A.) 578.

⁸⁹ *Re Bankes* [1902] 2 Ch. 388.

⁹⁰ *Re Cloncurry's Estate* [1932] Ir.R. 637, with which contrast *Duke of Marlborough v. At.-Gen.* [1945] Ch. 78, stated ante, p. 792, Illustration 5.

⁹¹ See Rules 171, 172; *Hoare v. Hornby* (1843) 2 Y. & C. 121; *Anstruther v. Adair* (1834) 2 My. & K. 513; *Re Simpson* [1904] 1 Ch. (C.A.) 1; *Duncan v. Cannon* (1854) 18 Beav. 128; *Watts v. Shrimpton* (1856) 21 Beav. 97; *De Serre v. Clarke* (1874) L.R. 18 Eq. 587.

⁹² *De Nicols v. Curlier* [1900] A.C. 21. See *Duncan v. Cannon* (1854) 18 Beav. 128; *Foubert v. Turst* (1708) 1 Bro.P.C. 129; *Lister's Judicial Factor v. Syme* [1914] S.C. 204; *Shand-Harvey v. Bennet-Clark* [1910] 1 Sc.L.T. 138.

Comment

The effect of a contract must depend on the intention of the parties at the time of making it. A marriage contract or settlement must, therefore, be construed with reference to the law, whatever it was, which the parties had in view when the contract was made, i.e., in general the law of the matrimonial domicile at the time of the marriage. No later change of domicile can effect its meaning, nor render it invalid. Any other view would clearly violate the basis of the marriage.

RULE 171.—Where there is no marriage contract or settlement, and where no subsequent change of domicile on the part of the parties to the marriage has taken place, the rights of husband and wife to each other's movables, whether possessed at the time of the marriage or acquired afterwards, are governed by the law of the matrimonial domicile, without reference to the law of the country where the marriage is celebrated or where the wife is domiciled before marriage.

Comment

In this form the Rule appears to be justified both by authority and reason.⁹³ 'It is unnecessary to cite authorities to show that it is now settled that, according to international law as understood and administered in England, the effect of marriage upon the movable property of spouses depends (in the absence of any contract) upon the domicile of the husband in the English sense'.⁹⁴ As the property rights of the parties to a marriage must be governed by some law, it is natural to assume that they will be governed by the law of the matrimonial domicile, i.e., the domicile which the husband has at the time of the marriage.

Illustrations

1. H, domiciled in England, marries in London W, a Frenchwoman domiciled in France. The rights of the parties to movables are governed by the law of England just as they would be if H and W were both domiciled in England.

2. H, domiciled in England, marries in Switzerland W, a Frenchwoman

⁹³ See *Westlake*, s. 36; *Welch v. Tennent* [1891] A.C. 639, 644, 645; *De Nicols v. Curlier* [1900] A.C. 21, 32-34, per Lord Macnaghten. The last case, however, is not an authority for this Rule, since under French law the result of marriage without a formal contract was found to be equivalent to the conclusion of an express contract adopting the rule of community of property as the principle affecting the marriage. For Roman Dutch law, see *Blatchford v. Blatchford* (1861) 1 E.D.C. 365; *Black v. Black* (1884) 3 S.C. 200; *Gaarn v. Cairns' Executors* [1910] E.L.D. 462; *Gunn v. Gunn* [1910] T.P.D. 428.

⁹⁴ *Re Martin* [1900] P. 211, 233, per Lindley, M.R.

domiciled in Italy. The rights of the parties to movable property are governed by the law of England.

3. H, domiciled in England, marries in France W, a Frenchwoman. W after her marriage inherits £1,000. The right to the money is governed by the law of England.

4. H, domiciled in England, marries W, a woman domiciled in France. It is the intention of both parties to go, immediately after the marriage, and settle in Scotland. This intention they forthwith carry out. Their rights over movables are governed by English law unless and until they acquire a domicile in Scotland.⁹⁵

5. H, domiciled in England, marries W, domiciled in Jersey, and settles with her in England. His liability for W's prenuptial debts is governed by the law of England.⁹⁶

RULE 172.—Where there is no marriage contract or settlement, and where there is a subsequent change of domicile, the rights of husband and wife to each other's movables, both *inter vivos* and in respect of succession, are governed by the law of the new domicile, except in so far as vested rights have been acquired under the law of the former domicile.

Comment

The Rule rests primarily upon the authority of *Lashley v. Hog*,⁹⁷ a decision in the case of a change of domicile from England to Scotland, which was held by the House of Lords to carry with it the application of Scottish law to the property relations of the husband and wife, in the absence of an English settlement affecting the husband's property. This case was distinguished from *De Nicols v. Curlier* by the House of Lords, and the ground⁹⁸ of distinction seems clearly to have been the absence of a written contract in *Lashley v. Hog*, while in *De Nicols v. Curlier* the circumstances in the view of French law amounted to the formation of an express contract for community of property.

⁹⁵ See *Collins v. Hector* (1875) L.R. 19 Eq. 334.

⁹⁶ *De Greuchy v. Wills* (1879) 4 C.P.D. 392. The discussion of the place of marriage in this case was clearly in its bearing on the matrimonial domicile.

⁹⁷ (1804) 4 Paton 581. See also *Re Marsland* (1886) 55 L.J.Ch. 581, where it was clearly assumed that, if the domicile had been changed to English, the wife would have been entitled to an equity to a settlement in the fund in question; *Craignish v. Hewitt* [1892] 3 Ch. (C.A.) 180, where Chitty, J., held that where the domicile had become English the Scottish husband could not claim succession, *iure mariti* and against the will, to half the property of his deceased English wife; *Re Groos* [1915] 1 Ch. 572, where the spouses had by contract negatived community of property and retained their rights over their own property including power of disposal by will, and on change of domicile the testamentary power of the wife was expanded by the disappearance of the restrictions imposed by Dutch law in favour of her children. See also the Scottish cases; *Hall's Trustees v. Hall* (1854) 16 D. 1087; *Kennedy v. Bell* (1864) 2 M. 587.

⁹⁸ [1900] A.C. 21, 34, 36, *per* Lord Macnaghten; pp. 36, 37, *per* Lord Shand; p. 43, *per* Lord Brampton.

Moreover, the Rule is given statutory validity for the case of a change of domicile from England to Scotland by the Married Women's Property (Scotland) Act, 1920, which lays down a definite code affecting the rights of husband and wife in respect of movable property, and makes it applicable 'where the husband is domiciled in Scotland', without any saving for the case where the matrimonial domicile was not Scottish.

It must, of course, be noted that the Rule does not require that the result of a change of domicile shall be to bring the property relations of husband and wife under the same rules as would have applied to them had they been married under the law of their new domicile. Community of goods in France, for instance, is constituted by a marriage under French law, and must commence from the date of the marriage; it cannot, therefore, be applied to a husband and wife who, after being domiciled in England, where they married, acquired a domicile in France.⁹⁹

The chief importance of the Rule lies in the sphere of succession. The effect of marriage in many continental countries, apart from any settlement, is to limit definitely the freedom of either husband or wife to dispose by will of their property; by change of domicile to England these fetters on disposal are entirely removed, so that a will made prior to the change of domicile will be interpreted and receive effect in accordance with English law.^{99a} By change, on the other hand, of domicile from England, *e.g.*, to Scotland, the power of disposal will be limited by operation of the principle of *legitim*, *ius relictæ* and *ius relictî*.

Rule 172 cannot yet be said to be settled law. It rests, as has been stated, primarily on the authority of *Lashley v. Hog*.¹ But that case is old and unsatisfactory, and there is force in Westlake's view that the *ratio decidendi* was that Mrs. Lashley's claim 'turned on testamentary and not on matrimonial law'.² The true principle, it is submitted, is this. If the effect of marriage according to the law of the matrimonial domicile is to give one spouse *vested* rights in the property of the other, then those rights must continue to be recognised everywhere, notwithstanding any change of domicile; but property acquired after the change of domicile will be subject to the law of the domicile at the time of acquisition, since there can be no vested right in hypothetical future acquisitions. If, on the other hand, the effect of marriage according to the law of the matrimonial domicile, is to give one spouse *inchoate* rights in the other's property, for example, a right to a certain proportion of his or her estate on death notwithstanding any testamentary disposition (*i.e.*, a mere *spes*

⁹⁹ Compare *De Nicols v. Curlier* [1900] A.C. 21, 33, *per* Lord Macnaghten.

^{99a} See *Re Groos* [1915] 1 Ch. 572.

¹ (1804) 4 Paton 581.

² Westlake, s. 36 a; cf. Cheshire, pp. 653-658; Wolff, ss. 333-339; Goodrich, ss. 120-121; Restatement, s. 290.

successionis), then those rights must be determined by the law of the spouse's domicile at death. This is merely another way of saying that testamentary and intestate succession to movables are governed by the law of the deceased's last domicile.³ The question is really one of characterisation⁴; is the nature of the surviving spouse's claim a matter of matrimonial or a matter of testamentary law?⁵

Illustration

H and W, domiciled in Holland, marry there without a contract and are accordingly subject to the Dutch system of community of goods, under which all property belonging to H and W at the time of the marriage or acquired later by either spouse becomes the common property of both. H and W acquire an English domicile. Movables owned by H and W at the time of the change of domicile are subject to the Dutch system of community. Movables acquired by H and W after the change of domicile are not. Therefore if H makes a will leaving all his property to X, it will include all movables acquired by H after the change of domicile, but not W's share under Dutch law in the movables owned by H and W at the time of such change.

³ See *post*, Chap. 31, p. 817.

⁴ *Ante*, p. 62.

⁵ Compare Falconbridge, pp. 69-71.

TORTS¹

RULE 173.²—Whether an act done in a foreign country is or is not a tort (i.e., a wrong for which an action can be brought in England) depends upon the combined effect of the law of the country where the act is done (*lex loci delicti commissi*) and of the law of England (*lex fori*).

Comment

This Rule lays down the principle of which the effect is worked out in Rule 174. It is not wholly easy of defence on theoretic grounds, and is not on the whole in accord with American law, which tends to the simpler view that an action may be brought in respect of a tort committed in another country on the basis that the *lex loci delicti commissi*, in general, determines the right to sue and the available defences.³

If all the operative facts giving rise to a cause of action occur in England, then even though all the parties are foreigners, no question of Conflict of Laws arises, and liability is determined solely by reference to English domestic law.⁴

Illustration

X, a Czech official, publishes in England a statement concerning A, another Czech official, to B, a third Czech official. A claims that the statement constitutes a libel. Whether the statement is an actionable libel is determined entirely by the rules of English domestic law.⁴

¹ Story, ss. 307 d, 307 e; Cheshire, Chap. 11; Wolff, ss. 469-479; Restatement Chap. 9; Goodrich, Chap. 6; Hancock, *Torts in the Conflict of Laws*; Falconbridge, Chap. 2, ss. (2) and (3); Chaps. 43, 44, 45.

² See Rule 174, *post*; *Mostyn v. Fabrigas* (1775) Cowp. 172, 175, *per* Lord Mansfield; *Chartered Bank of India v. Netherlands, etc., Co.* (1883) 10 Q.B.D. (C.A.) 521, 536, 537, judgment of Brett, L.J. Compare *Phillips v. Eyre* (1869) L.R. 4 Q.B. 225; (1870) L.R. 6 Q.B. (Ex.Ch.) 1, 28, 29, judgment of the court, delivered by Willes, J.; *Carr v. Francis, Times & Co.* [1902] A.C. 176. For Canada, see *Story v. Stratford Mill Building Co.* (1913) 30 O.L.R. 271; *O'Connor v. Wray* [1930] 2 D.L.R. 899; *MacLeod v. Paul* [1938] 2 W.W.R. 466; *Young v. Industrial Chemical Co., Ltd.* [1939] 4 D.L.R. 393; *McLean v. Pettigrew* [1945] 2 D.L.R. 65. *McLarty v. Steele* (1881) 8 R. 435, enunciates the same doctrine for Scotland; *Evans & Sons v. Steen & Co.* (1904) 7 F. 65. For South Africa, see *Rogaly v. General Imports, Ltd.* [1948] 1 S.A.L.R. 1217. For foreign currency obligations affecting tort liability, see Rules 160, 163, 164 and 165, *ante*, pp. 718, 734, 740 and 744, and Comment and Illustrations thereto.

³ Goodrich, s. 89.

⁴ *Skalatnay-Stacho v. Fink* [1947] 1 K.B. 1. See also 9 M.L.R. 179.

RULE 174.—An act done in a foreign country is a tort and actionable as such in England, only if it is both

- (1) actionable as a tort, according to English law, or in other words, is an act which, if done in England, would be a tort; and
- (2) not justifiable, according to the law of the foreign country where it was done.⁵

Comment and Illustrations

The first part of this Rule was laid down in *The Halleu*⁷ by the Privy Council in 1868. The ground upon which it is expressed to rest is the objection to giving damages in respect of a proceeding which English law does not condemn. This part of the Rule has been sharply criticised,⁸ and it is submitted that it does impose an unreasonable restriction upon the right to bring an action for damages in respect of a matter recognised as tortious by the *lex loci delicti commissi*. English law has not refused to enforce a contractual obligation, valid by its proper law, merely because it would not be a valid contract and hence actionable by the rules of English domestic law.⁹ It would have been more reasonable to have refused to allow an action to be brought in England only when to permit it would offend a rule of English public policy.

Any defence to the action which is valid under English law is, of course, available to the defendant, although such a defence would not be accepted by the law of the country in which the tort took place. Thus in an action for libel the fact that the words complained of are true will be a good defence in an action in England, although such a defence might not be sufficient in the country in which the words were spoken.¹⁰

Whether the penalty in the shape of damages depends on English law as the *lex fori*, or is determined by the *lex loci delicti commissi*, has not, in all cases, been conclusively decided in England. In *Machado v. Fontes*,¹¹ where the *lex loci delicti commissi* imposed only a criminal penalty, it was held that English

⁵ But note that no action can be brought in England for an injury to foreign land, except in certain defined cases. See *British South Africa Co. v. Companhia de Moçambique* [1893] A.C. 602; *The Tollen* [1946] P. 185; Hancock, pp. 95-100; Rule 20, p. 141, *ante*. The wording of Rule 174 has been altered in deference to suggestions by Falconbridge, pp. 696-7, and Willis, 14 Can. Bar Rev., p. 21 (1936).

⁷ (1868) L.R. 2 P.C. 193. See also *Phillips v. Eyre* (1870) L.R. 6 Q.B. 1; *The Mary Mozham* (1870) 1 P.D. (C.A.) 107, 115; *Machado v. Fontes* [1897] 2 Q.B. (C.A.) 231, 233; *Carr v. Francis, Times & Co.* [1902] A.C. 176, 182.

⁸ See Cheshire, pp. 373-4; Hancock, pp. 12 *et seq.*, 86 *et seq.*; Robertson, 4 M.L.R. 28 *et seq.*

⁹ *Re Bonacina* [1913] 2 Ch. 394.

¹⁰ *Cl. Hart v. von Gumpach* (1873) L.R. 4 P.C. 430.

¹¹ [1897] 2 Q.B. (C.A.) 231. See also *Baschet v. London Illustrated Standard Co.* [1900] 1 Ch. 78.

law, the *lex fori*, determined the question of damages. In a Canadian case,¹² it has been held that the principle of *Machado v. Fontes*¹³ requires that the *lex fori* should govern damages, even where damages are given by the *lex loci delicti commissi*.¹⁴

The second part of the Rule has occasioned some difficulty because of the introduction of the words 'not justifiable'. These words appear in the judgment of Willes, J. in *Phillips v. Eyre*,¹⁵ and were adopted in the House of Lords in *Carr v. Francis, Times & Co.*¹⁶ They import a notion less precise than 'actionable as a tort', in the first part of the Rule. In *Walpole v. Canadian Northern Ry. Co.*,¹⁷ the plaintiff brought an action in Saskatchewan under the Saskatchewan Fatal Accidents Act in respect of a fatal injury to her husband in British Columbia in the course of his employment by the defendant company, caused by the negligence of the company's servants. In British Columbia, all rights of action were excluded, and the only claim was to a defined measure of compensation. It was held that the plaintiff could not recover. It is submitted that the decision is unexceptionable, since the claim did not properly arise *ex delicto*, but was properly classified as a matter of workmen's compensation law.¹⁸ However, the Privy Council also expressed the view that under British Columbia law (the *lex loci delicti commissi*), the act of the defendants could not be held to be other than justifiable. It is submitted that 'to describe an injury to a workman as justifiable from the point of view of the employer is not a particularly felicitous use of language'.¹⁹

Again, in *Machado v. Fontes*,²⁰ great stress was laid by the Court of Appeal on the words 'not justifiable' in the Rule. The material question was whether the fact that libel was not civilly actionable, but only punishable by criminal process in Brazil, debarred a plaintiff from bringing an action in England on a libel

¹² *Story v. Stratford Mill Building Co.* (1913) 30 O.L.R. 271.

¹³ [1897] 2 Q.B. (C.A.) 231.

¹⁴ The view that the *lex fori* should govern the penalty in the shape of damages is criticised by Hancock, pp. 121-4. See also the same writer in 22 Can.Bar Rev., pp. 854-5. He considers that *Story v. Stratford Mill Building Co.* (1913) 30 O.L.R. 271 was an undesirable extension of *Machado v. Fontes* [1897] 2 Q.B. (C.A.) 231. But see Schmitthoff, pp. 152, 155. Falconbridge considers that the measure of damages in tort is a substantive, not a procedural, question, but that English law applies under the first branch of the rule in *Phillips v. Eyre* (1870) L.R. 6 Q.B. 1, i.e. Rule 174 (1): see Falconbridge, pp. 19, 699; and see *Lister v. McNulty* [1944] 3 D.L.R. 673, discussed by Hancock, 22 Can.Bar Rev. 843 (1944) and Falconbridge, pp. 83-85.

¹⁵ (1870) L.R. 6 Q.B. 1, 28. See also *Canadian Pacific Ry. v. Parent* [1917] A.C. 195.

¹⁶ [1902] A.C. 176, 182.

¹⁷ [1923] A.C. 113. See also *Macmillan v. Canadian Northern Ry.* [1923] A.C. 120.

¹⁸ See Cheshire, pp. 381-2; Wolff, pp. 498-9.

¹⁹ Cheshire, p. 882.

²⁰ [1897] 1 Q.B. (C.A.) 231. See also *McLean v. Pettigrew* [1945] 2 D.L.R. 65.

published in Brazil. The court laid stress on the word 'justifiable' in *Phillips v. Eyre*²¹ and held that the fact that libel was criminally punishable in Brazil made it not justifiable within the Rule. The decision has been much discussed, and its soundness challenged.²²

1. X, a British subject, commits what, according to English law, is an assault on A, a British subject, at Naples, where damages for it are recoverable by proper proceedings. The assault is a tort.²³

2. X, an Italian subject, commits what according to English law, is an assault on A, an Italian subject, at Naples, where damages for it are recoverable by proper proceedings. The assault is a tort.

3. X publishes in Paris a statement about A which, according to English law, is a libel. The publication is actionable according to the law of France. The publication is a tort.

4. X publishes in a foreign country statements about A which would, if published in England, have entitled A to maintain an action for libel against X. Under the law of such foreign country the publication of these statements is punishable, but would not be the subject of civil proceedings in such country. The publication of such statements is a tort for which A can maintain an action against X in England.²⁴

5. A, a passenger carried gratuitously in X's car, is injured by X's careless driving in Ontario. By Ontario law a passenger carried gratuitously has no right of action in such a case. X is prosecuted for the offence of driving without due care and attention on the occasion of the injury, in Ontario, but is acquitted. A brings an action in Quebec in respect of the injury. The acquittal by the Ontario court in the criminal proceedings is not conclusive, so that if it is found that X was wrongfully acquitted, A can maintain his action against X in Quebec.²⁵ By Quebec law X would be civilly liable in quasi-delict.

6. A suffers injury through the negligence of X in a foreign country. Under the law of such foreign country, A has only a claim for compensation to be assessed by a specified tribunal, and no further right of action. A cannot maintain an action in tort against X in respect of the injury in England.²⁶

7. X in Italy comments adversely on A, the head of the Government. His action there is a criminal offence. A brings an action against X in England for libel. X can plead that his remarks were fair comment.

8. X imprisons A in Jamaica under circumstances which, had the act been done in England, would have rendered X liable to an action for false imprisonment. The imprisonment is not wrongful according to the law of Jamaica. It is not a tort.²⁷

²¹ (1870) L.R. 6 Q.B. 1.

²² Hancock, 22 Can.Bar Rev. 853, says of the case that 'it appears to be at glaring variance with the policy that a plaintiff should not be given an undue advantage by a fortunate choice of a forum'. See also Cheshire, p. 378; Wolff, p. 497; Pollock, 13 L.Q.R. 233; Lorenzen, 47 L.Q.R. 485-7; Gutteridge, 6 C.L.J. 20; Robertson, 4 M.L.R. 34 *et seq.*; Schmitthoff, pp. 150-153; Falconbridge, 18-19, 698-702, in which various views of the decision are stated. The decision was not followed in the Scottish case of *Naftalin v. L. M. S. Ry.* [1933] S.C. 259. See 4 M.L.R. 214-6. The Supreme Court of Canada followed it in *McLean v. Pettigrew* [1945] 2 D.L.R. 65. For Australia, see *Varawa v. Howard Smith & Co.* [1910] V.L.R. 509; *Musgrave v. The Commonwealth* (1937) 57 C.L.R. 514, 532.

²³ *Scott v. Seymour* (1862) 1 H. & C. 219, 231.

²⁴ *Machado v. Fontes* [1897] 1 Q.B. (C.A.) 231.

²⁵ *McLean v. Pettigrew* [1945] 2 D.L.R. 65.

²⁶ *Walpole v. Canadian Northern Ry.* [1923] A.C. 118.

²⁷ *Phillips v. Eyre* (1870) L.R. 6 Q.B. 1.

9. *The Halley*, a British ship, of which X, a British subject, is owner, collides with and damages A's ship in Belgian waters. The damage is caused through the negligence of N, a pilot, whom X, by Belgian law, is compelled to employ. X is, under Belgian law, liable to an action for the damage done to A's ship; under English law X is, on the ground of his employing N, protected from liability. X's act is not a tort.²⁸

The place of wrong. A problem of some difficulty is raised by the question: where is the *locus delicti commissi*?²⁹ It is perfectly simple to answer this question in a case in which all the events, except the actual bringing of the action, occur within one country. If D publishes a libel on A in France and the action is brought in England, it is clear that France is the *locus delicti commissi*. But if the facts are that a substance is manufactured without reasonable care in New York and D suffers injury by using it in England, the problem becomes more difficult. Again a train in State X may without negligence emit sparks which destroy by fire D's farm in State Y. By the law of State X there is no liability in the absence of negligence, while in Y liability exists despite the absence of negligence.

Here, obviously, it is of the greatest importance to determine which State is the *locus delicti commissi*.

This problem has been considered in two English cases. In *George Monro, Ltd. v. American Cyanamid and Chemical Corporation*,³⁰ the plaintiff, an English company, bought rat poison in New York from an American corporation under an agreement which provided that the contract was to be governed by the law of New York, and that property in the goods was to pass in New York. An English purchaser suffered loss through the defective condition of the rat poison, and he recovered against the plaintiff, who wished to recover in turn against the American corporation, and sought leave to serve it out of the jurisdiction under Order XI, r. 1 (*ee*) which empowers the court to grant such leave where the action is founded on a tort committed within the jurisdiction.³¹ The place of tort was therefore the material point at issue.

The Court of Appeal unanimously refused leave. Considerable stress was placed on the discretion which the court had in deciding whether to grant leave under Order XI. However, Goddard and du Parcq, L.J.J., both clearly expressed the opinion that no tort had been committed in England. du Parcq, L.J., stated: 'The question is: Where was the wrongful act, from which the damage flows, in fact done? The question is not where was the damage suffered, even though damage may be of the gist of the action'.³²

²⁸ *The Halley* (1868) L.R. 2 P.C. 193. See now the Pilotage Act, 1913, s. 15.

²⁹ See especially, Hancock, *Torts in the Conflict of Laws*, pp. 171 *et seq.*; Lorenzen, 47 L.Q.R. 491 *et seq.* (1931); Cheshire, pp. 383 *et seq.*; Kahn-Freund, 7 M.L.R. 242-245; Rheinstein, 19 Tul.L.Rev. 4, 165 (1945).

³⁰ [1944] 1 K.B. 482.

³¹ See *ante*, Rule 28, Exception 6, p. 192.

³² *Ibid.* at p. 441.

There is some difficulty in holding that a tort is committed in New York, when there is no possible liability in tort until injury is suffered in England. This case was distinguished in *Bata v. Bata*,²¹ where the Court of Appeal granted leave under Order XI, r. 1 (cc), in a case in which allegedly defamatory statements written abroad were posted to and read in England.

The prevailing view in the United States is that the *locus delicti commissi* is the country or State where the last event necessary to make an actor liable for an alleged tort takes place.²² This view has not been followed in all American cases,²³ and it has been cogently criticised by Cook,²⁴ who prefers the view which has been judicially propounded in Germany that the *locus delicti commissi* is in any country where the wrongdoer acted and in any country in which the effects of such wrong took place. The injured person may choose the law of any country where some part of the facts including acts and effects took place. This enables him to choose among these laws, that which is most advantageous to his claim.²⁵ It is submitted that this is a reasonable view.

One or two questions still require consideration.

First Question. Does anything depend upon the answer to the inquiry whether the wrongdoer and the person wronged both or either of them are British subjects?

Reference was made to this question in *Scott v. Seymour*.²⁶ There Wightman, J. was of opinion that if a matter were actionable as a tort in England, then even though damages were not recoverable in the *locus delicti commissi*, one British subject could succeed in England in recovering damages against another British subject in respect of such a matter. Willes, J. indicated general approval of the judgment of Wightman, J. Crompton, J. expressed no opinion and Williams, J. disagreed with the view of Wightman, J. Blackburn, J., in an opinion which was hesitatingly expressed, inclined to the view of Williams, J. It is submitted that the opinion of Williams and Blackburn, JJ. is clearly sound, and that it may (if confined to acts done in a civilised country) be accepted to its fullest extent. The civil rights and liabilities of the parties before an English court are, subject to the rarest exceptions, not affected by their nationality.

²¹ For a strong criticism of the decision, see Cheshire, pp. 385-6. See also as to the discretionary character of the jurisdiction under Order XI, r. 1 (cc): *Kroch v. Russell et Cie* (1937) 150 L.T. 379.

^{22a} [1918] W.N. 360.

²³ See Goodrich, s. 90; Restatement, s. 377; but contrast Cook, Chap. 18.

²⁴ See Stumberg, pp. 184-5.

²⁵ Chap. 18, esp. pp. 319, 345. See also Stumberg, pp. 183 *et seq.*

²⁶ See Lorenzen, 47 L.Q.R. 491-3 (1931); Wolff, p. 501.

²⁷ (1892) 1 H. & C. 219; per Wightman, J. at pp. 234-5; per Williams and Crompton, JJ. at p. 235; per Willes, J. at p. 236; per Blackburn, J. at p. 237. See also *Machado v. Fontes* [1897] 2 Q.B. (C.A.) 231.

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^{33a} [1948] W.N. 366.

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Second Question.—How far is an act, wrongful by English law, actionable if committed beyond the limits of a civilised country?

This question applies either to acts done in a country which is not civilised or to acts done on the high seas.

Acts done in an uncivilised country.—With this matter this Rule is not concerned. In such a case, the reference to the unjustifiable character of the act according to the *lex loci delicti commissi* cannot have any meaning. If an act done by X in an uncivilised country damages A in his property, then if both X and A are domiciled in England, it may be that an action can be brought in England if the act would have been tortious if done in England. If X is domiciled in England and A in France, it may be that the answer to the question whether an action can be brought in England depends upon two questions (a) is the act unjustifiable according to French law? (b) could an action be brought in tort in England if the act had been done there? An action cannot be maintained in England for a trespass to land in any foreign country.³⁹

Acts done on the high seas.—An act done on board a ship on the high seas is governed by the law of the country⁴⁰ to which the ship belongs, e.g., England, France or Italy. This is obviously the only law applicable where the act in question is done by one person on board the vessel to the detriment of another person also on board the vessel. In such a case, if, for example, an injury is inflicted by one person upon another on board a foreign ship, and an action is brought in tort in England, it is submitted that the principle of this Rule will apply. Therefore the act must be actionable as a tort in England, and must not be justifiable under the law of the country to which the ship belongs.⁴¹ A more difficult case arises where ships of different countries are engaged in capture of such animals *feræ naturæ* as whales, and disputes arise as to the invasion by the crew of one ship of rights of property in such animals acquired by the crew of another ship. In such a case, it appears that a different rule must be adopted. As Cheshire observes: 'If two or more foreign ships carrying different flags were concerned in the dispute it might be virtually impossible to refer to each law, since the act might be innocent in one of the countries and wrongful in the others. Again, it seems a little strained to treat the law of the flag in maritime wrongs as being equivalent to the *lex loci delicti commissi* in the case of torts on land. The reason why English law requires proof that a wrong committed in a foreign country is actionable by the *lex loci* is that

³⁹ *British South Africa Co. v. Companhia de Moçambique* [1893] A.C. 602. But see *The Totten* [1946] P. 135; Rule 20 and Exceptions, *ante*, pp. 141-151.

⁴⁰ In the case of a British ship, it is submitted that the governing law is that of the country or State of registry, *Canadian Steamship Co. v. Watson* [1939] 1 D.L.R. 273, discussed by Falconbridge, Chaps. 43, 44; 3 M.L.R. 157-8. See also Hancock, p. 261; Merchant Shipping Act, 1894, s. 265; *ante*, p. 664.

⁴¹ *Canadian National Steamship Co. v. Watson* [1939] 1 D.L.R. 273.

the offending act has been committed within the exclusive jurisdiction of a foreign sovereign, but . . . there is no such thing as exclusive jurisdiction over the high seas'.⁴² In such a case, since it is not, in any real sense, possible to speak of a *lex loci delicti commissi*, it is submitted that an action in an English court should be governed by English law, such law being based on the common law of the sea as established by the usage of mariners.

Similarly, there is the strongest ground for the assertion that collisions at sea,⁴⁴ even though both or either of the ships should happen to be foreign ships, since they take place outside the territorial jurisdiction of any State, are in an English court to be treated as governed by English law, even apart from statute and convention, such law being based on the common law of the sea as established by the usage of mariners; and it is the opinion of Brett, L.J., that 'an action for a tort committed on the high seas between two foreign ships . . . can be maintained in this country although it is not a tort according to the laws of the courts in that foreign country'.⁴⁵ and, therefore, in a case where both the ships in collision were Dutch ships, and English plaintiffs brought an action for damage done to their goods by negligence of one of these ships, it has been laid down by Brett, L.J., that 'as the injury to the plaintiffs was committed by the servants of the defendants, not in any foreign country, but on the high seas, which are subject to the jurisdiction of all countries, the question of negligence in a collision raised in a suit in this country is to be tried, not indeed, by the common law of England, but by the maritime law,⁴⁶ which is part of the common law of England as administered in this country'.⁴⁷

⁴² At p. 390. See also Wolff, p. 504.

⁴⁴ Marsden, *Law of Collisions at Sea*, 8th ed., Chap. 9.

⁴⁵ *Chartered Mercantile Bank of India v. Netherlands, etc., Co.* (1893) 10 Q.B.D. (C.A.) 521, 537; *Submarine Telegraph Co. v. Dickson* (1864) 15 C.B. (N.S.) 759; *The Leon* (1881) 6 P.D. 148; *The Anne Johanne* (1860) Stuart's Cases in Vice-Adm. Court (Quebec) 43; *The Baarn* (No. 1) [1933] P. 251, especially at p. 262, per Scrutton, L.J.; *The Baarn* (No. 2) [1934] P. 171, especially at p. 176, per Scrutton, L.J. Contrast *Kendrick v. Burnett* (1897) 25 R. 82, where it was held that a tort must depend on the laws of both ships, but this was in connection with *solatium* for personal injury.

⁴⁶ The law indicated is described by the Court of Appeal in *Lloyd v. Gubert* (1865) L.R. 1 Q.B. 115, 125, as 'the general maritime law as administered in England, or to avoid periphrasis, the law of England'. See *The Johann Friedrich* (1899) 1 W.Rob. 35; *The Leon* (1881) 6 P.D. 148; *The Carlyle* (1858) 6 W.R. 197; *The Segredo* (1853) Spinks, Eccl. & Adm. 36, 45, per Dr. Lushington; *The Gaetano and Maria* (1882) 7 P.D. 137, 143, per Brett, L.J. The maritime law of Scotland is the same as in England: *Currie v. McKnight* [1897] A.C. 97, 101, 102; *Sheaf Steamship Co. v. Compania Trasmediterranea* [1930] S.C. 660, though procedure depends on the *lex fori*, and arrest *ad fundandam iurisdictionem* is valid. The same conception of a general maritime law may be seen in Lord Stowell's judgment in *The Carl Johan* (1821) cited in 1 Hagg. Adm. 113, 3 Hagg. Adm. 187. This law is also recognised to exist in the English decisions which held that where the rule of the road at sea had not been determined by international agreement binding on both ships involved in a collision, and different rules were

⁴⁷ See note 47 opposite

In order that an action in tort may be brought in England in respect of an act arising within the territorial waters of a foreign country, it is necessary that the requirements of this Rule should be satisfied. That is to say, the act must be actionable as a tort in England and not justifiable under the law of the country in whose territorial waters it occurs.⁴⁸

A collision occurs within the territorial waters of a foreign country while the offending vessel is under the control of a compulsory pilot. By English domestic law the owners of the offending vessel would be liable to an action in tort if the collision had occurred in English waters; by the law of the foreign country, there is no liability whatever imposed upon the owners of a vessel for damage done by it through the act or omission of a compulsory pilot. No action in tort will lie in England.⁴⁹

SUB-RULE.—An act done in a foreign country, which, though not justifiable under the law of that country at the moment when it was done, has since that time been the subject of an act of indemnity, passed by the legislature of such country or of the United Kingdom, is not a tort.⁵⁰

Illustration

X assaults and imprisons A in Jamaica. At the time of the assault, X's act is wrongful both by the law of Jamaica and by the law of England. The assault takes place for the purpose of suppressing a rebellion. The legislature of Jamaica afterwards passes an Act of Indemnity under which the assault is made lawful. The assault is, after the passing of this Act, not a tort.⁵¹

prescribed by the laws of the flags of the ships, liability fell to be determined by the old rule observed by the maritime nations; see *The Dumfries* (1856) Swabey 63; *The Zollverein* (1856) Swabey 96; *The Chancellor* (1861) 14 Moore P.C. 202; *The Repeater v. The Braga* (1865) 14 L.T. 258. This doctrine is attacked by Westlake, pp. 288-290. He states that the general maritime law is only a 'specious name' for English law. Hancock also attacks the English rule, pp. 278-9. The Restatement admits an exception for American law in cases of all colliding ships flying the same flag, when the law of the flag governs: s. 410 (a). But see Cheshire, pp. 388-9.

⁴⁷ There are special statutory provisions relating to such matters as collisions, but these illustrate no principles of the Conflict of Laws. Hence the detailed discussion in the fifth edition of this book at pp. 780-3 is omitted.

⁴⁸ *The Arum* [1921] P. 12. See also *The Halley* (1863) L.R. 2 P.C. 193; *Carr v. Francis, Times & Co.* [1902] A.C. 176. The contrary view expressed in the Scottish case of *Owners of S.S. Reresby v. Owners of S.S. Cobetas* [1923] Sc.L.T. 719, is not, it is submitted, well founded.

⁴⁹ *The Arum* [1921] P. 12.

⁵⁰ *Phillips v. Eyre* (1870) L.R. 6 Q.B. 1.

⁵¹ *Ibid.*

ADMINISTRATION IN BANKRUPTCY

RULE 175.¹—The administration in bankruptcy of the property of a bankrupt which has passed ² to the trustee is governed by the law of the country where the bankruptcy proceedings take place (*lex fori*).³

Comment

A creditor, whether an alien or a British subject, can under an English bankruptcy ⁴ prove for any debt, whether it be an English or a foreign debt,⁵ which is due to him from the bankrupt. But a foreigner proving (*e.g.*, for a foreign debt) stands in the same position as does an English creditor proving for an English debt; the equities available under the law of England against a bankrupt are available against a bankrupt or the trustee as representing him, in respect of rights acquired under the law of a foreign country.⁶ The distribution of the assets among the creditors⁷; the priorities among the creditors *inter se*⁸; the rules of double proof in the case of partnerships⁹; every matter, in short, which

¹ See Cheshire, p. 647; Wolff, s. 538; Westlake, ss. 145-148 a; Nadelmann in *Law and Contemporary Problems*, XI, No. 4 (1946) pp. 696-712; U. of Pa.L.R., 91 (1943) p. 601; *American Journal of International Law*, 38 (1944) pp. 470-71; *Clunet*, 67-72 (1940-45) pp. 64-74. See *Ex p. Melbourn* (1870) L.R. 6 Ch. 64; *Ex p. Holthausen* (1874) L.R. 9 Ch. 722; *Thurburn v. Steward* (1871) L.R. 3 P.C. 478. Compare *Pardo v. Bingham* (1868) L.R. 6 Eq. 485, and *Re Kloebe* (1884) 28 Ch.D. 175, which, though referring to the administration of a deceased person's estate, throws some light on the law governing administration in bankruptcy. The mere temporary presence in England of the foreign assignee or trustee affords no ground for proceedings against him in England as trustee; see *Smith v. Moffatt* (1865) 1 Eq. 397.

² For the effect of an English bankruptcy as an assignment, see Rule 54, p. 327, *ante*, and as a discharge, see Rule 55, p. 333, and Rule 103, p. 448, *ante*.

³ This Rule is in reality an application of the principle that all matters of procedure are governed by the *lex fori*. See Chap. 32, Rule 193, p. 859, *post*.

⁴ As the Rules in this Digest are concerned only with proceedings in England, our Rule applies only to an English bankruptcy, and means substantially that under such a bankruptcy the property which has passed to the trustee must be distributed wholly in accordance with the ordinary rules of the English bankruptcy law.

⁵ *Ex p. Melbourn* (1870) L.R. 6 Ch. 64. Compare *Re Kloebe* (1884) 28 Ch.D. 175.

⁶ *Ex p. Holthausen* (1874) L.R. 9 Ch. 722.

⁷ Privileged treatment of British creditors in preference to alien creditors is inadmissible, see *Re Wiskemann* (1923) 92 L.J.Ch. 349. Compare Nadelmann, *ante* n. 1.

⁸ *Ex p. Melbourn* (1870) L.R. 6 Ch. 64.

⁹ See, *e.g.*, Pollock, *Law of Partnership*, 14th ed., pp. 133-154; Lindley, *On Partnership*, 10th ed., pp. 891-899; Bankruptcy Act, 1914, s. 33 (6); 2nd

concerns the administration of the bankrupt's assets, or, in other words, which can be brought under the head of procedure in the very widest sense of that term—is to be determined in accordance with the ordinary rules of English bankruptcy law; and this is so even though the assets are the proceeds of foreign immovables, e.g., Scottish land, which under the English Bankruptcy Act has passed to the trustee.

Whilst, however, the mode of dealing with the property which has passed to the trustee, or rather with the proceeds thereof, is governed by the law of England, the question what is the property which has passed to a trustee, and subject to what charges it has passed to him, or, speaking generally, what are the rights of the bankrupt which have passed to the trustee, is a matter to be determined in each case by its appropriate law, e.g., if the right be a right to land in Scotland, then by Scottish law; if the right be acquired under a contract made in a foreign country, then by the law governing the contract.

Question.—How far are the special rules of English bankruptcy law as to the effect of bankruptcy on antecedent transactions¹⁰ enforceable against foreign creditors?

As regards transactions occurring within British territory the answer is clear: the Bankruptcy Act, 1914, applies to them as to transactions occurring in the United Kingdom. As regards transactions in countries not forming part of British territory, the answer probably is that these rules may be looked upon as matters of procedure, and will, e.g., as to the effect of a fraudulent preference, be enforced against a foreign creditor who proves for his debt under an English bankruptcy.¹¹

Illustrations

1. H and W are married in Batavia, and before marriage enter into a contract whereby £1,000 is settled on W for her separate use. By Batavian law, such a marriage contract has no effect as regards third persons until registered. The contract is never registered. H and W come to England.

Schedule, Rule 19; Baldwin, *Law of Bankruptcy*, pp. 631–633. The principle is illustrated by the old cases decided under a state of law now obsolete, *Ex p. Chevallier de Mello Mattos; Re Vanzeller* (1834) 1 M. & A. 345; *Ex p. Goldsmid* (1856–1857) 1 De G. & J. 257, 285; *Goldsmid v. Cazenove* (1859) 7 H.L. 735. But compare *Brickwood v. Miller* (1817) 3 Mer. 279. For the modern law, see *Re Doetsch* [1896] 2 Ch. 836, 839; though not a case in bankruptcy, the English rules as to double proof are recognised as generally applicable.

¹⁰ See Bankruptcy Act, 1914, ss. 40–44, taken together with the definition of 'property' in s. 167. See also p. 328, *ante*, and compare *Galbraith v. Grimshaw* [1910] A.C. 508. As regards the extent of property affected, see *Ex p. Dever, Re Suse* (1837) 18 Q.B.D. (C.A.) 660.

¹¹ This is apparently the principle maintained in Scotland. Goudy, *Law of Bankruptcy in Scotland*, 4th ed., pp. 606, 607, citing *Blackburn, Petr.*, February 22, 1810, F.C.; *Selkirk v. Davis* (1814) 2 Rose, 291; *Ex p. Wilson* (1872) L.R. 7 Ch. 490; *White v. Briggs* (1843) 5 D. 1143. Compare also *Ex p. Robertson* (1875) L.R. 20 Eq. 733; *Galbraith v. Grimshaw* [1910] A.C. 508.

H is there made bankrupt. W claims to prove for the £1,000. The Batavian law as to registration affects a question of remedy or procedure. All questions of priority of creditors are governed by English law (*lex fori*), and W is entitled under the English bankruptcy to prove for the sum settled *pari passu* with other creditors.¹²

2. N, a merchant in London, obtains a loan from A, a merchant in Prussia, by depositing with A the title deeds of a house at Shanghai. No conveyance or memorandum of deposit is made at Shanghai, and the house remains registered there in the name of N. N is adjudicated a bankrupt in England. Under English law A is entitled as against N to have the benefit of the security, and has a charge on the house at Shanghai. A's rights against T, the trustee, are governed by English law (*lex fori*). T is bound by the equities which bind the bankrupt, and A is entitled to have the house sold and the proceeds thereof, up to the amount of the debt to A, transferred to him.¹³

3. N makes a gift of goods to A in France. The gift is made after N has committed an act of bankruptcy. Within a month after the making of the gift N is adjudicated bankrupt in England. A proves for a debt incurred in France and under French law by N to A. The relation back of the trustee's title and the effect of such relation on the gift of N to A, is (*semble*) governed by English law (*lex fori*).¹⁴

¹² *Ex p. Melbourn* (1870) L.R. 6 Ch. 64, 68, 69. Compare *Thurburn v. Steward* (1871) L.R. 3 P.C. 478.

¹³ *Ex p. Holthausen* (1874) L.R. 9 Ch. 722.

¹⁴ Compare *Ex p. Robertson* (1875) L.R. 20 Eq. 733.

ADMINISTRATION AND DISTRIBUTION OF
DECEASED'S MOVABLES

1. ADMINISTRATION

RULE 176.¹—The administration of a deceased person's movables² is governed wholly by the law of the country from which the administrator derives his authority to collect them, *i.e.*, in effect, normally by the law of the country where the administration takes place (*lex fori*).³

Such administration is not affected by the domicile of the deceased.⁴

In this Rule, the term 'administration' does not include distribution.

Comment

Assets in the hands of an English administrator, wherever collected, are liable for all the debts of the deceased, whether incurred in England or a foreign country.⁵ This is obviously in accord with the principle that an English administrator, especially if principal, is given normally an unlimited grant and is expected to do his best to obtain all the net assets of the deceased wherever situate, so as to be able to discharge debts. Logically, it might have been expected that an ancillary administrator should only be liable to meet English debts, but the rule is clearly otherwise, and in point of fact the distinction of principal and ancillary administrators is not often insisted on by English courts.⁶ But when the English administration is ancillary, the administrator need not advertise for foreign claims, but, after discharging the debts English and foreign known to him, he can hand over the balance to the foreign principal administrator who is responsible for

¹ Story, s. 524; Goodrich, s. 187; Westlake, ss. 104, 105, 110, 111; *Preston v. Melville* (1840) 8 Cl. & F. 1; *Re Kloebe* (1884) 28 Ch.D. 175; *Re Lorillard* [1922] 2 Ch. (C.A.) 638; *Ewing v. Orr-Ewing* (1883) 9 App.Cas. 34; *Blackwood v. R.* (1882) 8 App.Cas. 82; *Enohin v. Wylie* (1862) 10 H.L.Cas. 1.

² As to immovables see pp. 535-536, *ante*.

³ See, as to principle that procedure is governed by the *lex fori*, Chap. 32, p. 859, *post*.

⁴ Compare *Cook v. Gregson* (1854) 2 Drew. 286, taken together with *Re Kloebe* (1884) 28 Ch.D. 175, 176, 180, judgment of Pearson, J.; *Re Lorillard* [1922] 2 Ch. (C.A.) 642; *per Eve, J.*; 645, *per Lord Sterndale, M.R.*

⁵ *Re Kloebe* (1884) 28 Ch.D. 175.

⁶ As to the distinction, see pp. 337-338, *ante*.

the payment of foreign debts.⁷ The foreign principal administrator has a *locus standi* to apply to the court to ask for such a transfer to him.⁸ The discretion to accede to or refuse his request is, however, absolutely unfettered.⁹ In exercising it the court is not required to have any regard to the fact that under the principal administration there are legitimate debts which have not been provided for and which, if any importance attaches to the distinction between principal and ancillary administration, ought to be regarded as having a claim upon the balance of assets prior to that of the beneficiaries. Domicile, in fact, is irrelevant in the administration of assets. The court has the right to benefit English beneficiaries at the expense of creditors in the country of the domicile who are statute-barred in England. And it will be guided in the exercise of its discretion by the place of residence of the beneficiaries. If they are wholly or mainly resident in the country of the domicile there will, as a rule, be no sufficient ground for refusing payment to the principal administrator in order to make distribution direct to them.¹⁰

The general principle of English law appears to be, that every question as to the admissibility of debts and as to the order in which debts of different kinds are to be paid is a matter of procedure, and therefore to be determined in accordance with the *lex fori*, and hence that an English administrator, in reference to the assets which he is administering under an English grant, must follow the order of priority prescribed by English law; and this whether the creditor claiming payment be an English or foreign, e.g., a French, creditor.¹¹

The principle that an English administrator must, in the administration of the deceased's estate, follow English law exclusively, applies, it would seem, only to assets which he holds as English administrator, i.e., which he has collected under his English grant, including the net proceeds of ancillary administrations remitted to him by the administrators, or made over to himself in his English capacity by him in the capacity of a foreign administrator.

If, for example, he has in England assets which he has collected in a foreign country, e.g., Ireland, under an Irish grant, then these foreign assets should be dealt with in accordance with the law of Ireland. The same person in effect fills a twofold character, viz.,

⁷ *Re Achillopoulos* [1928] Ch. 433, 445, per Tomlin, J.; compare *Re Holden* [1935] W.N. 52.

⁸ *Re Lorillard* [1922] 2 Ch. 638; *Re Bradley* [1941] 4 D.L.R. 309.

⁹ *Ibid.*, contrast *Enoch v. Wylie* (1862) 10 H.L.C. 1, 13, per Lord Westbury.

¹⁰ *Re Lorillard* [1922] 2 Ch. 638, 646-7; compare *Wilson v. Dunsany* (1854) 18 Beav. 293 (sed. dub.); *Cook v. Gregson* (1854) 2 Drew. 286.

¹¹ *Re Kloebe* (1884) 28 Ch.D. 175; *Re Hewit* [1891] 3 Ch. 568; *Re Doetsch* [1896] 2 Ch. 836, 839; *Re Smith* [1913] 2 Ch. 216. See now especially *Re Lorillard* [1922] 2 Ch. (C.A.) 638. See also *Re Bowes* [1889] W.N. 53, 138; *Milne v. Moore* (1894) 24 O.R. 456.

that of an English administrator and of an Irish administrator, and such Irish assets he holds and must administer as an Irish administrator.¹² The same principle may apply to foreign assets which he actually has received before complete administration in their *situs* by permission of a foreign administrator, whose duty towards claimants he may be held liable to carry out.¹³

It must be borne in mind that the word 'administration' is in this Rule not used in its most extensive sense; it here means simply the clearing of the deceased's estates from liabilities; it does not include the distribution of the residue or surplus which remains after the estate is cleared among the persons entitled to succeed beneficially thereto. This point is manifestly determinable in accordance with the rules governing the right of beneficial succession.¹⁴

But it is appropriate here to deal with a matter on the borderline between administration and succession, namely the right of recourse of an heir of foreign immovables who may have paid the foreign debts of the deceased. If the will directs the payment of such debts out of the personal estate of the deceased then there is a clear right to look for repayment to the personalty, which may be wholly or partly in England. Where, however, the question is not so resolved by the will, it is said that the right of recourse depends upon the *lex situs* of the immovables.¹⁵ Thus where a person dies domiciled in a foreign country and the heir to his lands there is compelled to pay the deceased's debts out of the lands, then if the *lex situs* gives a right to repayment out of movables, there is a right of recourse against the deceased's English personalty.¹⁶ But the decisions which establish this Rule involve no departure from the general rule that an English administration is governed by English law exclusively. For the situation to which they relate depends entirely upon the doctrine of English law that in an English administration personalty in England is liable for the debts, English or foreign, of the deceased, whatever his domicile.

It is further relevant to remark that the postponement of sale of assets is a matter of administration and not of succession and that the power to postpone sale of property comprised within an English grant of administration thus depends on English law.¹⁷

¹² *Cook v. Gregson* (1854) 2 Drew. 286; compare *Re Kloebe* (1884) 28 Ch.D. 175, 178, judgment of Pearson, J.

¹³ Compare *Hanson v. Walker* (1829) 7 L.J.(o.s.) Ch. 135. See also *Warner v. Giberson* (1904) 1 N.B.Eq.R. 65.

¹⁴ See Chap. 31, p. 817, post.

¹⁵ *Westlake*, s. 118; see *Balfour v. Scott* (1798) 6 Bro.P.C. 550.

¹⁶ *Anon.* (1728) 9 Mod. 66; *Bowman v. Reeve* (1721) Prec.Ch. 577; *Winchilsea v. Garetty* (1838) 2 Keen 293; *Elliot v. Minto* (1821) 6 Madd. 16; *Drummond v. Drummond* (1799) 6 Bro.P.C. 601; compare *Re Hewit* [1891] 3 Ch. 568.

¹⁷ *Re Wilks* [1935] Ch. 645. See also *Re Craen's Estate* [1937] Ch. 429, ante, p. 560, n. 20; *Re Nanton Estate* [1948] 2 W.W.R. 113 (power of maintenance); *Re Goenaga* [1948] W.N. 463 (time within which executor is empowered to act).

Illustrations

1. The deceased has died owing to A, an Englishman, a debt of £20, contracted in England, and to B, a Frenchman, a debt of £30, contracted in France. The assets in the hands of the deceased's English administrator are hable for both debts.¹⁸

2 The deceased, an Englishman residing in Venezuela, has executed an instrument to secure payment to A of £1,600. A afterwards registers the instrument in the form prescribed by the law of Venezuela, and by that law becomes thereby entitled to have his debt paid out of the general assets of T in priority to other creditors. This does not entitle A to priority of payment out of assets administered in England.²¹

3. The deceased has died leaving property both in America, where he is domiciled, and in England. There are administrations in both countries. Debts which by English law are time barred, though effective in America, cannot be admitted in the English administration.²²

2. DISTRIBUTION

RULE 177.²³—The distribution of the distributable residue of the movables of the deceased is (in general) governed by the law of the deceased's domicile (*lex domicilii*) at the time of his death.²⁴

Comment

The ultimate aim of an administration (if that word be taken in its widest sense) is the due distribution by the administrator of the distributable residue of the deceased's assets among the persons entitled to succeed beneficially thereto.

Distribution, therefore, follows the appropriate rule as to succession, and the succession to, and therefore the distribution of a deceased's movables is, whether he die intestate²⁵ or testate²⁶ (in general),²⁷ governed by the law of his domicile at the time of his death.

Meaning of law of domicile.—The law of the deceased's domicile in reference to succession means the rules applicable to succession in the case of the particular intestate or testator by the law of the country where he dies domiciled in the eyes of English law, which in the instance, for example, of a person dying domiciled in a foreign country need not be the same as the ordinary rules

¹⁸ *Re Kloebe* (1884) 28 Ch.D. 175.

²¹ *Pardo v. Bingham* (1868) L.R. 6 Eq. 485.

²² *Re Lorillard* [1922] 2 Ch. 688.

²³ See Chap. 31, *post*. As to immovables see pp. 535, 536, *ante*.

²⁴ See pp. 298–300, *ante*. For a statutory recognition of the principle, see the Presumption of Life Limitation (Scotland) Act, 1891, s. 3, and the Indian Succession Act, 1925, ss. 5, 19.

²⁵ As to intestate succession, see Chap. 31, Rule 178, *post*.

²⁶ As to testamentary succession, see Chap. 31, Rules 180–186, and compare Rules 187, 188, *post*.

²⁷ See Exceptions 1 and 2 to Rule 181, *post*, Rule 186, *post*, and Rules 187–191, *post*.

applicable to the case of succession to the property of native (e.g., French) intestates or testators, or may vary according to the religion or caste of the decedent.²⁸

Law at time of death.—The law which, as far as regards English courts, governs the succession to a deceased's movables is the law of the deceased's domicile as it stands 'at the time of his death'; and this qualification is of importance, for, if a change with retrospective operation is made in that law after the death of the intestate or testator, the succession to, and therefore the distribution of, his movables in England is not affected by the change.²⁹

Our Rule, in short, amounts to this: that English courts will in general distribute the movables of a deceased person exactly as the courts of his domicile would distribute them at the time of his death.

Question.—How is the duty of distribution to be performed when the deceased dies domiciled in a foreign country?

The distribution may be carried out either by the English administrator on his own authority, or by or under the direction of the court (e.g., where an administration action has been brought).

(1) *Distribution by administrator.*—When the deceased dies domiciled in a foreign country, e.g., Victoria, the English administrator (who must in this case be an ancillary administrator) should, after payment of all debts and other claims proved in England—assuming, of course, there is no administration action pending in England—hand over the distributable residue to the personal representative of the deceased under the law of Victoria. This course is open to the English administrator,³⁰ and, unless he takes the direction of the court,³¹ which, of course, he must do if an administration action has been brought, and an order for administration made, is (it is conceived) his only safe course.

(2) *Distribution by court.*—The court may at its discretion adopt either of two different methods of distribution.

The court may, on the one hand, hand over the distributable residue to the personal representative of the deceased under the

²⁸ See *Abd-ul-Messih v. Farra* (1888) 13 App.Cas. 431; *Bartlett v. Bartlett* [1925] A.C. 377; *Parapano v. Hapaz* [1894] A.C. 165; *Tano v. Tano*, 9 Cypr.L.R. 94; *Re Annesley* [1926] Ch. 692; *Re Ross* [1930] 1 Ch. 377. Compare *In Goods of Lacroix* (1877) 2 P.D. 94; *ante*, pp. 47-61.

²⁹ *Lynch v. Government of Paraguay* (1871) L.R. 2 P. & D. 268; *Re Aganoor's Trust* (1895) 64 L.J.Ch. 521.

³⁰ *Eames v. Hacon* (1880) 16 Ch.D. 407; (1881) 18 Ch.D. (C.A.) 347; *Re Kloebe* (1884) 28 Ch.D. 175; *De Mora v. Concha* (1885) 29 Ch.D. (C.A.) 268, especially 284, observation of Fry, L.J.; *Re Trufort* (1887) 36 Ch.D. 600, 611, judgment of Stirling, J.; *Re De Penny* [1891] 2 Ch. 63, 68, judgment of Chitty, J.; *Ewing v. Orr-Ewing* (1885) 9 App.Cas. 34, 40; 10 App.Cas. 453, especially pp. 502-4, 509, 510, and pp. 463, 464, note. *Re Achilopoulos* [1928] Ch. 438, 445.

³¹ See, e.g., Ord. LV, rr. 3, 4, and *Re Lorillard* [1922] 2 Ch. (C.A.) 638.

law of his domicile, and leave to such representative the distribution thereof among the beneficiaries. If this course is taken, all persons who, whether as next of kin or otherwise, claim a share in the deceased's estate, must enforce their claims before the tribunals of his domicile.³²

The court may, on the other hand, determine for itself what is the law of the deceased owner's domicile, and who are the persons who, in accordance with such law, are entitled to succeed to the deceased's movables, and, having determined this, distribute or instruct the administrator to distribute, in accordance with such law, the distributable residue remaining in the hands of the English administrator.³³

The adoption of one method in preference to the other may make a material difference to the shares actually receivable by the beneficiaries. Thus, if some creditors are not statute-barred in the country of the domicile of a deceased person dying abroad, but are so barred in England, and if the court, as it may, directs a distribution otherwise than through the principal administrator, the distributable assets may be very much more valuable than they otherwise would be.³⁴

Illustration

A mother and daughter, who are German nationals and at all times domiciled in Germany, are killed in an air raid in London as a result of the same explosion, and it cannot be proved which of them survived the other. The daughter is entitled to movable property under her mother's will if she survived her mother. Section 184 of the Law of Property Act, 1925, has no application and the presumption of German law that the deaths were simultaneous must determine the question of survivorship.³⁵

³² See especially *Enohin v. Wylie* (1862) 10 H.L.C. 1, 13, 14. Compare *Eames v. Hacon* (1880) 16 Ch.D. 407; (1881) 18 Ch.D. (C.A.) 347; *Ewing v. Orr-Ewing* (1888) 9 App.Cas. 34, 39; (1885) 10 App.Cas. 453, 502, 504; and see now *Re Lorillard* [1922] 2 Ch. (C.A.) 638.

³³ *Enohin v. Wylie* (1862) 10 H.L.C. 1, 19, 23-24; *Ewing v. Orr-Ewing* (1888) 9 App.Cas. 34, 39; *Re Trufort* (1857) 36 Ch.D. 600, 610; *Re Lorillard* [1922] 2 Ch. 638.

³⁴ See comment on Rule 176, *ante*, p. 811, and *Re Lorillard* [1922] 2 Ch. 638. See also *Re Hagen* [1942] 1 D.L.R. 752; *Re Ritchie* [1942] 3 D.L.R. 380.

³⁵ *Re Cohn* [1945] Ch. 5; see 61 L.Q.R. 340 (1945).

SUCCESSION TO MOVABLES^{1, 2}

1. INTESTATE SUCCESSION

RULE 178.—The succession to the movables³ of an intestate is governed by the law of his domicile at the time of his death, without any reference to the law of the country where

- (1) he was born; or
- (2) he died; or
- (3) he had his domicile of origin; or
- (4) the movables are, in fact, situate at the time of his death.

Comment

When the estate of a deceased person has been fully administered, that is to say when all debts, duties and expenses have been paid, the question arises by what law the beneficial distribution of his net estate is to be governed. So far as movables are concerned the law is now well settled, that the succession to the movables of an intestate is governed by the law of his domicile at the date of his death.⁴ Changes in the law of his domicile, made after his death, are disregarded.⁵

The Rule applies, be it noted, only to the *succession* in the

¹ See Story, ss. 480-481a; Cheshire, pp. 665-711; Wolff, ss. 539-577; Falconbridge, Chaps. 22-25, 36; Johnson, Vol. 2, Chaps. 9 and 10, Vol. 3, Chap. 1; Westlake, Chap. 5; Foote, pp. 298-333; Restatement, ss. 301-310; Goodrich, ss. 161, 164-173; *Bruce v. Bruce* (1790) 6 Bro.P.C. 566; *Somerville v. Somerville* (1801) 5 Ves. 749a; *Stanley v. Bernes* (1831) 3 Hagg.Ecc. 373; *Dogliani v. Crispin* (1866) L.R. 1 H.L. 301; *Bullen v. Wisconsin* 240 U.S. 625; *Baker's Estate v. Baker's Estate* (1908) 25 S.C. 284 (Cape of Good Hope); *McConnell v. McConnell* (1889) 18 O.R. 36.

² The whole of this chapter should be read in conjunction with Chap. 1, pp. 47-61, on *Renvoi*, and Chap. 20, pp. 487-514, on *Legitimacy and Legitimation*.

³ Note the difference between 'movables' and 'personalty', pp. 40, 45, *ante*. Chattels real are not included in movables; they are immovables, and devolve in the case of intestacy in accordance with the *lex situs* (see Rule 127, p. 529, *ante*).

⁴ For meaning of 'law of domicile at time of death', compare p. 814, and p. 815, *ante*. *Pipon v. Pipon* (1744) Amb. 25, 799; *Thorne v. Watkins* (1750) 2 Ves.Sen. 35; *Bruce v. Bruce* (1790) 6 Bro.P.C. 566; *Balfour v. Scott* (1793) 6 Bro.P.C. 550; *Somerville v. Somerville* (1801) 5 Ves. 750.

⁵ *Lynch v. Government of Paraguay* (1871) L.R. 2 P. & D. 268; *Re Aganoor's Trusts* (1895) 64 L.J.Ch. 521.

Comment

The general principle which governs testamentary no less than intestate succession is, that the law of the country in which the deceased was domiciled at the time of his death governs the distribution of and the succession to his movables, and therefore decides what constitutes his last will, and whether and how far it is valid; and this without regard to the place either of his birth or of his death, or to the situation of the movables at the time of his death. This general principle is modified in relation to capacity, formalities, construction and revocation. So far as testamentary capacity is concerned it may be regarded as settled, and as consistent with principle, that the law of the testator's domicile determines whether or not he has personal capacity to make a will.¹⁰ If the testator's domicile is the same at the date of his death as it was when he made his will, there is no difficulty. But if his domicile changes between the date of his will and the date of his death, it may be necessary to determine which law should govern. The question is not an easy one, because English authority is lacking, and writers on the conflict of laws are not in agreement.¹¹ It is submitted, however, that on principle the law of his domicile at the date of his will should govern. It may be noted (1) that by English domestic law (and presumably by the domestic laws of other countries) a testator must have personal capacity to make a will at the date when the will is made, and it is neither necessary nor sufficient that he should be capable of making a will at the date of his death; (2) that under the Wills Act, 1861, it is necessary that the testator should be a British subject at the date when the will is made, but it is not necessary that he should be a British subject at the date of his death.¹² These considerations are, it is submitted, sufficient to justify the wording of our Rule, though it must be admitted that at present authority is lacking.

The Rule, be it noted, is limited to *personal* capacity, for example, to questions whether, and if so to what extent, an infant, lunatic or married woman can make a will. It does not apply to questions of proprietary capacity, for example, to questions whether a testator can leave property away from his wife and children. Such questions are, it is submitted, best regarded as questions of material or essential validity.¹³

¹⁰ *In bonis Maraver* (1828) 1 Hagg.Ecc. 498; *In bonis Gutteriez* (1869) 38 L.J.P. & M. 38.

¹¹ Story, s. 465; Savigny, s. 377; Phillimore, s. 868; Minor, s. 70; Westlake, s. 86; Dicey, 5th ed., p. 828; Goodrich, s. 164; Wolff, s. 557; Cheshire, pp. 680-682.

¹² *In bonis Von Buseck* (1881) 6 P.D. 211; *Blowham v. Favre* (1884) 9 P.D. 130; *Re Colville* [1992] 1 D.L.R. 47; *post*, p. 828.

¹³ *Post*, Rule 182, p. 827.

strict sense of that term. Where a person dies, *e.g.*, intestate and a bastard, and under the law of the country where he is domiciled there is no succession to his movables, but they are *bona vacantia*, and leaves movables situate in a country, *e.g.*, England, in which he is not domiciled, the title to such movables is governed by the *lex situs*, *i.e.*, under English law the movables being situate in England, the Crown is entitled thereto.⁶ In such a case the foreign Treasury claims not by way of succession but because there is no succession. It does not follow that the decision would be the same if the law of the domicile was such that the foreign Treasury claimed as *ultimus heres*. That would be a true case of succession and would, it is submitted, be governed by the law of the domicile.

Illustrations

1. A French subject dies intestate and domiciled in England. Succession to his movables is governed by the English Administration of Estates Act, 1925, without any reference to the law of France.

2. A British subject domiciled in France dies intestate in England. The succession to his movables in England is governed by French law.

3. A British subject domiciled in Portugal dies there intestate, leaving no relative except A, an illegitimate son, who by Portuguese law is entitled to succeed to the intestate's property. The intestate leaves movables in England. A is entitled to succeed to the movables.⁷

4. A British subject dies intestate domiciled in Paraguay, leaving movables in England. At the time of the intestate's death A is, under the law of Paraguay, entitled to succeed to the intestate's property. After the intestate's death the legislature of Paraguay changes the rules as to succession so that, under the changed law of Paraguay, A is not entitled to succeed to the intestate's property. After the change of the law in Paraguay, A claims in our courts to succeed to the intestate's movables in England. A is entitled to succeed to the movables.⁸

5. D, an Austrian subject domiciled in Austria, is entitled to a fund in court in this country. He dies in Vienna illegitimate, intestate and without heirs. By Austrian law the property of an Austrian citizen is in such a case confiscated, as property to which there is no heir, by the *fiscus* (Treasury). The Austrian *fiscus* does not claim by way of succession but because there is no succession. The Crown is entitled to the fund under English law (*lex situs*) as *bona vacantia*.⁹

2. TESTAMENTARY SUCCESSION

(1) Capacity.

RULE 179.—The law of the testator's domicile at the time of making his will determines whether or not he has personal testamentary capacity.

⁶ *Re Barnett's Trusts* [1902] 1 Ch. 847; *Re Musurus* [1936] 2 All E.R. 1666.

⁷ *Dogliani v. Crispin* (1886) L.R. 1 H.L. 301.

⁸ See *Lynch v. Government of Paraguay* (1871) L.R. 2 P. & D. 268; *Re Aganoor's Trusts* (1895) 64 L.J.Ch. 521.

⁹ *Re Barnett's Trusts* [1902] 1 Ch. 847; *Re Musurus* [1936] 2 All E.R. 1666.

Comment

The general principle which governs testamentary no less than intestate succession is, that the law of the country in which the deceased was domiciled at the time of his death governs the distribution of and the succession to his movables, and therefore decides what constitutes his last will, and whether and how far it is valid; and this without regard to the place either of his birth or of his death, or to the situation of the movables at the time of his death. This general principle is modified in relation to capacity, formalities, construction and revocation. So far as testamentary capacity is concerned it may be regarded as settled, and as consistent with principle, that the law of the testator's domicile determines whether or not he has personal capacity to make a will.¹⁰ If the testator's domicile is the same at the date of his death as it was when he made his will, there is no difficulty. But if his domicile changes between the date of his will and the date of his death, it may be necessary to determine which law should govern. The question is not an easy one, because English authority is lacking, and writers on the conflict of laws are not in agreement.¹¹ It is submitted, however, that on principle the law of his domicile at the date of his will should govern. It may be noted (1) that by English domestic law (and presumably by the domestic laws of other countries) a testator must have personal capacity to make a will at the date when the will is made, and it is neither necessary nor sufficient that he should be capable of making a will at the date of his death; (2) that under the Wills Act, 1861, it is necessary that the testator should be a British subject at the date when the will is made, but it is not necessary that he should be a British subject at the date of his death.¹² These considerations are, it is submitted, sufficient to justify the wording of our Rule, though it must be admitted that at present authority is lacking.

The Rule, be it noted, is limited to *personal* capacity, for example, to questions whether, and if so to what extent, an infant, lunatic or married woman can make a will. It does not apply to questions of proprietary capacity, for example, to questions whether a testator can leave property away from his wife and children. Such questions are, it is submitted, best regarded as questions of material or essential validity.¹³

¹⁰ *In bonis Maraver* (1828) 1 Hagg.Ecc. 498; *In bonis Gutierrez* (1869) 38 L.J.P. & M. 38.

¹¹ Story, s. 465; Savigny, s. 377; Phillimore, s. 863; Minor, s. 70; Westlake, s. 86; Dicey, 5th ed., p. 823; Goodrich, s. 164; Wolff, s. 557; Cheshire, pp. 680-682.

¹² *In bonis Von Buseck* (1881) 6 P.D. 211; *Bloxham v. Favre* (1884) 9 P.D. 130; *Re Colville* [1932] 1 D.L.R. 47; *post*, p. 823.

¹³ *Post*, Rule 182, p. 827.

Illustrations

1. A married woman domiciled in Spain died in 1820, leaving a will of movables situate in England. By the law of Spain she was, and by the law of England she was not, then capable of making a will. The will was held valid in England.¹⁴

2. T is domiciled in a country where the age of majority is twenty-five and a minor cannot make a will. T, when resident in England, makes a will of movables at the age of twenty-two and dies. The will is invalid.

3. T, an Englishman domiciled in England but resident in Virginia, makes a will at the age of nineteen and dies. The will, though valid by the law of Virginia, is invalid in England on the ground that an infant is incapable of making a will.

4. T, domiciled in Germany, makes a will at the age of seventeen. He acquires an English domicile and dies under the age of twenty-one. By German law persons over the age of sixteen may make valid wills. The will is (*semble*) valid.

5. T is domiciled in a country where the age of majority is twenty-five and a minor cannot make a will. He makes a will at the age of twenty-two. He acquires an English domicile and dies without having confirmed his will. The will is (*semble*) invalid.

6. T, a married woman domiciled in France, makes a will when aged seventeen. She acquires an English domicile and dies under twenty-one. By French law married women over sixteen and under twenty-one are competent to dispose by will of one-half of the property they could have disposed of if over twenty-one. The will is (*semble*) valid as to one-half of T's movables.¹⁵

SUB-RULE.—A legatee has capacity to receive a legacy of movables if he has capacity either by the law of his domicile or by the law of the testator's domicile.

Comment

On principle the law of the legatee's domicile should determine whether he is of full age and otherwise capable of receiving a legacy. But our courts take a liberal view and authorise payment to the legatee as soon as he has capacity to receive the legacy by the law of his domicile or by the law of the testator's domicile, whichever first happens.

Illustration

T, domiciled in England, gives legacies to S and D, both domiciled in Hamburg. At the date of T's death S is a boy aged seventeen and D is a girl aged eighteen. By Hamburg law girls attain majority at age eighteen and boys at age twenty-two. The legacy to S can be paid to him as soon as he attains twenty-one. The legacy to D can be paid to her forthwith.¹⁶

¹⁴ *In bonis Maraver* (1828) 1 Hagg.Ecc. 498; *In bonis Gutteriez* (1869) 38 L.J.P. & M. 88.

¹⁵ Compare *Re Lewal's Settlement Trusts* [1918] 2 Ch. 391.

¹⁶ *Re Hellman's Will* (1866) L.R. 2 Eq. 368; compare *Leslie v. Baillie* (1848) 2 Y. & C.C.C. 91; *Re Schnapper* [1928] Ch. 420; cf. *ante*, pp. 483-484.

(2) *Formal Validity.*

RULE 180.¹⁷—Any will of movables which is formally valid according to the law of the testator's domicile at the time of his death is valid.

Comment

The general principle governing testamentary succession, that the law of the country in which the deceased was domiciled at the time of his death governs the distribution of and the succession to his movables, is fully applicable in reference to wills formally valid by that law. The object of our courts is to deal with such a will exactly as the courts of the domicile would deal¹⁸ with it at the time of the testator's death.¹⁹ Hence, on the one hand, if the deceased is a foreigner dying domiciled in England though resident abroad, the will, if it is good according to English law, will be held valid here, without reference to the law of the country to which he belongs by nationality or where he is resident; and, on the other hand, if the deceased is a person resident whether in England or abroad, but domiciled in a foreign country, our courts will hold valid any will of movables good by the law of the country (*e.g.*, France) where the testator is domiciled.²⁰

When once the rights of the parties, under the will of a testator who died domiciled in a foreign country, are determined by the courts of that country, English tribunals, as elsewhere pointed out, are bound by and follow the decision of the foreign court.²¹

Illustrations

1. A Frenchman domiciled in France makes an unattested holograph will of movables valid by the law of France. The will is valid.

2. A Frenchman domiciled in France makes in England a will of movables in the form required by English law. The French courts hold it valid as being made in accordance with the forms required by the law of the place of execution (*lex actus*). The will is (*semble*) valid.²²

¹⁷ *Re Price* [1900] 1 Ch. 442, 451. Note that Rules 180–181, as well as the Exceptions thereto, refer to cases where there has been no change of domicile after the execution of the will. Where there has been such a change they must be read subject to Rule 186, *post*, p. 839.

¹⁸ See *Abd-ul-Messih v. Farra* (1888) 13 App.Cas. 431; *Bartlett v. Bartlett* [1925] A.C. 377, and compare *In bonis Dost Aly Khan* (1880) 6 P.D. 6. Compare *Hare v. Nasmyth* (1816) 2 Add. 25; *Moore v. Darell* (1832) 4 Hagg.Ecc. 346; *In bonis Cosnahan* (1866) L.R. 1 P. & D. 183; *Miller v. James* (1872) L.R. 3 P. & D. 4; *De Bonneval v. De Bonneval* (1898) 1 Curt. 856; *Larpent v. Sindry* (1898) 1 Hagg.Ecc. 382.

¹⁹ See *Lynch v. Government of Paraguay* (1871) L.R. 2 P. & D. 268; *Re Aganoor's Trust* (1895) 64 L.J.Ch. 521.

²⁰ See pp. 47–61, *ante*.

²¹ See *Laneville v. Anderson* (1860) 2 Sw. & Tr. 24; *Doglioni v. Crispin* (1866) L.R. 1 H.L. 301; *Re Trufort* (1887) 36 Ch.D. 600; *ante*, p. 432.

²² See *In bonis Lacroix* (1877) 2 P.D. 94.

RULE 181.²³—Any will of movables which is formally invalid according to the law of the testator's domicile at the time of his death is (subject to the Exceptions hereinafter mentioned, and to the effect of Rule 186) invalid.

Comment

A will, though made by a person capable of making it, may nevertheless be invalid for want of some formal requisite—*e.g.*, signature by the testator, attestation by the required number of witnesses, and so forth. It may, in short, be defective for want (to use the terms of English law) of due execution. Such a defect constitutes a formal invalidity.

The question whether a will is duly executed, or, in other words, whether it is or is not formally valid, must be determined in accordance with the law of the testator's domicile. In cases, in short, of testamentary disposition, as in cases of intestate succession, the rule of our courts (though subject now, as regards formal validity, to considerable exceptions) is to look to the law of the testator's domicile. This, it should carefully be noted, is still the rule. It applies to all wills, whether of British subjects or aliens, which, for whatever reason, do not fall within the Exceptions to Rule 181.

Illustrations

1. An American citizen domiciled in New York, but resident in England, makes his will while in England, according to the formalities required by the English Wills Act. The will is invalid, according to the law of New York, for want of a formal declaration to the witnesses that the document is his last will. The will is invalid.

2. An American citizen domiciled in New York, executes when in France a holograph will, valid by the law of France, but not attested as required by the law of New York. He leaves movable property in England. His will is invalid (unless the New York court would hold it valid).

3. A British subject born in Mauritius, but whose parents were at the time of his birth domiciled in France, comes to England and acquires an English domicile. He, whilst in London, executes a will of movables in England according to the forms required by the law of Mauritius, but not according to the English Wills Act. The will is invalid.

Exception 1.²⁴—Every will and other testamentary instrument made out of the United Kingdom by a British subject (whatever may be the domicile of such person at the time of making the same or at

²³ *Craigie v. Lewin* (1843) 3 Curt. 435; *De Zichy Ferraris v. Hertford* (1843) 3 Curt. 468, 486; *Bremer v. Freeman* (1857) 10 Moore P.C. 806; *Enohin v. Wylie* (1862) 10 H.L.C. 1; 81 L.J.Ch. 402; *In bonis Keller* (1891) 61 L.J.P. & M. 89.

²⁴ Wills Act, 1861, s. 1. For criticisms of the drafting of the Act, and proposals for amendment, see 62 L.Q.R. 173-176, 185, 328-330.

the time of his or her death) shall, as regards personal estate, be held to be well executed for the purpose of being admitted in England and Ireland to probate, and in Scotland to confirmation, if the same be made according to the forms required either

[1] by the law of the place where the same was made²⁵; or

[2] by the law of the place where such person was domiciled when the same was made; or

[3] by the laws then in force in that part [if any] of His Majesty's dominions²⁶ where he had his domicile of origin.

Comment

This Exception is (except the figures and words in square brackets) given in the terms of the Wills Act, 1861, s. 1; the words 'if any', suggested by *In bonis Lacroix*,²⁷ are added for the sake of clearness.

It will, however, be observed that part of the Exception²⁸ refers to cases in which there may have been a change of domicile between the execution of the will and the death of the testator, and therefore are not, strictly speaking, within an Exception to Rule 181. The effect of a change of domicile is considered in the comment upon Rule 186.

A will to come within this Exception must be, first, a will 'made out of the United Kingdom'²⁹ (e.g., in Guernsey or in Eire or in France); secondly, a will 'made by a British subject' who must be a British subject at the time when the will is executed³⁰ but need not be a British subject at the time of his death³¹ or birth³²; thirdly, a will of 'personal estate'. The term

²⁵ See for a curious application, *Lyne v. De la Ferté* (1910) 102 L.T. 143, in which a holograph will made in France in a form valid by French law by a testator domiciled in England is admitted to probate, though it deals with leaseholds and is wrongly dated, while French law regards the date as an essential feature, but excuses inadvertent error. If no specific form is laid down by the *locus actus*, then (*semble*) the court will accept a will made in accordance with the general principles of law and equity: see *Stokes v. Stokes* (1898) 67 L.J.P. 55, when a holograph unattested will of a British subject in the Congo Free State was held valid, as the courts there would uphold such a will. Compare *Re Morgan's Estate* [1915] S.R. 147.

²⁶ The expression 'His Majesty's dominions' is of course equivalent to 'British territory' as defined, p. 40, *ante*.

²⁷ (1877) 2 P.D. 94.

²⁸ *Viz.*, the words in the parentheses and clause 2.

²⁹ For meaning of 'United Kingdom', see p. 40, *ante*.

³⁰ *In bonis Von Buseck* (1881) 6 P.D. 211; *Blaxam v. Favre* (1883) 8 P.D. 101, 105; (1884) 9 P.D. (C.A.) 130.

³¹ *Re Colville* [1932] 1 D.L.R. 47.

³² *In bonis Gally* (1876) 1 P.D. 488. Contrast *In bonis Gatti* (1879) 27 W.R. 323.

'personal estate' is used in its strict technical sense, and includes all interests in English land which come within the description of personal estate, for example, leaseholds,³³ land subject to a trust for sale but not yet sold,³⁴ the vendor's interest in land contracted to be sold,³⁵ and the mortgagee's interest in land subject to a mortgage,³⁶ though these are not necessarily interests in movables. Conversely, it excludes capital moneys arising under the Settled Land Act, 1925, which are impressed by statute with a trust for reversion into freehold land, though these are (it would seem) movables.³⁷

When the above three conditions are fulfilled, a will (though not executed according to the form required by the law of the testator's domicile at the time of his death) will be held to be 'well executed for the purpose of being admitted to probate' (i.e., will be held formally valid), if executed according to any of the forms specified in the Exception.³⁸

The first and third of these forms are new, the old rule (Rule 180) looking only to the last domicile of the testator. The second form corresponds with the old rule when no change takes place in the domicile of the testator after execution of the will; when there is a change it adds a fourth form to those possible, for as the Wills Act, 1861, does not invalidate³⁹ a will made in any form which would be valid independently of the Act, a British subject's will of *movables* following the form required by the law of his last domicile will be held valid. Hence a British subject has, when residing out of the United Kingdom, a choice of three⁴⁰ different forms, according to any one of which he may make a will of personal estate which will be held, as far as form goes, valid in England. Thus, a British subject is domiciled in Germany. At the moment of making his will he is travelling in Italy. He is the son of Canadian parents and has a domicile of origin in

³³ *Re Watson* (1887) 35 W.R. 711; *Re Grassi* [1905] 1 Ch. 584.

³⁴ *Re Lyne's Settlement Trusts* [1919] 1 Ch. 80.

³⁵ *Re Casey Estate* [1936] 1 W.W.R. 30.

³⁶ *Re Gauthier* [1944] 8 D.L.R. 401.

³⁷ *Re Cartwright* [1939] Ch. 90.

³⁸ Note that a will must be interpreted by one law at a time; *Pechell v. Hilderley* (1869) 1 P. & D. 673: a testator's will and a codicil, the latter made in Italy, invalid both by English and Italian law, were confirmed by a codicil valid by Italian law but ineffective to confirm the will by that law: held that the English and Italian laws could not be combined to validate the documents as a whole by holding that the codicil was effectively executed by Italian law, and then construing it as a valid English codicil validating the invalid will and codicil. But the testamentary documents may assume any of the three possible forms in any combination. Moreover, in *In bonis Lacroix* (1877) 2 P.D. 94, it was held that a British subject, domiciled and present in France, validly made a will and two codicils in English form, and a confirmatory holograph will in French form, French law permitting a British subject to use his national form, and the French will being in the local form.

³⁹ Wills Act, 1861, s. 4.

⁴⁰ If there has been a change of domicile, he has in effect a choice of four different forms. See Rule 186, *post*, p. 839.

Nova Scotia. He may make a valid will of personal estate in any one of three different forms, *viz.*, the German form (*lex domicilii*), the Italian form (*lex actus*), the Nova Scotian form (*lex domicilii originis*). Moreover, if he changes his domicile his will, if executed in a form which was at the time of making it not valid under any of these three possibilities, may yet be valid if it was in the form held valid by the law of his last domicile, in so far as it concerns movables strictly speaking.

If, however, the testator became a British subject by naturalisation, his will, if made only in accordance with the form required by the law of the place where he had his domicile of origin, may very well turn out to be invalid. The testator, for example, is a Frenchman whose domicile of origin is French. He becomes a British subject by naturalisation. He is domiciled in Massachusetts and is resident in New York, where he makes his will in accordance with the forms required by the law of the place where he has his domicile of origin (*viz.*, France), but not in accordance with the forms required by the law of New York. The will is invalid. It is not made according to the forms required by the law of the country where the testator is domiciled, *viz.*, Massachusetts. It is not made according to the forms required by the law of the place where it is made, *viz.*, New York. It is made according to the forms required by the law of the place where the testator has his domicile of origin (*viz.*, France), but this place is not 'part of His Majesty's dominions'.

If, indeed, the law of Massachusetts held such a will valid when made by a British subject,⁴¹ the will might be good as being made in accordance with the testator's *lex domicilii*, but it may pretty confidently be assumed that the courts of Massachusetts would not hold the will valid, and therefore that it would neither under Rule 180 nor under Exception 1 be held valid in England.

Illustrations

1. T, a British subject domiciled in England, goes for a few hours to Boulogne. While there he executes a will of all his personal property, including English leaseholds, in accordance with the forms required by the law of France, but not in accordance with the forms required by the Wills Act, 1837. The will is valid.

2. The circumstances are the same as in Illustration 1, except that T executes a will of all his real and personal property. The will is, as regards the real property, invalid, but as regards the personal property, valid.

3. T, a British subject, is the son of Canadian parents and has a domicile of origin in Nova Scotia. He is travelling in Italy. He is domiciled in Denmark. He makes a will of all his movable property in accordance with the form required either (a) by the law of Denmark (*lex domicilii*), or (b) by the law of Italy (*lex actus*), or (c) by the law of Nova Scotia (*lex domicilii originis*). The will is valid.

4. T is a Frenchman whose domicile of origin is French. He has become a British subject by naturalisation. He is domiciled in Massachusetts. He

⁴¹ See *In bonis Lacroix* (1877) 2 P.D. 94.

makes a holograph will in accordance with the forms required by the law of France (*lex domicilii originis*), but not in accordance with the forms required by the law of Massachusetts, where he is domiciled. The will is invalid.

*Exception 2.*⁴³—Every will and other testamentary instrument made within the United Kingdom by any British subject (whatever may be the domicile of such person at the time of making the same or at the time of his or her death) shall, as regards personal estate, be held to be well executed, and shall be admitted in England and Ireland to probate, and in Scotland to confirmation, if the same be executed according to the forms required by the laws for the time being in force in that part of the United Kingdom where the same is made.

Comment

This Exception reproduces verbatim the Wills Act, 1861, s. 2. It will be noticed that the words in parentheses refer to cases where there may have been a change of domicile between the execution of the will and the death of the testator, and therefore are not, strictly speaking, within an Exception to Rule 181. The effect of the terms referring to a change of domicile is considered in the comment upon Rule 186.

A will to come within this Exception must be: first, a will 'made within the United Kingdom'; secondly, a will made by a 'British subject' who must be a British subject at the time when the will is executed though not necessarily at the time of his death or birth⁴⁴; thirdly, a will of 'personal estate' in the strict sense of that term.⁴⁵ If these conditions are satisfied, a will (though not duly executed according to the law of the testator's domicile) will be held to be well executed, and will be admitted to probate (*i.e.*, will be held formally valid) if executed 'according to the forms required by the laws for the time being in force in that part of the United Kingdom where the same is made'. Moreover, by section 4 of the Act the old rule that a will is valid if made according to the law of the testator's domicile is expressly preserved. Thus, a British subject may, when within the United Kingdom, make a will of movables which is to be held duly executed if he makes it either according to the form required by the law of the country where he is domiciled (*e.g.*, Mauritius) or

⁴³ Wills Act, 1861, s. 2; *In bonis Batho* (1908) 52 S.J. 318; *In bonis Cocquerel* [1918] P. 4.

⁴⁴ See *ante*, p. 823, notes 30-32.

⁴⁵ See *ante*, p. 824, notes 33-37.

according to the form required by the law of the country where the will is made, *e.g.*, Scotland, or Northern Ireland. Further, if he changes his domicile he may make a will under the law of his new domicile.

A will, it should be noticed, which falls within either Exception 1 or Exception 2, though it must be held by an English court to be duly executed or free from any formal defect, may still, as before the Act of 1861, be invalid, either because the testator is, according to the law of his domicile, incapable⁴⁶ of making a will, or because the will is materially or essentially invalid or inoperative as containing provisions contravening the law of the testator's domicile.⁴⁷

Illustrations

1. T, a British subject domiciled in England, makes an unattested holograph will in Scotland which is valid by Scots law. The will is valid because 'executed according to the forms required by the laws in force in that part of the United Kingdom where the same was made'.⁴⁸

2. T, a British subject domiciled in England, makes a will which is well executed in accordance with the Wills Act, 1837. T acquires a French domicile and dies. The will is valid, whether or not it is valid by French law.⁴⁹

3. T, a British subject domiciled in Scotland, makes an unattested holograph will in England which is valid by Scots law. T dies domiciled in England. The will is not valid under Exception 2 to Rule 181, but is valid under Rule 186.⁵⁰

(3) *Material or Essential Validity.*

RULE 182.⁵¹—The material or essential validity of a will of movables or of any particular gift of movables contained therein is governed by the law of the testator's domicile at the time of his death.

Comment

A will made by a person under no testamentary incapacity and duly executed or formally valid may nevertheless be invalid, or wholly or in part inoperative, because it contains provisions to which the law will not give effect. Thus, English law prohibits bequests upon trust for accumulation beyond certain periods⁵² or which vest at too remote a date. The laws of France and of Scotland invalidate, unlike English law, bequests of more than

⁴⁶ See Rule 179, *ante*, p. 818.

⁴⁷ See Rule 182, *infra*.

⁴⁸ *In bonis Batho* (1908) 52 S.J. 318.

⁴⁹ *In bonis Cocquerel* [1918] P. 4.

⁵⁰ *Post*, p. 839.

⁵¹ *Whicker v. Hume* (1858) 7 H.L.C. 124; *Thornton v. Curling* (1824) 8 Sim. 310; *Campbell v. Beaufoy* (1859) Johns. 320; *Macdonald v. Macdonald* (1872) 14 Eq. 60; *Re Groos* [1915] 1 Ch. 572; *Re Annesley* [1926] Ch. 692; *Re Ross* [1930] 1 Ch. 377; *Re Priest* [1944] Ch. 58.

⁵² Law of Property Act, 1925, s. 164.

a certain proportion of the testator's property in derogation of the rights of his widow or children. Such invalidity, arising from the nature of the bequest, is termed *material or essential* invalidity, and whether a will is or is not void wholly or in part on account of such invalidity depends upon the law of the country where the testator is domiciled at the date of his death. Thus, where a British subject domiciled in France made a disposition of his movable property which, though valid by the law of England, was invalid by the law of France, the will was held inoperative.⁵³

Nor is the effect of the material invalidity of a will affected by the Wills Act, 1861. That Act renders formally valid, and therefore admissible to probate, a will which might otherwise be bad for defects of form; but even when a will has been admitted to probate in solemn form, and therefore must be held not defective as to its formal requisites, it is, in so far as its provisions contravene the law of the testator's domicile, treated here as inoperative, and the persons obtaining probate will be held by the courts to be trustees for those who would be entitled to succeed to deceased's property if (as far as the inoperative provisions go) he had died intestate.

Where a will was admitted to probate in solemn form, but there was a doubt whether the provisions were valid according to the testator's *lex domicilii*, the law was thus laid down:—

'A probate is conclusive evidence that the instrument proved was testamentary according to the law of this country. But it proves nothing else. That may be illustrated in this way. Suppose there was a country in which the form of a will was exactly similar to that in this country, but in which no person could give away more than half his property. Such an instrument made in that country by a person there domiciled, when brought to probate here, would be admitted to probate as a matter of course. Probate would be conclusive that it was testamentary, but it would be conclusive of nothing more; for after that there would arise the question: How is the court that is to administer the property to ascertain who is entitled to it? For that purpose you must look beyond the probate to know in what country the testator was domiciled, for by the law of that country the property must be administered. Therefore, if the testator, in the case I have supposed, had given away all his property, consisting of £10,000, it would be the duty of the court that had to construe the will to say £5,000 only can go according to the direction in the will; the other £5,000 must go in some other channel'.⁵⁴

It is well settled that the material or essential validity of a

⁵³ *Thornton v. Curling* (1824) 8 Sim. 310; *Campbell v. Beaufoy* (1859) Johns. 320; see *Whicker v. Hume* (1858) 7 H.L.C. 124.

⁵⁴ *Whicker v. Hume* (1858) 7 H.L.C. 124, 156, 157, per Lord Cranworth. Cf. pp. 165, 166, per Lord Wensleydale. Cf. *Concha v. Concha* (1886) 11 App.Cas. 541, 551; *Re Groos* [1915] 1 Ch. 572; *Bartlett v. Bartlett* [1925] A.C. 577.

will of movables or of any particular gift of movables contained therein is governed by the law of the testator's domicile at the date of his death. That law determines such questions as whether the testator is bound to leave a certain proportion of his estate to his wife and children, whether legacies to charities are valid, to what extent gifts are invalid as infringing the rule against perpetuities or accumulations, whether substitutionary gifts are valid, whether gifts to attesting witnesses are valid, and so on.

Closely analogous to the question whether the testator is bound to leave a certain proportion of his estate to his wife and children (as he is bound to do under the laws of Scotland, France and many Continental countries) is the question whether the court has jurisdiction to make an order for the payment of part of the income of his estate to his dependants (as it has in England under the Inheritance (Family Provision) Act, 1938, and under similar statutes in many common law jurisdictions of the British Commonwealth). In England⁵⁵ and Ontario⁵⁶ the jurisdiction of the court is limited by statute to cases where the testator died domiciled in England and Ontario respectively. In other jurisdictions it has been held, consistently with principle, that the local statute only applies so far as movables are concerned if the testator died domiciled within the jurisdiction.⁵⁷

Illustrations

1. A testator domiciled in Eire makes a will leaving money in the English funds to A upon trusts for accumulation which are prohibited by the Law of Property Act, 1925, section 164, which however does not extend to Ireland. The will is valid.⁵⁸

2. T, domiciled in France, makes a will while in England containing provisions in contravention of French law. The will is made in the form required by French law. It is here, as regards such provisions, inoperative and invalid.⁵⁹

3. T, an Italian citizen domiciled in Italy, but resident in England, makes a will disposing of all her property, which consists of movables in England, in favour of a friend. As she has a son living, she is required by Italian law to leave half her property to her son. The will is invalid as regards half the bequest.⁶⁰

4. T, a testatrix domiciled in Holland, by will appoints her intended husband H, heir of her estate 'with reservation only of the legitimate portion coming to her relations in a direct line'. T marries H, acquires an English domicile, and dies. The will is not revoked by T's marriage.⁶¹ By Dutch law T cannot leave more than one quarter of her estate away from her ascendants

⁵⁵ Inheritance (Family Provision) Act, 1938, s. 1 (1); *Re White* [1941] Ch. 192.

⁵⁶ Ontario Dependents' Relief Act, 1937, s. 2.

⁵⁷ *Re Roper* [1927] N.Z.L.R. 781; *Re Ostrander Estate* [1915] 8 W.W.R. 367 (Saskatchewan); *Re Elliott* [1941] 2 D.L.R. 71; *Re Herron Estate* [1941] 4 D.L.R. 203 (British Columbia). See Morris in 62 L.Q.R. 178-179; Falconbridge, Chap. 36; and contrast the position with regard to immovables, Rule 127, Exception 8, *ante*, p. 549.

⁵⁸ *Freke v. Carbery* (1878) L.R. 16 Eq. 461.

⁵⁹ *Thornton v. Curling* (1824) 8 Sim. 310; *Re Annesley* [1926] Ch. 692.

⁶⁰ Cf. *Re Ross* [1930] 1 Ch. 377.

⁶¹ *In bonis Groos* [1904] P. 269, *post*, p. 387, Rule 185, Exception 2.

or descendants. H is entitled to the whole of T's movables, because the material validity of her will is to be governed by English law.⁶²

5. T, domiciled in England, makes a holograph will in Scotland on a printed will form and has it attested by two witnesses. He gives a legacy to the wife of one of the attesting witnesses. By English law, such gifts are void under section 15 of the Wills Act, 1837. By Scots law, holograph wills are valid, and by section 2 of the Wills Act, 1861,⁶³ wills made by British subjects within the United Kingdom may be admitted to probate if executed in accordance with the forms required by the law for the time being in force in that part of the United Kingdom where the same are made. The legacy is void, because the material validity thereof is governed by English law.⁶⁴

6. T, an Englishwoman domiciled in England, marries a Russian and thereby acquires a Russian domicile. She makes no provision in her will for her daughter D. She dies leaving movables in England. The court has no jurisdiction to make an order for the maintenance of D under the Inheritance (Family Provision) Act, 1938, because T died domiciled in Russia.⁶⁵

SUB-RULE.—The law of a deceased person's domicile at the time of his death, in general, determines whether, as to his movables, he does or does not die intestate, whether wholly or partially.

Comment

This Sub-Rule is an immediate result of the principle that the validity of a will⁶⁶ is in general determined by the law of a testator's domicile. A French citizen dies domiciled in England, leaving an unattested testamentary document, written wholly in his own hand and signed by himself. At the moment of executing it he is resident in Paris; he leaves no other will. Our courts will decide, looking wholly to ordinary English law, that the document is not a will, *i.e.*, that the deceased has died intestate. If, on the other hand, the testator had died in England but was domiciled in France, and the document had been executed in England, our courts would, in deciding whether it constituted a will or not, have looked wholly to French law. In either case, therefore, whether the testator does or does not leave a valid will, or, in other words, whether he does

⁶² *Re Groos* [1915] 1 Ch. 572. This is better regarded as a question of material validity than as a question of construction. The construction of the will is not altered, but the property affected is increased in amount. The fetter imposed by Dutch law is struck off by the change of domicile.

⁶³ Exception 2 to Rule 181, *ante*, p. 826.

⁶⁴ *Re Priest* [1944] Ch. 58. This case has attracted unfavourable comment, see *R. M. W.* in 60 L.Q.R. 114; *Kahn-Freund* in 7 M.L.R. 288; *Falconbridge*, 476-479: but it is submitted that the decision was entirely correct, compare *Morris* in 61 L.Q.R. 124; 62 L.Q.R. 172-173. The defect was more than a mere matter of form. And though the will *might* have been admitted to probate under the Wills Act, 1861, the fact remains that it *was* admitted to probate under the Wills Act, 1837.

⁶⁵ *Re White* [1941] Ch. 192.

⁶⁶ See *ante*, p. 819; *Price v. Dewhurst* (1837) 8 Sim. 279; *Enohin v. Wylie* (1862) 10 H.L.C. 1; *Re Cunnington* [1924] 1 Ch. 58.

or does not die intestate, is determined by our courts in accordance with the law of the deceased's domicile.

The effect, however, of Exceptions 1 and 2 to Rule 181, and of Rule 186, or, in other words, of the Wills Act, 1861, occasionally is that wills are held formally valid by our courts though not made in accordance with the testator's *lex domicilii*, or, in other words, that a deceased person is held by English courts to have died testate who, according to the law of his domicile at the time of his death, has died intestate.

(4) Interpretation.

RULE 183.—Subject to the Exception hereinafter mentioned, a will of movables is (in general) to be interpreted with reference to the law of the testator's domicile at the time when the will is made.

Comment

This Rule bears upon two different cases :—

(1) Where the testator uses technical terms of law, which have a definite meaning attached to them by the law of his domicile, his will must be interpreted with reference to such law.

(2) Where he has used terms the meaning of which is not governed by a rule of law, such as names and measures, weights, money, etc., it is reasonable to presume,⁶⁷ in the absence of reason to the contrary, that he meant the measures, weights, etc., known by these names in the country where he was domiciled.

Except, however, in the cases in which the construction of a will is governed by an absolute rule of law, the maxim, that the terms of a will should be construed with reference to the law of the testator's domicile, is a mere canon of interpretation, which should not be adhered to when there is any reason, from the nature of the

⁶⁷ *Anstruther v. Chalmers* (1826) 2 Sim. 1; *Yates v. Thomson* (1835) 3 Cl. & F. 544; *Reynolds v. Kortwright* (1854) 18 Beav. 417; *Bernal v. Bernal* (1838) 7 L.J.Ch. 115; *Campbell v. Sandford* (1834) 2 Cl. & F. 450; *Campbell v. Campbell* (1866) L.R. 1 Eq. 383; operation of provision for grandchildren interpreted by English law; *Ommanney v. Bingham* (1793) 3 Ves. 202. condition in restraint of marriage invalid by law of domicile; *Re Fergusson's Will* [1902] 1 Ch. 483; *Re Scott* [1915] 1 Ch. 592; *Re Norbury* [1939] Ch. 528; *Re Frazer* [1941] Ch. 326; *Re De Noailles* (1916) 114 L.T. 1089: French charitable bequests not interpreted to admit doctrine of *cy-près*; *Re Macduff* [1896] 2 Ch. 351: validity of bequests for philanthropic ends to be judged by English law of domicile; *Ewing v. Orr-Ewing* (1883) 9 App.Cas. 34, 43, per Lord Blackburn; *Baring v. Ashburton* (1886) 54 L.T. 463; *Re Cunningham* [1924] 1 Ch. 68. See also *McConnell v. McConnell* (1889) 18 O.R. 36; *Barlow v. Orde* (1870) 13 Moo.Ind.App. 277; *Kemp's Estate v. McDonald's Trustees* [1915] A.D. 491 (Union of South Africa); *Mayor of Canterbury v. Wyburn* [1895] A.C. 89; *Elliot v. Joicey* [1935] A.C. 209; *Public Trustee of New Zealand v. Lyon* [1936] A.C. 163; *Re Hirst* (1941) 58 T.L.R. 58.

will, or otherwise, to suppose that the testator wrote it with reference to the law of some other country.⁶⁸

Questions of construction must be carefully distinguished from questions of status. Thus if the testator gives property to the 'next of kin' of X, that is a question of construction, and will generally be governed by the law of the testator's domicile⁶⁹; but if he gives property to the 'children' of X, that is a question of status, and will be governed by the principles discussed in chapter 20.⁷⁰

Illustrations

1. T dies domiciled in France, though a British subject; he gives his real and personal property to his English executor to realise, pay certain legacies, and divide the residue among certain named legatees. Two of these legatees die before T. By French law their shares fall to be divided among the eight surviving legatees, by English law they are undisposed of. Despite the English form of the will, its terminology, the English residence and British nationality of almost all the legatees, the will is to be construed by the law of the testator's French domicile.⁷¹

2. T, domiciled in England, gives a legacy to the heirs or next of kin of X, domiciled in Germany. The heirs or next of kin are to be ascertained in accordance with English law.⁷²

3. T, domiciled in England, gives a legacy free of duty to X, domiciled in Germany, and an annuity free of income tax to Y, domiciled in Kenya. The legacy is not free of German inheritance tax nor is the annuity free of Kenya income tax.⁷³

Exception.—Where a will is expressed in the technical terms of the law of a country where the testator is not domiciled, the will should be interpreted with reference to the law of that country.

⁶⁸ *Re Price* [1900] 1 Ch. 442, 452, 453; *Re D'Este's Settlement* [1903] 1 Ch. 898, 900; *Re Scholefield* [1905] 2 Ch. 408; *Re Bonnefoi* [1912] P. 233, *Re Simpson* [1916] 1 Ch. 502; *Re Wilkinson's Settlement* [1917] 1 Ch. 620.

⁶⁹ *Re Fergusson's Will* [1902] 1 Ch. 483.

⁷⁰ *Shaw v. Gould* (1868) L.R. 3 H.L. 55; *Re Goodman's Trusts* (1881) 17 Ch.D. 266.

⁷¹ *Re Cunningham* [1924] 1 Ch. 68, following *Anstruther v. Chalmers* (1826) 2 Sim. 1; *Re Bonnefoi* [1912] P. (C.A.) 233. On the use of English terms in wills of persons domiciled in Quebec, see *Martin v. Lee* (1861) 14 Moore P.C. 142; *McGibbon v. Abbott* (1885) 10 App.Cas. 653, where it was shown that they will not be presumed to import English doctrines unknown in Quebec. Currency is normally that of domicile: see *Saunders v. Drake* (1742) 2 Atk. 465; *Pierson v. Garnet* (1786) 2 Bro.Ch. 38; *Malcolm v. Martin* (1789) 3 Bro.Ch. 50; *Cockerell v. Barber* (1810) 16 Ves. 461; *Campbell v. Sandford* (1834) 2 Cl. & F. 450; *Re Bigham* [1935] Ch. 524; *Re Schnapper* [1936] 1 All E.R. 322. As regards the meaning of property as including debts much depends on the indications of the will: see *Nisbett v. Murray* (1799) 5 Ves. 149; *Arnold v. Arnold* (1834) 2 My. & Ke. 365; *Tyrone v. Tyrone* (1860) 1 De G.F. & J. 613; *Guthrie v. Walrond* (1883) 22 Ch.D. 573; *Re Clark* [1904] 1 Ch. 294.

⁷² *Re Fergusson's Will* [1902] 1 Ch. 483; *Re Bessette* [1942] 3 D.L.R. 207. It would be otherwise if the gift had been to the children of X: *ante*, p. 501 n. 11.

⁷³ *Re Norbury* [1939] Ch. 528; *Re Frazer* [1941] Ch. 326; compare *Re Scott* [1915] 1 Ch. 592, and contrast *Re Quirk* [1941] Ch. 46 (immovables).

Comment

There are two different cases to which the principle of this Exception applies both as regards movables and immovables.⁷⁴

(1) When a will is expressed in the technical terms of the country where it is executed, the presumption is that the testator was referring to the law of the place of execution, and the will, therefore, should be interpreted so far as possible with reference to that law. Thus, a testator domiciled in England, but living in France, executes a will there in French, which is expressed in all the technical terms of French law. Such a will ought, it is conceived, to be interpreted with reference to French law.

(2) When a will is expressed in the technical terms of the country where it is to be carried into effect, the presumption again is that the testator was referring to the law of the country where the will was to be carried into effect, and the will, therefore, should be interpreted with reference to that law.⁷⁵

Thus, an Englishman domiciled in France executes a will there, leaving his money on English trusts to be executed in England. The will is expressed in the technical terms of English law and employs terms for which French law has no exact parallel. There cannot, it is conceived, be a doubt that the will must be interpreted with reference to English law.

Illustrations

1. T, domiciled in Scotland, by a Scottish trust deed and settlement executed in the form requisite for an English will, conveys an estate in Scotland and a house in London in trust for A and the heirs male of his body in fee, whom failing for B and his heirs male in fee. The will, by its use of technical terms of English law, must be interpreted strictly as regards the house, giving only a limited estate in tail male to A, while the terms give under Scottish law an estate of a much wider character to him, thus defeating the purpose of the testator.⁷⁶

2. T, domiciled in England, dies in Nicaragua, leaving a will in Spanish. The interpretation of the will must depend on the normal Spanish meaning of its terms, in the absence of evidence of special senses applying to them in Nicaragua.⁷⁷

(5) Election.

RULE 184.—The question whether a legatee of movables

⁷⁴ *Ferguson v. Marjoribanks* (1853) 15 D. 637; *Thompson's Trustees v. Alexander* (1851) 14 D. 207; *Bradford v. Young* (1885) 29 Ch.D. (C.A.) 617; *Re Cliff's Trusts* [1892] 2 Ch. 229; *Chua Khwee Eng v. Chua Poh Choon* [1923] A.C. 424; *Choa Eng Wan v. Choa Giang Te* [1923] A.C. 469.

⁷⁵ Compare *Re Miller* [1914] 1 Ch. 511, with *Studd v. Cook* (1883) 8 App.Cas. 577, which deals with immovables: see p 548, *ante*.

⁷⁶ *Re Miller* [1914] 1 Ch. 511.

⁷⁷ *Re Mannors* [1923] 1 Ch. 220: in this case the original was admitted to probate with a translation annexed. If the original is not admitted to probate, the court may inspect it if the translation seems inaccurate: *Re Cliff's Trusts* [1892] 2 Ch. 229; explaining *L'Est v. L'Batt* (1719) 1 P.Wms. 526; in *Reynolds v. Kortwright* (1854) 18 Beav. 417, a domiciled Englishman made a will in Spanish in a Spanish colony, but effect was given under the principles of English law to the English version of the will.

under a will is put to his election between benefits under and outside the will is governed by the law of the testator's domicile at the date of his death.

Comment

Under the law of England and of some other countries, a beneficiary under a will is sometimes required to elect between taking a benefit under the will and taking a benefit outside the will. Thus, if a testator gives property to A, and gives property of A's to B, A will not be allowed to receive the property given to him by the will unless he allows B to receive the property of A which the testator has given to B. Questions of election in the conflict of laws usually arise in connection with gifts of immovables, and therefore the doctrine is more fully considered elsewhere.⁷⁸ But sometimes questions of election arise in connection with gifts of movables, and therefore it is necessary to determine by what law the question should be governed. The answer would appear to depend on the nature of the doctrine of election. If the doctrine is a peremptory rule of law, the matter is clearly one of material or essential validity, and so governed by the law of the testator's domicile at the date of his death.⁷⁹ If on the other hand the doctrine is a mere matter of the intention of the testator, the question is one of construction, and so governed by the law intended by the testator.⁸⁰ It is submitted that the former view is to be preferred. 'The doctrine of election', says Jarman,⁸¹ 'does not depend on any supposed intention of the testator, but is based on a general principle of equity.' 'The rule of English Private International Law', says Cheshire,⁸² 'is now well settled, that where a testator dies possessed of property in more countries than one, the question whether a beneficiary is put to his election is governed by the law of the testator's domicile.' Other writers on the conflict of laws lay down the rule in similar terms.⁸³ No English case puts the proposition quite so broadly and simply as this, but the negative evidence from the cases is strong and clear. For down to 1945 no reported English case can be found in which the beneficiary was put to his election, unless the testator was domiciled either in England or in some country the law of which adopts the doctrine of election or some analogous doctrine like the Scottish doctrine of approbate and reprobate.

In 1945, however, it was decided at first instance⁸⁴ that a

⁷⁸ Rule 127, Exception 9, *ante*, p. 550.

⁷⁹ Rule 182, *ante*, p. 827.

⁸⁰ Rule 183, *ante*, p. 831.

⁸¹ *Jarman on Wills*, 7th ed., p. 511.

⁸² Page 741.

⁸³ Dicey, 5th ed., pp. 976-77; Westlake, s. 125; Halsbury, Vol. 6, p. 254; Beale, s. 306.5; Goodrich, s. 163.

⁸⁴ *Re Allen* (1945) 114 L.J.Ch. 298, criticised by Morris in 10 Conveyancer 102, 24 Can.Bar Rev. 528.

beneficiary under the will of a testator domiciled in South Africa was put to her election, although it was 'common ground' that by South African law no case for election arose,⁸⁵ because the will was drafted in English form and executed in England. This decision goes beyond any of the decided cases,⁸⁶ is inconsistent with a decision of the House of Lords,⁸⁷ and is (it is submitted) wrong.

Illustration

H and W, domiciled at all times in South Africa, marry there without an antenuptial contract. By South African law the effect is that all property belonging to H at the date of the marriage or acquired during coverture becomes community property, and on the death of either H or W the survivor is absolutely entitled to one half of the community property. H, while residing in England, makes a will in English form giving W all his personal chattels and a life interest in the residue of his property. The question whether W must elect between her half of the community property and the benefits given to her by H's will must be determined by South African law.⁸⁸

(6) Revocation.

RULE 185.—Subject to the Exceptions hereinafter mentioned and to the effect of Rule 186, the question whether a will of movables has been revoked depends on the law of the testator's domicile at the date of the alleged act of revocation.

Comment

The question what law determines whether a will has been revoked is one of considerable nicety and does not appear to have received much discussion except as regards revocation by subsequent marriage. It is submitted that on principle the question should be governed by the law of the testator's domicile. If his domicile is the same at all material times there is no difficulty. But if his domicile changes between the date of the alleged act of revocation and the date of his death, and the two laws differ, it is necessary to determine which law governs. At first sight it might be supposed that since a will is an ambulatory document and does not take effect until the death of the testator, the law of his domicile at the date of his death should determine whether or not his will has been revoked. On the other hand, there is force in the argument that if a

⁸⁵ This seems to have been due to some misunderstanding of South African law: Maasdorp, *Institutes of South African Law*, Vol. 1, pp. 173-74; 24 Can.Bar. Rev. 532-33.

⁸⁶ *Trotter v. Trotter* (1828) 4 Bli. 502; *Maxwell v. Maxwell* (1852) 2 D.M. & G. 705; *Brodie v. Barry* (1818) 2 V. & B. 127; *Dundas v. Dundas* (1880) 2 D. & C. 349; *Orrell v. Orrell* (1871) L.R. 6 Ch.App. 302; *Dewar v. Maitland* (1866) L.R. 2 Eq. 834; *Johnson v. Telford* (1880) 1 R. & M. 254; and especially *Re Ogilvie* [1918] 1 Ch. 492.

⁸⁷ *De Nicols v. Curlier* [1898] 1 Ch. 403, 413; affirmed [1900] A.C. 21.

⁸⁸ *Re Allen* (1945) 114 L.J.Ch. 298, is contrary, but see criticism above.

will is effectively revoked by the law of the testator's domicile at the date of revocation, it ceases to exist as a will just as though it had never been made, so that there is no will upon which the law of his domicile at the date of his death can operate. Therefore it is submitted that the law of the testator's domicile at the date of the alleged revocation should determine whether his will has been revoked. But in the absence of English authority this submission must be made with hesitation. Moreover, the opposite view is taken in the American Restatement⁸⁹; and it has been held in California that where the testator was divorced from his wife while domiciled in Washington, and died domiciled in California, and divorce operated to revoke his will by the law of Washington but not by the law of California, his will was not revoked.⁹⁰

Illustrations

1 T, who is domiciled in Italy, writes to his solicitor instructing him to destroy his will. By Italian law this amounts to a revocation of the will whether or not the solicitor complies with the direction. By English law it does not amount to a revocation because the will is not destroyed in the presence of the testator as required by section 20 of the Wills Act, 1837. The will is revoked.⁹¹

2 The facts are the same as in Illustration 1, except that the testator acquires an English domicile after writing the letter to his solicitor and remains domiciled in England until his death. The will is (*semble*) revoked.

3. The facts are the same as in Illustration 1, except that the testator is domiciled in England at the date of writing the letter to his solicitor, and in Italy at the date of his death. The will is (*semble*) not revoked.

Exception 1.—If the alleged act of revocation is the execution of a later will or codicil, the question whether the later instrument revokes the first depends entirely on whether the second instrument is valid in accordance with the foregoing Rules.

Comment

A later will or codicil may revoke an earlier will either expressly or by implication. It may do so expressly, as when the testator says in the later instrument 'I hereby revoke all testamentary dispositions heretofore made by me'. Or it may do so by implication, as when the testator gives all his property to A in the first instrument and gives all his property to B in the second. In doubtful cases the practice of the Probate Division is to admit both wills to probate, leaving it to the Chancery Division to determine whether or to what extent the second revoked the first.

In such cases it would seem obvious that the question whether

⁸⁹ Section 307.

⁹⁰ *Re Patterson's Estate* (1924) 64 Cal.App. 643; 222 P. 374; 266 U.S. 594. Contrast *Re Traversi's Estate* (1946) 64 N.Y.Supp. (2nd) 453.

⁹¹ Compare *Velasco v. Coney* [1934] P. 148.

the second instrument revokes the first should be determined by the intrinsic validity of the second will, which in turn depends upon the Rules already laid down in this chapter.

Illustrations

1. T, domiciled in England, makes a will which is well executed in accordance with the Wills Act, 1837. He acquires an Italian domicile and makes an unattested holograph will in which he revokes all former wills. He dies domiciled in Italy. The second will is formally valid by Italian law and is therefore valid in England under Rule 180. The first will is revoked.⁹²

2. The facts are the same as in Illustration 1, except that the testator remains domiciled in England. The second will is formally invalid under Rule 181. The first will is not revoked.

3. The facts are the same as in Illustration 2, except that the testator is a British subject and the second will is made in France or Scotland and is formally valid by French or Scots law. The second will is valid in England under Exceptions 1 or 2 to Rule 181. The first will is revoked.⁹³

4. T, domiciled in Germany, makes a will when aged seventeen. He acquires an English domicile and makes a will when aged nineteen in which he revokes all former wills. By German law persons over the age of sixteen may make valid wills. The first will is valid in England and the second will is invalid in England under Rule 179. The first will is (*semble*) not revoked.

5. T, domiciled in England, makes a will in which he leaves all his property to A. T acquires a French domicile and makes a will in which he leaves all his property to B without expressly revoking the first will. Both wills are admitted to probate in England. The question whether, or to what extent, the second will revokes the first is *prima facie* governed by French law in accordance with Rule 183.

Exception 2.—The question whether a will is revoked by the subsequent marriage of the testator depends on the law of the testator's domicile at the moment of the marriage.

Comment

Under the law of some countries (*e.g.*, England under s. 18 of the Wills Act, 1837) a marriage *ipso facto* revokes any will made before marriage by either party to the marriage,⁹⁴ whilst under the law of other countries (*e.g.*, Scotland or France) marriage does not revoke a will made before marriage either by the husband or the wife. When, therefore, H makes a will whilst domiciled in England, and afterwards acquires a Scottish domicile and marries W, an Englishwoman, it is clear that on his death the validity of his will is to be determined by the law of Scotland, where he is domiciled at his death. That law holds that a valid will is not revoked by marriage.

⁹² *Cottrell v. Cottrell* (1872) L.R. 2 P. & D. 397; compare *In bonis Kalling* (1897) 32 Ir.L.T. 131.

⁹³ Compare *Re Colville* [1932] 1 D.L.R. 47.

⁹⁴ Unless made after December 31, 1925, and expressed to be made in contemplation of a marriage: Law of Property Act, 1925, s. 177.

But that does not dispose of the question, for, if the will has been revoked under s. 18 of the Wills Act, 1837, it is clear that Scottish law has no will on which it can operate. As a matter of fact, English courts determine the effect of marriage on the revocation of a will of movables (or immovables) by the law of the country where the testator or the testatrix is domiciled at the moment of the marriage.⁹⁵ In order fully to appreciate the effect of the rule upheld by our courts, which is not that of American law,⁹⁶ and which constitutes part of matrimonial as opposed to testamentary law, it must be remembered that the domicile of a wife becomes, at the moment of the marriage, the same as the domicile of her husband. English courts therefore, in effect, hold that the question whether or not a marriage operates as the revocation of a will which has been made by either husband or wife before marriage, must be determined in accordance with the law of the country where the husband is domiciled at the moment of the marriage. Thus, if he is then domiciled in England, the marriage revokes any will already made, either by himself or by his wife, and it is not rendered valid by his afterwards acquiring a Scottish domicile. If at the moment of the marriage he is domiciled in Scotland, neither his nor his wife's will is revoked by the marriage, even though at the time of his death they have acquired an English domicile.

Illustrations

1 T, domiciled in Scotland, makes a will, marries, acquires an English domicile, and dies domiciled in England. The will is not revoked.⁹⁷

2. T, domiciled in Scotland, makes a will, acquires an English domicile, marries, and dies domiciled in England. The will is (*semble*) revoked.⁹⁸

3. T, a Frenchwoman domiciled in France, makes a will, marries H, of whom it is doubtful whether he is domiciled in England or France. T dies domiciled in France. If H was at the moment of the marriage domiciled in France the will is not revoked; if he was then domiciled in England the will is revoked.⁹⁹

4. T, an Englishwoman domiciled in England, makes a will, marries a domiciled Scotsman, and dies domiciled in Scotland. The will is not revoked, because the domicile of T became Scottish at the moment of the marriage.¹

5. T, a Dutch lady domiciled in Holland, makes a will, marries a domiciled Dutchman, and dies domiciled in England. The will is not revoked.²

⁹⁵ *In bonis Reid* (1866) L.R. 1 P. & D. 74; *Re Martin* [1900] P. 211 (C.A.); *In bonis Groos* [1904] P. 269; *In bonis Von Faber* (1904) 20 T.L.R. 640; *Westerman v. Schwab* [1905] S.C. 132; *Seifert v. Seifert* (1914) 23 D.L.R. 440.

⁹⁶ Restatement, s. 307.

⁹⁷ *In bonis Reid* (1866) L.R. 1 P. & D. 74.

⁹⁸ Compare *In bonis Reid* (1866) L.R. 1 P. & D. 74, 76, *per* Sir J. P. Wilde. The question whether the will would be saved from revocation by s. 3 of the Wills Act, 1861, is discussed *post*, p. 841.

⁹⁹ *Re Martin* [1900] P. 211.

¹ *Westerman v. Schwab* [1905] S.C. 132.

² *In bonis Groos* [1904] P. 269; compare *In bonis Von Faber* (1904) 20 T.L.R. 640.

(7) *Effect of Change of Testator's Domicile after Execution of Will.*

RULE 186.—No will or other testamentary instrument [made by a British subject] shall be held to be revoked or to have become [formally] invalid, nor shall the construction thereof be altered by reason [only] of any subsequent change of domicile of the person making the same.

Comment

A testator may execute his will when domiciled in France, and may die when domiciled in England. If this is so, the question arises whether the validity of the will depends on the law of France or on the law of England. It is to a case of this kind that Rule 186 applies.

This Rule, if we omit the words in brackets, reproduces verbatim the Wills Act, 1861, s. 3; with this Rule should be read the two Exceptions to Rule 181,³ whereof Exception 1 reproduces the Wills Act, 1861, s. 1, and Exception 2 reproduces the Wills Act, 1861, s. 2. It is a question of some difficulty to determine what the scope of the section is and how far it modifies the law laid down in the preceding Rules.

Up to 1861 our courts probably held⁴ that a will invalid in point of form by the law of England where the testator died domiciled was to be held invalid, even though perfectly valid according to the law of the country where the testator was domiciled when the will was executed. Thus, if a testator, while domiciled in France, made a holograph will in the form allowed by the law of France, but not duly executed according to the English Wills Act, 1837, and afterwards died domiciled in England, his will was, before 1861, held invalid here. The Wills Act, 1861, was passed to remedy the inconveniences or remove the doubts arising from this state of the law.

Sections 1 and 2 of the Act provide that a will of a British subject which comes within the terms of the section shall be held to be well executed 'whatever may be the domicile of such person at the time of making the same or at the time of his or her death'. It is clear, therefore, that in certain circumstances a will is not invalidated by a change of domicile. Thus, if a British subject domiciled in Scotland makes an unattested holograph will in Scotland, and dies domiciled in England, his will is clearly valid under

³ See *ante*, pp. 822, 826; see also Rules 179, 183 and 185, and 188, 831, 835.

⁴ The law before 1861 as to the effect of a change of domicile on the validity of a will was not free from doubt. See *Stanley v. Berry* (1844) 10 Moo. P.C. 373, 447; *Croker v. Marquis of Hertford* (1844) 3 Moo. P.C. 373; *Donovan v. Freeman* (1857) Deane 278; *Crookenden v. Fuller* (1859) 10 Moo. P.C. 306.

section 2, because it was valid by the *lex actus*. Similarly, if a British subject domiciled in France makes an unattested holograph will in France, and dies domiciled in England, his will is clearly valid under section 1, because it was valid by the *lex actus* or alternatively the *lex domicilii* at the date of execution. But circumstances are conceivable in which a change of domicile might invalidate the will of a British subject notwithstanding section 2. Thus, if a British subject domiciled in Scotland makes an unattested holograph will in England, and dies domiciled in England, his will would not be valid under section 2, because it was not valid by the *lex actus*. It is suggested that section 3 was passed to cover cases of this type, and also to make it perfectly clear that a will valid under either of the first two sections should not be invalidated by a subsequent change of domicile. Unfortunately the section is drafted in very wide terms, and gives rise to difficult questions.

First Question. Is section 3 limited to the wills of British subjects?

The first two sections are expressly so limited. The Act is entitled 'An Act to amend the law with respect to wills of personal estate made by British subjects'. Dicey⁵ and Westlake,⁶ however, were of the opinion that section 3 also applies to the wills of aliens. But the legislature cannot have intended to legislate for the wills of all testators in the world irrespective of their connection with the United Kingdom. If a Frenchman domiciled in France made an unattested holograph will in France, and died domiciled in New York, and both French and New York law agreed that he died intestate, it surely could not be contended that his will was saved from revocation by section 3. Dicey⁷ therefore admitted that the section must be restricted to the wills of British subjects and of aliens dying domiciled in England, though this limitation is not expressed in the Act. But once it is admitted that some limitation has to be made, it seems best to limit section 3 to the wills of British subjects, because that renders section 3 harmonious with sections 1 and 2. Accordingly, it is submitted that the view of Foote⁸ and Cheshire⁹ is correct, and that section 3 applies only to the wills of British subjects.¹⁰

It is true that in *In bonis Groos*,¹¹ Sir Gorell Barnes, P., expressed the opinion that section 3 applies to the wills of aliens. But this opinion was not necessary to the decision of the case. The question was whether the will of a Dutch lady domiciled in Holland

⁵ 5th ed.

⁶ Section

⁷ 5th ed., p.

⁸ Pages 801-

⁹ Pages 690-

¹⁰ See *Moore*, 173-76, where it is suggested that the section should be restricted to wills of British subjects and 'No such will': see *Emanuel v. Constable* (1827)

¹¹ [1891]

was revoked by her subsequent marriage to a domiciled Dutchman, she having died domiciled in England. Since the testatrix was domiciled in Holland at the moment of the marriage, this question depended on Dutch law,¹² by which marriage does not revoke a will. It was therefore unnecessary to have recourse to section 3 at all in order to admit the will to probate; and the learned judge was plainly prepared to decide the case on general principles without reference to the section. Moreover, there is no suggestion in the judgments of the Court of Appeal in *Re Martin*^{12a} that the will in that case (which was made by a Frenchwoman domiciled in France at the time of making her will, but in England at the time of her subsequent marriage) might have been saved from revocation by section 3.

Second Question. Does section 3 apply to cases where the domicile is changed and no further act is done which might revoke the will, or does it apply to cases where the domicile is changed and some such further act is done?

It is submitted that the former is the correct interpretation, and that the section should be read as if it said 'No will shall be revoked by reason *only* of any subsequent change of domicile'.

If a British subject domiciled in England makes a will which is well executed according to the Wills Act, 1837, and dies domiciled in Italy having while so domiciled made an unattested holograph will, valid by Italian law, in which he revokes all former wills, it surely could not be contended that section 3 saves the first will from revocation: moreover there is authority that it does not do so.¹³ Again, if a British subject domiciled in England makes a will which is well executed according to the Wills Act, 1837, and dies domiciled in Italy having while so domiciled purported to revoke his will in a manner which is effective by Italian law but ineffective by English law (for example, by directing it to be destroyed in his absence), it is submitted that section 3 would not save the will from revocation. Similarly, if a British subject domiciled in Scotland makes a will in Scotland, and later acquires an English domicile and marries, it is submitted that section 3 would not save the will from revocation. In these three cases it is not the subsequent change of domicile which revokes the will, but the execution of the second will, the direction to destroy, and the marriage.

It is true that in *In bonis Reid*¹⁴ and *In bonis Groos*¹⁵ the section was invoked to prevent the revocation of the will by subsequent marriage. But in both cases the decision was correct quite apart from section 3, on the general principle enunciated in

¹² Rule 185, Exception 2, *ante*, p. 837.

^{12a} [1900] P. 211 (C.A.), stated *ante*, p. 838, Illustration 3.

¹³ *Cottrell v. Cottrell* (1872) L.R. 2 P. & D. 397, *ante*, p. 837, Illustration 1.

¹⁴ (1866) L.R. 1 P. & D. 74.

¹⁵ [1904] P. 269.

Exception 2 to Rule 185,¹⁶ that the question whether a will is revoked by marriage depends upon the law of the testator's domicile at the moment of the marriage. If section 3 is to receive the wider interpretation suggested by the dicta in these two cases, it is hard to see why it did not save the will in *Cottrell v. Cottrell*¹⁷ from revocation: a result which would surely have been at variance with common sense. Moreover, the will in *Re Martin*^{17a} was not saved from revocation by section 3.

Third Question. Is section 3 limited to formal validity and construction or does it also apply to material validity and personal capacity?

It is to be noted that sections 1 and 2 of the Act, which are the dominant sections, refer to matters of form and that section 4 also clearly deals with form. Hence it is natural to restrict section 3 to matters of form and construction, and no case appears to suggest that this view is wrong. It is submitted, therefore, that section 3 only applies to formal validity and construction and that it does not extend to material validity or to the personal capacity of the testator. Material validity is governed by the law of the testator's domicile at the date of his death,¹⁸ and it is unlikely that the legislature intended to alter this rule in a statute dealing mainly with matters of form. Personal capacity is probably governed by the law of the testator's domicile at the date of the will.¹⁹ Therefore, if the testator has testamentary capacity at the date of the will but not at the date of his death, the will is valid on general principles, and it is unnecessary to have recourse to section 3.

The construction of the will also depends *prima facie* on the law of the testator's domicile at the date of the will,²⁰ so that here again it is unnecessary to have recourse to section 3. It is clear that all questions of construction must be dealt with exactly as they would have been dealt with had the testator not changed his domicile.

Illustrations

1. T, a British subject domiciled in Scotland, makes an unattested holograph will in England. The will is valid by Scots law. T acquires an English domicile and dies. The will is not within Exception 2 to Rule 181,²¹ and is, therefore, *prima facie* invalid. But it is valid under Rule 186.

2. The facts are the same as in Illustration 1, except that T is not a British subject. The will is (*semble*) invalid.

3. T, a Frenchman domiciled in France, makes an unattested holograph will which is valid by French law. He acquires an English domicile and dies. The will is (*semble*) invalid.

4. T, a British subject domiciled in England, makes a will which is well

¹⁶ *Ante*, p. 837.

¹⁷ (1872) L.R. 2 P. & D. 397; *ante*, p. 837, Illustration 1.

^{17a} [1900] P. 211 (C.A.), stated *ante*, p. 838, Illustration 3.

¹⁸ Rule 182, *ante*, p. 827.

¹⁹ Rule 179, *ante*, p. 818.

²⁰ Rule 183, *ante*, p. 831.

²¹ *Ante*, p. 826.

executed in accordance with the Wills Act, 1837. He acquires an Italian domicile, makes an unattested holograph will revoking all former wills, and dies. His second will is formally valid by Italian law. His first will is revoked.²²

5. T, a British subject domiciled in England, makes a will which is well executed in accordance with the Wills Act, 1837. He acquires an Italian domicile, writes to his solicitor directing him to destroy his will, and dies. This amounts to a valid revocation by Italian law, but not by English law. The will is (*semble*) revoked.²³

6. T, a British subject domiciled in Scotland, makes a will, acquires an English domicile, marries, and dies domiciled in England. The will is (*semble*) revoked.²⁴

7. T, a British subject domiciled in Northern Ireland, makes a will bequeathing money in the English funds on trusts for accumulation in excess of the periods permitted by the Law of Property Act, 1925, which does not extend to Ireland. T dies domiciled in England. The trusts for accumulation are, *semble*, invalid so far as the statutory periods are exceeded.²⁵

3. EXERCISE OF POWER BY WILL²⁶

(1) *Capacity.*

RULE 187.—A testator has capacity to exercise by will a power of appointment conferred by an English instrument, if (a) he has testamentary capacity by the law of his domicile, or (b) he has testamentary capacity by English law.

The term 'English instrument' in this Rule and in the following Rules means an instrument (*e.g.*, a settlement or a will) which creates a power of appointment, and operates under English law.

Comment

Power of appointment by will generally.—Under English law a person can by an instrument, such as a marriage settlement or a will, give to some other person²⁷ a power to appoint by will the person or persons who shall succeed to movable property on the death of the person to whom the power is given. The person who

²² *Cottrell v. Cottrell* (1872) L.R. 2 P. & D. 397.

²³ Compare *Velasco v. Coney* [1934] P. 143.

²⁴ See *In bonis Reid* (1866) L.R. 1 P. & D. 74, 76; cf. *Re Martin* [1900] P. 211 (C.A.).

²⁵ Compare *Freke v. Carbery* (1873) 16 Eq. 461.

²⁶ As to Rules 187–192, and the Illustrations thereof, the reader should note that: (1) Unless the contrary is expressly stated or is apparent from the context, they refer exclusively to (a) powers of appointment created under an *English instrument*; (b) powers of appointment exercised *by will*; (c) powers in regard to *movable property*. (2) The word 'exercise' is throughout employed with reference to a power; the word 'execute' or 'make', with reference to a will.

²⁷ Or retain for himself. Power to appoint may be given not restricted to a will, but we are here concerned only with the question of testamentary exercise of a power.

thus gives or creates the power is called 'the donor of the power'; the person to whom the power is given, and who therefore can exercise the power, is called 'the donee of the power', or 'the appointor', and the power is independent of any interest in the property vested in the donee of the power; the person in whose favour the power is exercised is called 'the appointee'. Now the donor of the power, the donee, and the appointee may each be personally subject to the laws of different countries. The donor may be—and when, as under this Rule, we are dealing with an English instrument, generally though not invariably is—an Englishman domiciled in England; the donee may be a French citizen domiciled in France; the appointee in whose favour the power is exercised may be an American citizen domiciled in New York; and further, each one of these persons may change his domicile and nationality after the creation of the power of appointment. Hence the exercise of a power by will often raises questions connected with the conflict of laws, such as the following inquiries. First, by what law will an English court determine the general question of the *capacity* of a donee to exercise a power of appointment by will? ²⁸ Secondly, by what law will such court determine how far a given will is a *formally valid* exercise of such power? ²⁹ Thirdly, by what law will an English court determine the *interpretation*,³⁰ or fourthly, the *essential validity* ³¹ of the exercise of such power? Fifthly, by what law will an English court determine whether the exercise of such power has been *revoked*? ³² It might indeed be thought that the answer to these questions must be the same as the answer to similar inquiries with regard to the validity, etc., of a will ³³ of movables, so that a will, to be a valid exercise of the power, must also invariably comply with the law of the donee's domicile. But this is not so. The making of a will, and the exercise by will of a power of appointment, are, according to English law, different things. A man who makes an effective will necessarily disposes of his own property, or of property in which he has some interest. The exercise, on the other hand, of a power to appoint by will is not in strictness disposal of property belonging to the donee. He usually has, it is true, some interest in the property in respect of which he exercises the power; but this is not necessarily the case. Whilst, again, the making of a will is strictly an exercise of testamentary capacity on the part of the testator, the exercise of a power by will is, for some purposes at any rate, the carrying out by the donee of the power of the wishes of the donor (*e.g.*, the settlor) by whom the power is created. T,

²⁸ See Rule 187. This Rule refers only to the *personal* capacity of the testator.

²⁹ See Rules 188, 189, *post*.

³⁰ See Rule 190, *post*.

³¹ See Rule 191, *post*.

³² See Rule 192, *post*.

³³ See Rules 179–186, pp. 818–843, *ante*.

in short, who exercises the power of appointment, is sometimes regarded not as a testator making his own will, but rather the donor's mandatory, or agent, who, within the limits of the authority or discretion given to him, is carrying out the intentions of his principal, the donor. These characteristics of a power of appointment by will must be borne in mind, as they account for, if they do not always justify, the anomalies of some of the Rules hereinafter laid down as to the exercise of powers of appointment in connection with the conflict of laws.

Capacity.—From the nature of a power of appointment, as described above, it follows that the question of the capacity of the donee to exercise the power may be considered from two aspects, either from the point of view of the testamentary capacity of the donee according to the law of his domicile, or from the point of view of the donor's domicile. If T, the donee of a power of appointment, is under the law of his domicile capable of making a will, it has been decided that he has capacity to exercise by will a power of appointment, even though he lacked capacity to do so by English law.³⁴ On the other hand, it does not follow that a person of full age in the view of English law cannot exercise a power of appointment because incapable under the law of his domicile of making a will. It seems clear on principle that just as a power can be exercised by a person domiciled abroad by a will made in a form appropriate to an English will,³⁵ so a person possessing capacity under English law can exercise a power, though incapable of making a will by the law of his domicile.

So far as capacity to exercise a power is concerned, no distinction has yet been suggested between general and special powers.

Illustrations

1. T, the donee of a power of appointment by will, is a married woman domiciled in France. She makes a will when aged nineteen. By French law married women over sixteen and under twenty-one are competent to dispose by will of one-half of the property they could have disposed of if over twenty-one. T has capacity to exercise the power with respect to one-half of the property subject thereto and the other half will go as in default of appointment.³⁶

2. T is the donee of a special power to appoint by will. He has attained the age of twenty-one, but is domiciled in a country according to the law whereof he remains an infant and is incapable of making a will till he attains the age of twenty-two. He has capacity to exercise the power.³⁷

(2) *Formal Validity.*³⁸

RULE 188.—A will of movables made in exercise of a power of appointment by will conferred by an English

³⁴ *Re Lewal's Settlement Trusts* [1918] 2 Ch. 391.

³⁵ See Rule 188 (1) (a), *post*.

³⁶ *Re Lewal's Settlement Trusts* [1918] 2 Ch. 391.

³⁷ Inference from cases cited *post*, p. 846, n. 39.

³⁸ See note 26, p. 843, *ante*.

instrument is entitled to be admitted to probate, and is, as far as form is concerned, a good exercise of the power where the will—

(1) complies with any of the following conditions as to form (that is to say)—

- (a) where the will is executed in accordance with the form required by the ordinary testamentary law of England, *i.e.*, by the Wills Act, 1837³⁹; or
- (b) where the will is executed in accordance with the form required by the law of the testator's (donee's) domicile at the time of his death⁴⁰; or
- (c) where the will is executed in accordance with any form which is valid under the Wills Act, 1861,⁴¹ *i.e.*, where the will is valid either under Exception 1⁴² or Exception 2⁴³ to Rule 181 or under Rule 186; and

(2) is executed in accordance with the terms of the power as to execution.⁴⁴

Comment

The exercise of a power under an English instrument to appoint 'by will' or 'by will duly executed' is satisfied as to *form* by the fulfilment of two requirements. The one is that the will shall be executed in accordance with some one of the three conditions enumerated in Rule 188 (1), *i.e.*, that the will should be a document

³⁹ See the Wills Act, 1837, ss. 9, 10; *Tatnall v. Hankey* (1838) 2 Moore P.C. 342; *In bonis Alexander* (1860) 29 L.J.P. & M. 93; *In bonis Hallyburton* (1866) L.R. 1 P. & D. 90; *In bonis Huber* [1896] P. 209; *In bonis Tréfond* [1899] P. 247; *Re Mégret* [1901] 1 Ch. 547; *Murphy v. Deichler* [1909] A.C. 447; *Re Baker* [1908] W.N. 161. A will in this form can deal with personal estate as well as movables.

⁴⁰ *D'Huart v. Harkness* (1865) 34 Beav. 324; *Re Price* [1900] 1 Ch. 442; *Re Pryce* [1911] 2 Ch. (C.A.) 286; *Re Walker* [1908] 1 Ch. 560; *Re Simpson* [1916] 1 Ch. 502; *Re Wilkinson's Settlement* [1917] 1 Ch. 620; *Re Strong* (1925) 95 L.J.Ch. 22; *Re Lewal's Settlement* [1918] 2 Ch. 391; *Re Woods, Re Browne* [1947] 4 D.L.R. 386.

⁴¹ *Re Simpson* [1916] 1 Ch. 502; *Re Wilkinson's Settlement* [1917] 1 Ch. 620; *Re Price* [1900] 1 Ch. 442; *contra, Re Kirwan's Trusts* (1883) 25 Ch.D. 373, and *Hummel v. Hummel* [1898] 1 Ch. 642. A will in this form can deal with personal estate as well as movables.

⁴² See p. 822, *ante*.

⁴³ See p. 826, *ante*.

⁴⁴ *Barretto v. Young* [1900] 2 Ch. 339; *Re Walker* [1908] 1 Ch. 560; and *conf. Rule 189, p. 850, post*.

which, at any rate when the exercise of a power of appointment is concerned, English courts admit to be a duly executed will. The other requirement is that any special terms or conditions of the power as to the execution of the will shall be followed.

(1) (a) *Where the will is executed in accordance with the Wills Act, 1837.*

A will so executed is a valid exercise of the power quite irrespective of the domicile of T, the testator, and though the will might not be a valid will under the law of T's domicile. This is an admitted, though now a thoroughly established, anomaly. It has been thus explained :—

‘An appointment by will executed according to the requirements of the power is entitled to probate, though it does not follow the formalities of the law of the domicile. The law takes a liberal view, and where the instrument creating the power directs it to be executed by will, in a particular form, a will may be good for the purposes of the appointment, if executed according to the law of this country, though not according to the law of the domicile. That is, where the instrument creating the power directs it to be executed by will, executed in a particular way, it may be a good will if executed in the form required, though not according to the law of the domicile’.⁴⁵

The principle is now firmly established by the decision of the House of Lords in *Murphy v. Deichler*,⁴⁶ where Lord Loreburn said : ‘It has been established, I think not unreasonably, that if it is a proper execution of an English power of appointment by will—if it be executed by will in English form, even although the persons appointing be domiciled abroad, and the will be not validly executed according to the law of the domicile—the document may be admitted to probate as a will for the purpose of the appointment although it might not be admissible for other purposes’.

(b) *Where the will is executed in accordance with the law of the testator's domicile.*

The grounds on which such a will may be held a valid exercise of a power have been judicially explained. The explanation, be it noted, is given with reference to a case where a testatrix possessed under an English instrument a power of appointment ‘to be executed by her will in writing duly executed’, and had exercised the power by a will valid according to the law of her domicile, but not valid under or in accordance with the Wills Act, 1837.

‘Here’, says Romilly, M.R., ‘I find this :—A sum of money is given simply to such person as [T] shall, by her last will duly executed, appoint. What does that mean? It means a will so executed as to be good according to the English law. Here it is

⁴⁵ *D'Huart v. Harkness* (1865) 34 Beav. 328, *per* Romilly, M.R. Compare, *per* Jenne, P., *In bonis Huber* [1896] P. 209, 213.

⁴⁶ [1909] A.C. 447, 448–49.

admitted to probate, and that is conclusive that it is good according to the English law. The English law admits two classes of wills to probate: first, those which follow the forms required by the Wills Act, 1837, s. 9; and secondly, those executed by a person domiciled in a foreign country, according to the law of that country, which latter are perfectly valid in this country. Accordingly, where a person domiciled in France executes a will in the mode required by the law of that country, it is admitted to proof in England, though the English formalities have not been observed. When a person simply directs that a sum of money shall be held subject to a power of appointment by will, he does not mean any one particular form of will recognised by the law of this country, but any will which is entitled to probate here. A power to appoint by will simply may be executed by any will which, according to the law of this country, is valid, though it does not follow the forms of the statute.⁴⁷

(c) *Where the will is executed in accordance with the Wills Act, 1861.*

One of the principles laid down in *D'Huart v. Harkness*⁴⁸ is that any will is prima facie an exercise of a power to appoint by will which is so executed that it is entitled to probate in England. But this principle is clearly wide enough to cover, and does cover, any will which is formally valid, i.e., which is entitled to probate under the Wills Act, 1861. It is true that in *Re Kirwan's Trusts*⁴⁹ and *Hummel v. Hummel*⁵⁰ it was held that a will admitted to probate under the Wills Act, 1861, was not a good exercise of a power to appoint by will. But those cases were very adversely criticised and in effect overruled in *Re Simpson*⁵¹ and *Re Wilkinson's Settlement*.⁵² Moreover, *Re Kirwan's Trusts*⁴⁹ can be distinguished on the ground that the appointment was a fraud upon the power, and also on the ground that the appointment did not comply with the formalities prescribed by the donor of the power.⁵³ There must be some mistake in the report of *Hummel v. Hummel*⁵⁰ for the testatrix had lost her British nationality by marrying an alien, and therefore section 1 of the Wills Act, 1861, was inapplicable.

(2) *Compliance with the terms of the power.* If the will exercising the power is duly executed in accordance with the Wills Act, 1837, it is immaterial that it fails to comply with some additional

⁴⁷ *D'Huart v. Harkness* (1865) 34 Beav. 324, 327, 328. It should be noted that the testatrix in this case died before the Wills Act, 1861, came into force, and therefore the decision in the case had no reference to that Act.

⁴⁸ (1865) 34 Beav. 324.

⁴⁹ (1888) 25 Ch.D. 373.

⁵⁰ [1898] 1 Ch. 642.

⁵¹ [1916] 1 Ch. 502.

⁵² [1917] 1 Ch. 620. See also *Re Price* [1900] 1 Ch. 442.

⁵³ See Rule 188 (2) and next paragraph.

or other form of execution or solemnity.⁵⁴ But if the will exercising the power is admitted to probate under some foreign system of law, either because that system is the law of the donee's domicile at the date of his death or because it is applicable under the Wills Act, 1861, any additional or other formalities prescribed by the donor of the power must be complied with.⁵⁵ This rule leads to some very fine distinctions. An English lawyer would not see much difference between a requirement that the power shall be exercised by a will 'duly executed', and a requirement that the power shall be exercised by a will 'executed in the presence of two witnesses'. Yet in the former case an unattested holograph will, if valid by the law of the donee's domicile at the date of his death, is a good exercise of the power⁵⁶; in the latter case it is not.⁵⁵ The court has, however, an equitable jurisdiction to aid defective execution in favour of the children of the appointor⁵⁷ and perhaps in favour of other persons also.⁵⁸

Illustrations

1. T is, in favour of any husband of hers who should be living at her death, donee of a power of appointment by will to be signed in the presence of two credible witnesses. T, in 1831, whilst domiciled in England, exercises the power in favour of her husband. The will is signed in the presence of two credible witnesses. T, at her death in 1859, is domiciled in Scotland. Her husband survives her. The will is executed in accordance with the testamentary law of England, but not in accordance with the testamentary law of Scotland. The will is a valid exercise of the power.⁵⁹

2. T is donee of a power of appointment by will in respect of movables situate in England. T, domiciled in Scotland, exercises the power by a will made in accordance with the form required by the law of England, but not in accordance with the form required by the law of Scotland. The will is executed in Scotland.⁶⁰ The will is a valid exercise of the power.⁶¹

3. T, an Englishwoman born a British subject, has power to dispose of £2,000 consols in favour of such persons as she should, by will duly executed, appoint. T marries a Frenchman domiciled in France and thereby acquires a French domicile. Whilst domiciled in France she, in 1860, exercises her power of appointment in favour of her husband by a will not made in the form required by the English Wills Act, but in a form valid according to the law of France. T. dies in March, 1861,⁶² domiciled in France. The will is a valid exercise of the power.⁶³

⁵⁴ See Exception to Rule 189, *post*, p. 851.

⁵⁵ *Barretto v. Young* [1900] 2 Ch. 339.

⁵⁶ *D'Huart v. Harkness* (1865) 34 Beav. 324.

⁵⁷ *Re Walker* [1908] 1 Ch. 560. But not grandchildren, unless the appointor stands *in loco parentis*.

⁵⁸ The full list is given in *Farwell on Powers*, 3rd ed., p. 385, and includes (a) purchasers for value, (b) creditors, (c) charities, and (d) persons for whom the appointor is under a natural or moral obligation to provide.

⁵⁹ *In bonis Alexander* (1860) 29 L.J.P. & M. 93. The dates should be noticed. The will is made before the passing of the Wills Act, 1837, and the testatrix dies before the passing of the Wills Act, 1861, so that neither Act has any application to the case. See *In bonis Huber* [1896] P. 209.

⁶⁰ So that the Wills Act, 1861, s. 2, has no application. See Rule 181, Exception 2, p. 826, *ante*.

⁶¹ *In bonis Hallyburton* (1866) L.R. 1 P. & D. 90.

⁶² The Wills Act, 1861, has no application. See s. 5.

⁶³ *D'Huart v. Harkness* (1865) 34 Beav. 324.

4. T, an Englishwoman, has power to dispose of £2,000 consols in favour of such persons as she should, by will duly executed, appoint. T is married to a British subject, and is resident but not domiciled in France. Whilst there resident, she, in 1890, exercises her power of appointment in favour of her husband by a will not made in the form required by the English Wills Act, 1837, but executed in a form which is valid according to the law of France (*lex actus*).⁶⁴ The will is a valid exercise of the power.⁶⁵

5. T is a British subject born in a British colony, where she has her domicile of origin. She is donee of a power to dispose of £2,000 consols in favour of such person as she should, by will duly executed, appoint. She acquires a domicile of choice in France, where she makes her will and where she remains domiciled till the time of her death. The will is made in accordance with the forms required by the law of the colony where T has her domicile of origin. The will, even if not formally valid according to French law, is a valid exercise of the power.⁶⁵

6. T has a power of appointment by will over £2,000. T is a British subject domiciled in Italy. T, whilst in France, but not there domiciled, executes a holograph will valid by the law of France (*lex actus*), but not attested as required by the Wills Act, 1837, ss 9 and 10. The will is a good exercise of the power.⁶⁶

RULE 189.⁶⁷—Subject to the Exception hereinafter mentioned, no will which does not satisfy the requirements of Rule 188 is a valid exercise of a power of appointment by will created by an English instrument.

Comment

A will is not a valid exercise of a power of appointment if the will either—

(1) does not comply with some one of the three conditions as to form enumerated in Rule 188 (1), under the heads (a), (b) and (c); or

(2) does not in every other respect (subject, of course, to the Exception hereinafter mentioned) comply with the terms of the power as to the mode in which the will is to be executed, *e.g.*, the number of witnesses by which the signature of the testator is to be attested.

The combination of Rule 188 and Rule 189 leads, it should be observed, to the following result. A will, on the one hand, may be a valid will entitled to probate and yet not a valid exercise of a power to appoint by will; whilst a will, on the other hand, which is not valid as a will, and therefore not, as such, admissible to probate, may yet be a valid exercise of a power to appoint by will,

⁶⁴ See Rule 181, Exception 1, p. 822, *ante*, *i.e.*, Wills Act, 1861, s. 1.

⁶⁵ Compare *Re Simpson* [1916] 1 Ch. 502; *Re Wilkinson's Settlement* [1917] 1 Ch. 620.

⁶⁶ This, no doubt, is inconsistent with *Hummel v. Hummel* [1898] 1 Ch. 642, but see p. 848, *ante*.

⁶⁷ *Re Daly's Settlement* (1858) 25 Beav. 456; *Re Kirwan's Trusts* (1883) 25 Ch.D. 373; *Barretto v. Young* [1900] 2 Ch. 399. See the Wills Act, 1837, ss. 9 and 10.

and therefore in that capacity admissible to probate, or rather administration with the will annexed.⁶⁸

Suppose, for example, that T is a French citizen domiciled in France, who under an English instrument is donee of a power of appointment by will, duly executed and attested by two witnesses. If T makes a will in his own handwriting and signed by himself, but unattested, the will is a valid will according to the testamentary law of France (*lex domicilii*), and therefore as a will valid in England, but for want of compliance with the terms of the power it is not a valid exercise of the power of appointment. If T, on the other hand, makes in France a will in accordance with the form required by the Wills Act, 1837, the will, if not made in accordance with the testamentary law of France (*lex domicilii*), would as a will not be valid in England, but would be a valid exercise of the power.

Illustrations

1. T is donee of a power of appointment by will, to be exercised in the presence of one or more witnesses. T is a British subject. In 1871 T, when in France, intending to exercise the power of appointment, makes a will in his own handwriting, which is signed by him but is unattested, and, in virtue of the power, appoints that his daughter shall succeed to a certain fund. The will is valid according to the law of France (*lex actus*), and complies therefore with one of the forms required by the Wills Act, 1861, s. 1. The will is rightly admitted to probate, *i.e.*, is formally valid, but is not a valid exercise of the power.⁶⁹

2. T, an Englishwoman married to a British subject, has under her marriage settlement a power of appointment in respect of a trust fund. The power is to be exercised by her last will. T, when residing in France but domiciled in England, executes in 1856 a will which is not in the form required by the Wills Act, 1837, though it is in a form valid by the law of France. T dies in 1856.⁷⁰ The will is not a valid exercise of the power.⁷¹

3. T, a French citizen domiciled in France, has a power of appointment to be exercised by will attested by two witnesses. She bequeaths all her property by holograph will, unattested, to her grandchildren. The will is well executed according to French law. It is admitted to probate. It is not a valid exercise of the power.⁷²

Exception.⁷³—A will executed in accordance with the form required by the Wills Act, 1837, is, so far as regards the execution and attestation thereof, a

⁶⁸ *In bonis Huber* [1896] P. 209; *Pouey v. Hardern* [1900] 1 Ch. 492. Compare *Re Price* [1900] 1 Ch. 442, 447. See as to form of grant, *Re Vannini* [1901] P. 330. The grant applies only in respect of such property as the testator had power to dispose of and did dispose of; see *In bonis Huber* [1896] P. 209; *In bonis Tréfond* [1899] P. 247, 250; *Re Anziani* [1930] 1 Ch. 407.

⁶⁹ *Re Kirwan's Trusts* (1888) 25 Ch.D. 373.

⁷⁰ Therefore her will does not come within the operation of the Wills Act, 1861. See Rule 181, Exception 1, p. 822, *ante*.

⁷¹ *Re Daly's Settlement* (1858) 25 Beav. 456.

⁷² *Barretto v. Young* [1900] 2 Ch. 339.

⁷³ Wills Act, 1837, s. 10.

valid execution of a power of appointment by will, notwithstanding that it shall have been expressly required, under the instrument creating the power, that a will made in exercise of such power should be exercised with some additional or other form of execution or solemnity.

Comment

This Exception applies to any power of appointment by will which is exercised by a will executed in accordance with the Wills Act, 1837, ss. 9 and 10, but it possibly applies only where the will is made by a person domiciled in England. It was suggested in one case that the provisions of ss. 9 and 10 of the Wills Act have no application to the wills of persons not domiciled in England.⁷⁴ But this suggestion was not necessary for the decision of the case and there seems no reason for making any such distinction. It is quite clear that a will which is well executed in accordance with English law, but not in accordance with the law of the donee's domicile, is a good exercise of a power.⁷⁵ Once this anomaly is admitted, it seems idle to urge that section 10 is not applicable to such a will.

Illustrations

1. T, domiciled in England, has, under an English settlement, a power of appointment by will duly executed and attested by *four* witnesses. T exercises the power of appointment by a will in the form required by the Wills Act, 1837, executed in the presence of and attested by *two* witnesses only. The will is a good exercise of the power by virtue of the Wills Act, 1837, ss. 9 and 10.

2. The case is the same as the foregoing, except that T is a French citizen domiciled in France, and the will is not valid according to French law. *Semble*, the will is a good exercise of the power.

3. The case is the same as Illustration 2, except that T executes a holograph will signed by T, unattested by any witnesses, but valid by French law. The will is (*semble*) not a good exercise of the power.⁷⁶ But the court has jurisdiction to aid defective execution in favour of the children of the appointor.⁷⁷

(3) *Interpretation and Effect.*⁷⁸

RULE 190.—A general bequest contained in a will of movables is to be interpreted and to receive effect as an exercise of a general power of appointment.

This Rule applies to such bequest in the following cases, that is to say :—

Case 1.—Where the will is executed by a testator

⁷⁴ See *Barretto v. Young* [1900] 2 Ch. 339, 343.

⁷⁵ *Murphy v. Deichler* [1909] A.C. 447; Rule 188 (1) (a), *ante*, p. 846.

⁷⁶ *Barretto v. Young* [1900] 2 Ch. 339.

⁷⁷ *Re Walker* [1908] 1 Ch. 560; see *ante*, p. 849, n. 58.

⁷⁸ See p. 843, note 26, *ante*.

domiciled in England in accordance with the forms required by the Wills Act, 1837, ss. 9 and 10, unless a contrary intention appears by the will.

Case 2.—Where the will is executed by a testator not domiciled in England in a form valid under the law of his domicile, unless it appears from the will that it was not intended to apply to property over which the testator has a power of appointment.⁷⁹

Case 3.—Where the will is executed by a testator not domiciled in England in accordance with the forms required by the Wills Act, 1837, ss. 9 and 10, unless a contrary intention appears by the will.

Comment

This Rule is intended to give the effect of the Wills Act, 1837, s. 27. The object of this enactment was to do away with the then existing rule of interpretation under which a 'general bequest', e.g., of 'all T's personal estate' to A, was not construed and did not operate as the exercise of a power of appointment conferred upon T. The reason of this was that property over which T had a power of appointment was not in strictness T's own property. The effect of the rule established by the Wills Act, 1837, s. 27, is that such a general bequest is now construed as including all personal property, and therefore all movable property, over which T has a general power of appointment. But the rule, after all, is a rule of interpretation—i.e., as the Act says, it only applies 'unless a contrary intention appears by the will'—and would not operate, for example, to take the simplest case, if the will were to contain the statement that the general bequest of all T's personal property was not intended to include certain property over which he had a power of appointment, and the same result must, it would seem, follow if the general tenor of T's will should show that a general bequest was not intended to operate as the exercise of a power of appointment.

When, however, it is established that T's will contains a general bequest of T's personal estate, the question arises: What are the cases in which the rule of construction contained in section 27 of

⁷⁹ *Re Price* [1900] 1 Ch. 442; *Re Baker's Settlement Trusts* [1908] W.N. 161; *Re Pryce* [1911] 2 Ch. (C.A.) 286; and especially *Re Simpson* [1916] 1 Ch. 502, 510; *Re Lewal's Settlement Trusts* [1918] 2 Ch. 391; *Re Strong* (1925) 95 L.J.Ch. 22. These cases establish the doctrine as against the contrary view in *Re D'Este's Settlement* [1908] 1 Ch. 898; *Re Scholefield* [1905] 1 Ch. 408, compromised on appeal [1907] 1 Ch. 664. For Roman-Dutch Law see *Westminster Bank v. Zinn* [1938] A.D. 57. For Canada, see *Re Woods*, *Re Browne* [1947] 4 D.L.R. 386.

the Wills Act, 1837, applies? The answer appears to be that it is applicable in the three cases enumerated in Rule 190 :—

Case 1.—Here the rule of construction laid down in Rule 190 clearly applies; for a will of movables executed by a person domiciled in England in accordance with the forms required by the Wills Act, 1837, s. 10, is the kind of will which obviously comes within the scope of the Wills Act, 1837. It is, so to speak, the normal English will, and, if no contrary intention appears by the will itself, must be construed in accordance with the rule of construction laid down by English law.

Case 2.—The rule in this case has been settled in the same sense after some conflict of judicial opinion. The propriety of the rule as now laid down is obvious; a will executed by a testator domiciled abroad according to the form permissible by the law of his domicile is in effect a substitute for the will executed by a testator domiciled in England in accordance with the Wills Act, 1837, and it is perfectly legitimate to apply to such a will a rule of construction which applies to a will executed under that Act. The rule applies whether or not there is an indication on the face of the will that it is intended to be construed in accordance with English law.⁸⁰ The mere fact that the law of the testator's domicile knows nothing of powers of appointment is sufficient to admit the English canon of construction.

Case 3.—It is fairly certain, that the principle which governs Case 2 here applies. Still, one must, in the absence of a catena of decisions,⁸¹ speak with hesitation. The Wills Act, 1837, it may be said, does not, as regards wills of movables, apply to wills made by persons domiciled abroad, and therefore a particular section of that Act cannot of itself apply to such wills without a clear expression of the testator's intention that it shall apply. To this objection there are two replies. The first is that a will executed in accordance with the Wills Act, 1837, though not in accordance with the formalities required by the law of the testator's domicile, may be a valid exercise of a power of appointment by will,⁸² and therefore may be construed in regard to such power of appointment by the rule of construction applicable to an English will executed by a person domiciled in England. The second is that the effect of the Wills Act, s. 27, arises in this case, not from the Act itself applying to the wills of persons domiciled out of England, but from the fact that s. 27 is, through the form in which the will is drawn, or even from the mere fact that the law of the testator's domicile knows nothing of powers of appointment, imported by the testator himself into the will as a rule of construction.

⁸⁰ In *Re Price* [1900] 1 Ch. 442, there was such an indication; in the subsequent cases cited *ante*, p. 853, n. 79, there was not.

⁸¹ See, however, *Re Baker's Settlement Trusts* [1908] W.N. 161, and *Re Wilkinson* [1984] O.R. 6, which are decisions in this sense.

⁸² See Rule 188 (1) (a), p. 846, *ante*.

This construction can never be applied to special powers of appointment, which are not within section 27 of the Wills Act, and for which therefore an intention to exercise the power must appear in the will.

Illustrations⁸³

1. T is domiciled in England. The will is made in accordance with the Wills Act, 1837. The will is to be construed as an exercise of the power.

2. T is domiciled in France. She executes a holograph will made in a French form and unattested. It is valid by the law of France. According to French law it would be a complete disposition of all property over which T has the power to dispose, but French law does not know of powers of appointment and would, under the circumstances, apply the law of England with reference to the exercise of such a power. The will contains expressions from which it may be inferred that T meant her will to operate in England as well as in France, and wrote it with reference to the law of England. The will is to be construed as an exercise of the power.⁸⁴

3. T, domiciled in France, executes a will in English complying with the requirements of the Wills Act, 1837. The will is to be construed as an exercise of the power.

4. T, domiciled in France, executes a holograph will in the French form and unattested. It is valid by French law. It contains no words introducing the principle of construction contained in the Wills Act, 1837, s. 27, but makes a general bequest. The will is to be construed as an exercise of the power.⁸⁵

5. T, a German subject domiciled in Germany, executes a will in German form, nominating her eldest daughter as heiress to all her inheritance. By German law a general bequest covers all movables over which the testator has power to dispose and the English distinction between property and power is unknown. The will is to be construed as an exercise of the power.⁸⁶

(4) *Material or Essential Validity.*

RULE 191.—The operation of restrictions on the freedom of the donee to dispose by will of his movables depends in the case of

- (a) a special power of appointment, on the law which governs the operation of the instrument, and not on the law which governs the operation of the will⁸⁷;
- (b) a general power of appointment, on the law which governs the operation of the will, and not

⁸³ In the Illustrations to this Rule it is to be assumed, unless the contrary is stated, that T is a woman who, under an English settlement, has a general power of appointment by will over £1,000 consols, and that she has made a general bequest of all her personal property or all her movable property to A.

⁸⁴ *Re Price* [1900] 1 Ch. 442. See *Re Harman* [1894] 3 Ch. 607.

⁸⁵ *Re Lewal's Settlement Trusts* [1918] 2 Ch. 391.

⁸⁶ *Re Strong* (1925) 95 L.J.Ch. 22.

⁸⁷ *Pouey v. Hordern* [1900] 1 Ch. 492; *Re Pryce* [1911] 2 Ch. (C.A.) 286, 297. On the question of personal capacity see Rule 187, p. 848, *ante*.

on the law which governs the operation of the instrument.⁸⁸

Comment

This Rule seems to be the logical result of the circumstance (to which attention has already been called) that the exercise of a power of appointment by will on the part of a donee, *i.e.*, the testator, may be regarded in two different ways : it may be looked upon either, on the one hand, as the simple expression by the donee of the wishes of the donor, or, on the other hand, as a will giving expression to the wishes of the donee, *i.e.*, the testator. Now where the power is a special power, *e.g.*, where the donee has power to appoint among his children or issue and not among persons generally, the appointment by the donee is most naturally considered as the giving effect, as it were, by an agent to the wishes or intentions of the donor, and the will made under such special power is held to be governed as to its effect by the law to which the donor of the power was subject, *e.g.*, the law of England, for there seems no adequate ground for differentiating in this Rule between powers created under English and under foreign instruments. When, on the other hand, the power of appointment is a general power so that the donee might under the power leave the property subject thereto to any person whom he chose, then the exercise of the power of appointment is looked upon as being in fact the exercise of ordinary testamentary power by the donee and subject as regards the limitations and effects thereof to the law to which the donee's testamentary power would in an ordinary case be subject, the law in the case of movables, of the country, *e.g.*, France, where the donee dies domiciled.

Accordingly it has been held that if the foreign law of the donee's domicile imposes restrictions on the amount of property which he is free to dispose of by will, *e.g.*, by requiring him to leave a *legitima portio* to his children, such restrictions do not apply if the power is a special power,⁸⁹ but do apply if the power is a general power, at any rate when the effect of the appointment is to throw the appointed property into the donee's estate as one mass.⁹⁰

Illustrations

1. T, an Englishwoman, has under an English marriage settlement a special power of appointment by will over funds in England in favour of her children. In 1890 T, being then married to a Frenchman domiciled in France, exercises such power in favour of A, one of her children. The will is admitted to probate. It is contended that T, being a French citizen domiciled in France, has, under French law, no capacity to disinherit her other children. The power

⁸⁸ *Re Pryce* [1911] 2 Ch. (C.A.) 286; *Re Lewal's Settlement Trusts* [1918] 2 Ch. 391, 398.

⁸⁹ *Pouey v. Hordern* [1900] 1 Ch. 492.

⁹⁰ *Re Pryce* [1911] 2 Ch. 286 (C.A.), distinguishing or overruling *Re Bald* (1897) 66 L.J.Ch. 624, and *Re Mégret* [1901] 1 Ch. 547.

of appointment is a special power. Her exercise, therefore, of the power is valid.⁹¹

2. T, before her marriage domiciled in England, has a general power of appointment by will over certain movables in England. T marries H, a Dutchman domiciled in Holland. By her will in Dutch form, but admitted to probate in England, she appoints her husband, H, sole heir of the whole of the property of which the law in force at the time of her death should allow her to dispose in his favour. T dies domiciled in Holland. According to both Dutch and English law the exercise of the power of appointment has the effect of making the appointed property T's assets for all purposes. Under Dutch law T has no power to dispose of more than seven-eighths of such appointed property. H is beneficially entitled to only seven-eighths of such appointed property.⁹²

(5) *Revocation.*

RULE 192.—The exercise by will of a power of appointment will be held to have been validly revoked if the will is revoked in a manner sufficient (a) by the law of the donee's domicile,⁹³ or (b) by English law.⁹⁴

Comment

The first part of this Rule is established by the decision in *Velasco v. Coney*.⁹⁵ The second part of the Rule is as yet unsupported by authority, but it is submitted that it is a logical deduction from the principle previously noted, that the exercise of a power of appointment by will can be regarded either as an expression by the donee of the donor's wishes, or as an expression of the wishes of the donee. It is now firmly established that a will executed in accordance with the formalities required by English law, but not by the law of the donee's domicile, is a good exercise of a power of appointment created by an English instrument.⁹⁶ It should follow logically that if the donee revokes the appointment in a manner which is effective by English law, but ineffective by the law of his domicile, the appointment would be revoked.

It must be remembered (1) that the question whether a will is revoked by the subsequent marriage of the testator depends upon the law of the domicile of the testator at the date of the marriage, and not on the law of his domicile at the date of his death⁹⁶; (2) that a will exercising a power of appointment is not by English law revoked by the subsequent marriage of the testator if the appointed property would not pass to the donee's next of kin in default of appointment.⁹⁷

⁹¹ *Pouey v. Hordern* [1900] 1 Ch. 492.

⁹² *Re Pryce* [1911] 2 Ch. (C.A.) 286.

⁹³ *Velasco v. Coney* [1934] P. 143.

⁹⁴ Inference from *Murphy v. Deichler* [1909] A.C. 446, *ante*, p. 847.

⁹⁵ See preceding note and Rule 188 (1) (a), *ante*, p. 846.

⁹⁶ *Re Martin* [1900] P. 211, and Rule 185, Exception 2, *ante*, p. 837.

⁹⁷ Wills Act, 1837, s. 18.

It is believed that Rule 192, like Rules 187 and 188, does not depend upon any distinction between general and special powers.

Illustrations

1. T, domiciled in Italy, has a power of appointment created by an English instrument. In 1910 T exercises the power by a will validly executed in accordance with English and Italian law. In 1914 T writes from Italy to her solicitor in England instructing him to destroy the will. This is a valid revocation by the law of Italy, but not by English law. The power is not exercised, *i.e.*, the revocation is valid.⁹⁸

2. T, an Italian citizen domiciled in Italy, has a power of appointment created by an English instrument. T exercises the power by a will validly executed in accordance with English and Italian law. Later T makes a subsequent will which is validly executed in accordance with English law but not in accordance with Italian law. In this will T revokes all former wills but does not refer to the power. *Seem*, the power is not exercised,^{99a} *i.e.*, the revocation is valid.

3. T, an Englishwoman domiciled in England, has a power of appointment created by an English instrument. T makes a will validly executed in accordance with English law in which she exercises the power. T then marries a Frenchman domiciled in France. The domicile of T thus becomes French at the moment of the marriage. The exercise of the power is not revoked.⁹⁹

4. T, a Frenchwoman domiciled in France, has a power of appointment created by an English instrument. T makes a will validly executed in accordance with French law in which she exercises the power. T then marries an Englishman domiciled in England. The domicile of T thus becomes English at the moment of the marriage.¹ The exercise of the power is *revoked*, unless the will is made in contemplation of the marriage,² or unless the appointed property would not pass to T's next of kin in default of appointment.³

⁹⁸ *Velasco v. Coney* [1934] P. 148.

^{99a} Subject, of course, to the possible effect of Rule 190, *ante*, p. 852.

⁹⁹ Compare *Re Lewal's Settlement* [1918] 2 Ch. 391.

¹ Compare *Re Martin* [1900] P. 211.

² Law of Property Act, 1925, s. 176.

³ Wills Act, 1887, s. 18.

PROCEDURE¹

RULE 193.—All matters of procedure are governed wholly by the local or domestic law of the country to which a court wherein an action is brought or other legal proceeding is taken belongs (*lex fori*).

In this Digest, the term 'procedure' is to be taken in its widest sense, and includes (inter alia)—

- (1) remedies and process;
- (2) evidence;
- (3) limitation of an action or other proceeding;
- (4) set-off or counter-claim.

Comment

The principle that procedure is governed by the *lex fori* is of general application and universally admitted, but the courts of any country can apply it only to proceedings which take place in, or at any rate under the law of, that country. In a body of Rules, therefore, such as those contained in this Digest, which state the principles enforced by an English court, the maxim that procedure is governed by the *lex fori* means in effect that it is governed by the ordinary law of England, without any reference to any foreign law whatever. The maxim is in fact a negative rule: it lays down that the High Court, in common, it may be added, with every other English court, pursues its ordinary practice² and adheres to its ordinary methods of investigation whatever be the character of the parties, or the nature of the cause which is brought before it.

¹ Story, ss. 556-588; see also Chap. 17; Cheshire, Chap. 19; Wolff, ss. 214-227; Restatement, Chap. 12; Goodrich, Chap. 5; Cook, Chap. 6; Falconbridge, Chap. 13.

The decree of a foreign Californian court cannot authorise a person to sue in an English court otherwise (e.g., in the name of a company, against which he has recovered judgment) than in accordance with the English rules of procedure. *Barber v. Mexican Land Co.* (1900) 48 W.R. 235.

² As to security for costs, see *Redondo v. Chayter* (1879) 4 Q.B.D. (C.A.) 453, 457, 458. An alien, even if temporarily resident only in England, could not be required to give security for costs. This rule was indeed altered by Ord. LXV, r. 6a, but even now a foreigner will not necessarily be ordered to give security merely because he is poor, if he has no present intention of leaving England. For the kind of case where security will be ordered, i.e., where the plaintiff temporarily in England would probably be unavailable when wanted, see *Michiels v. Empire Palace Co.* (1892) 66 L.T. 132. See also *ante*, p. 161, note 3.

'A person', it has been said, 'suing in this country, must take the law as he finds it; he cannot, by virtue of any regulation in his own country, enjoy greater advantages than other suitors here, and he ought not therefore to be deprived of any superior advantage which the law of this country may confer. He is to have the same rights which all the subjects of this kingdom are entitled to',³ and the foreign defendant, it may be added, is to have the advantages, if any, which the form of procedure in this country gives to every defendant.

Whilst, however, it is certain that all matters which concern procedure are in an English court governed by the law of England, it is equally clear that everything which goes to the substance of a party's rights and does not concern procedure is governed by the law appropriate to the case.

'The law on this point is well settled in this country, where this distinction is properly taken, that whatever relates to the remedy to be enforced must be determined by the *lex fori*,—the law of the country to the tribunals of which the appeal is made',⁴—but that whatever relates to the rights of the parties must be determined by the proper law of the contract or other transaction on which their rights depend.

Our Rule is clear and well established. The difficulty of its application to a given case lies in discriminating between matters which belong to procedure and matters which affect the substantive rights of the parties. In the determination of this question two considerations must be borne in mind :—

(1) English lawyers give the widest possible extension to the meaning of the term 'procedure'. The expression, as interpreted by our judges, includes all legal remedies, and everything connected with the enforcement of a right. It covers, therefore, the whole field of practice; it includes the question of set-off and counterclaim,⁵ the whole law of evidence,⁶ as well as every rule in respect

³ *De la Vega v. Vianna* (1830) 1 B. & Ad. 284, 288.

⁴ *Don v. Lippmann* (1837) 5 Cl. & F. 1, 13, *per* Lord Brougham.

⁵ See *South African Republic v. La Compagnie Franco-Belge du Chemin de Fer du Nord* [1897] 2 Ch. (C.A.) 487, where it was not deemed a sufficient ground for departure from exclusion of counterclaims that there was no other means by which the defendants could obtain justice against the sovereign State which was plaintiff.

⁶ A party or witness cannot be compelled to disclose anything tending to expose him to criminal proceedings or forfeiture abroad. *United States of America v. McRae* (1867) 4 Eq. 327; 3 Ch. 79. A document must be proved by English law (*Appleton v. Braybrooke* (1817) 6 M. & S. 84), but its weight as evidence will be measured by foreign law; e.g., in proof of marriage: *Biddulph v. Camoys* (1846) in 29 L.J.P. & M. 58; *Abbott v. Abbott* (1860) *ibid.* 57; contrast *Finlay v. Finlay* (1862) 31 L.J.P. & M. 149. Foreign judgments are to be proved by sealed or signed or examined copies (14 & 15 Vict. c. 99, s. 7). See the Evidence (Foreign Dominion and Colonial Documents) Act, 1933: *North v. North* (1936) 52 T.L.R. 380.

It must be noted, however, that when a contract is governed by a foreign law, evidence which is admissible in the foreign court to ascertain the intention of the parties will be admitted in an English court, although such

of the limitation of an action or of any other legal proceeding for the enforcement of a right, and hence it further includes the methods, e.g., seizure of goods or arrest of person, by which a judgment may be enforced.⁷

(2) Any rule of law which solely affects, not the *enforcement of a right*, but the *nature of the right itself*, does not come under the head of procedure. Thus, if the law which governs, e.g., the making of a contract, renders the contract absolutely void, this is not a matter of procedure, for it affects the rights of the parties to the contract, and not the remedy for the enforcement of such rights.

Hence any rule limiting the time within which an action may be brought, any limitation in the strict sense of that word, is a matter of procedure governed wholly by the *lex fori*. But a rule which after the lapse of a certain time extinguishes a right of action—a rule of *prescription* in the strict sense of that word—is not a matter of procedure, but a matter which touches a person's substantive rights, and is therefore governed, not by the *lex fori*, but by the law, whatever it may be, which governs the right in question. Thus if, in an action for a debt incurred in France, the defence is raised that the action is barred under French law by lapse of time, or that for want of some formality an action could not be brought for the debt in a French court, the validity of the defence depends upon the real nature of the French law relied upon. If that law merely takes away the plaintiff's remedy, it has no effect in England. If, on the other hand, the French law extinguishes the plaintiff's right to be paid the debt, it affords a complete defence to an action in England.⁸

To this it must be added that an English statutory enactment, which affects both a person's right and the method of enforcement, establishes a rule of procedure and therefore applies to an action in respect of a right acquired under foreign law. Hence, s. 4 of the Statute of Frauds,⁹ s. 40 of the Law of Property Act, 1925, and

evidence would not be admissible in the case of a transaction governed by English law: *St. Pierre v. South American Stores* [1937] 1 All E.R. 206, 209; [1937] 3 All E.R. 349; 19 B.Y.B.I.L. 251.

⁷ Where a person is bankrupt in England and is a partner in a firm abroad which is being administered in bankruptcy, the right of the creditors to prove against the firm, and also in England, depends on the English law as to double proofs. *Ex p. De Mello Mattos* (1894) 1 M. & A. 345; *Ex p. Goldsmid* (1856) 1 De G. & J. 257, under the older law; and under the later law compare *Re Doetsch* [1896] 2 Ch. 886.

⁸ See Lorenzen, 28 Yale L.J. 492 (1919), reprinted in Lorenzen, *Selected Articles on the Conflict of Laws*, Chap. 12; Cheshire, pp. 830 *et seq.*; Robertson *Characterisation in the Conflict of Laws*, pp. 248 *et seq.*; Falconbridge, Chap. 12.

⁹ *Leroux v. Brown* (1852) 12 C.B. 801. See, however, *Williams v. Wheeler* (1860) 8 C.B. (n.s.) 299, 316; *Gibson v. Holland* (1865) L.R. 1 C.P. 1, 8; *Berman v. Winrow* [1943] T.P.D. 213. For criticism of *Leroux v. Brown*, see Cheshire, pp. 826-7; Robertson, pp. 253 *et seq.*; Lorenzen, 32 Yale L.J. 311 (1923), reprinted in Lorenzen, *Selected Articles on the Conflict of Laws*, Chap. 11; Falconbridge, pp. 64-69. The Statute of Frauds, s. 7 (see now

s. 4 of the Sale of Goods Act, 1893, which, whether affecting rights or not, certainly affect procedure,¹⁰ apply to actions on contracts made in a foreign country and governed by foreign law. Whence the conclusion follows that a contract though made abroad, which does not satisfy the provisions of s. 4 of the Statute of Frauds, s. 40 of the Law of Property Act, 1925, or s. 4 of the Sale of Goods Act, 1893, respectively, cannot be enforced in England.

While there is little authority, it appears that English courts, contrary to the prevailing American practice, tend to hold that damages are a matter of procedure in an action based on a foreign tort.¹¹ In contract, there is no direct English authority, but it is submitted that questions of remoteness of damage should be determined by the proper law of the contract, and should not be treated as a matter of procedure.¹² The rate of interest to be allowed (if any) for breach of a foreign contract must depend on its proper law.¹³

With regard to the Illustrations to this Rule it must always be borne in mind that, as we are dealing with proceedings before an English court, the *lex fori* is the same thing as the law of England.

Illustrations

LEX FORI GOVERNS PROCEDURE

(1) Remedies and Process.

1. A brings an action against X for breach of a contract made with X in Scotland as a member of a Scottish firm. According to the law of Scotland (proper law of the contract), A could not maintain an action against X until he had sued the firm, which he has not done. According to the law of England (*lex fori*), the right to bring an action against the member of a firm does not depend upon the firm having been first sued. A can maintain an action against X.¹⁴

2. A, a Portuguese, at a time when arrest of a debtor on mesne process is allowable under the law of England (*lex fori*), but is not allowable under the law of Portugal (proper law of the contract), brings an action against X, a Portuguese, for a debt contracted in Portugal. A has a right to arrest X.¹⁵

ss. 53-55 of the Law of Property Act, 1925), relates to procedure, and applies to proceedings having reference to foreign land. *Rochefoucauld v. Boustead* [1897] 1 Ch. (C.A.) 196. Compare *Re De Nicols* [1900] 2 Ch. 410.

¹⁰ *Jones v. Victoria Graving Co.* (1877) 2 Q.B.D. 814, 828.

¹¹ See pp. 800-1, *ante*; contrast *Falconbridge*, pp. 19, 699.

¹² See *Livesley v. Horst* [1925] 1 D.L.R. 159; *Wolff*, s. 226; *Robertson*, p. 270. *Cheshire*, pp. 850 *et seq.*, distinguishes questions of remoteness of damage, governed by the proper law of the contract, and questions of the measure of damages, which determine the 'quantification of the amount payable', and which are governed by the *lex fori*. See *ante*, pp. 649-650.

¹³ See Rule 157, *ante*, p. 708.

¹⁴ *Bullock v. Caird* (1875) L.R. 10 Q.B. 276. Compare *Re Doetsch* [1896] 2 Ch. 886, as to the administration of a deceased partner's estate, where creditors were permitted recourse to it though, under Spanish law, before any legal proceedings against it, it would first have been necessary to exhaust the assets of the firm. See also *General Steam Navigation Co. v. Guillo* (1843) 11 M. & W. 877; *Bank of Australasia v. Harding* (1850) 9 C.B. 661.

¹⁵ *De la Vega v. Viana* (1880) 1 B. & Ad. 284, with which contrast *Melan v. Fitzjames* (1797) 1 B. & P. 188, which can be explained on the ground that the French contract created no personal obligation in France, but merely bound

3. A, in Spain, sells X goods of the value of £50. The contract is made by word of mouth, and there is no memorandum of it in writing. The contract is valid and enforceable according to Spanish law (proper law of the contract). A contract of this description is, under the Sale of Goods Act, 1893, s. 4 (*lex fori*), not enforceable by action. A cannot maintain an action against X for refusal to accept the goods.¹⁶

4. X, a man residing in England, writes to A, a Danish woman residing in Denmark, an offer of marriage. A accepts the offer by letter. It is intended that the contract shall be carried out in England. Danish law does not permit an action for breach of promise of marriage except in circumstances which in this instance do not exist. A brings an action against X in England. An action lies because (1) the contract is an English contract; (2) the law of Denmark does not affect the validity of the contract but the remedy for the breach, and is a law as to procedure.¹⁷

5. In proceedings in the Admiralty Division of the High Court *in rem* the priority as between A, to whom the ship was mortgaged and X, the master who claims an account of wages and disbursements on the ship, is determined by the law of England (*lex fori*).¹⁸

6. X, in 1936, incurs an obligation in France to pay A a sum of 8,100 francs for clothes supplied. In 1938 A brings an action in England to recover this sum. X pays into court a sum in sterling, which, at the current rate of exchange, is equivalent to 8,100 francs. A claims that he is entitled to a larger sum, namely, the sterling equivalent of 8,100 francs at the time when the debt fell due in 1936. The English rule that the material time is the date when the debt fell due applies, and A may therefore claim the larger sum.¹⁹

7. A brings an action against X to obtain specific performance of a contract made between A and X in and subject to the law of a foreign country. The contract is one of which A might, according to the law of that country (proper law of the contract), obtain specific performance, but it is not one for which specific performance can be granted according to the law of England (*lex fori*). A cannot maintain an action for specific performance.

8. A, a French author, claims damages from X in respect of infringement of copyright. He is entitled to the remedies of English law, even if they give more effective protection than would be his in France.²⁰

(2) Evidence.

9. A brings an action against X to recover a debt incurred by X in and under the law of a foreign country (proper law of the contract). A tenders evidence of the debt which is admissible by the law of the foreign

the defendant's property. The law of France determined the nature of the obligation as opposed to procedure. See also *Talleyrand v. Boulanger* (1797) 3 Ves. 447; *Flack v. Holm* (1820) 1 J. & W. 405, 417, 418. See also *Liverpool Marine Credit Co. v. Hunter* (1868) L.R. 3 Ch. 479, 486.

¹⁶ See *Acebal v. Levy* (1834) 10 Bing. 376, and note that the Sale of Goods Act, 1893, s. 4, differs in wording from the Statute of Frauds, s. 17. The Sale of Goods Act, 1893, s. 4, enacts that no contract which comes within it 'shall be enforceable by action'. The Statute of Frauds, s. 17, enacted that no contract which comes within it 'shall be allowed to be good', but even this enactment probably referred to procedure. Contrast, however, *Story*, ss. 262, 262a. See also *Nihalchand Navalehand v. McMullan* [1934] 1 K.B. (C.A.) 171; 16 B.Y.B.I.L., pp. 210-12.

¹⁷ See *Hansen v. Dixon* (1906) 23 T.L.R. 56.

¹⁸ *The Milford* (1858) Sw. 362, 366; *The Jonathan Goodhue* (1859) Sw. 626; *The Tagus* [1903] P. 44; *The Colorado* [1923] P. (C.A.) 103; *The Ziguas* [1932] P. 113. See, however, *Cheshire*, pp. 847-9; *Wolff*, s. 225. See also *Clark v. Bowring & Co.* [1908] S.C. 1168. There is a statutory exception to the application of the *lex fori*; Maritime Conventions Act, 1911, s. 7.

¹⁹ *Madeleine Vionnet et Cie v. Wills* [1940] 1 K.B. 72. See 56 L.Q.R. 150; 21 B.Y.B.I.L. 216; 3 M.L.R. 228; criticised *ante*, pp. 746-748.

²⁰ *Baschet v. London Illustrated Standard Co.* [1900] 1 Ch. 73.

country, but is inadmissible by the law of England (*lex fori*). The evidence is inadmissible.²¹

10 A brings an action against X, an Englishman, for breach of a promise of marriage made by X to A, a German woman, at Istanbul. A has not such corroborative evidence as is required by the Evidence (Further Amendment) Act, 1869, s. 2 (*lex fori*). A cannot prove the promise or maintain the action.²²

11. A, a Frenchman, makes a contract in France with X, an Englishman, to serve him in France from a future date for a year certain. The contract is made by word of mouth, and there is no memorandum of it in writing. It is a contract valid by the law of France (proper law of the contract), for the breach of which an action might be brought in a French court, but under section 4 of the Statute of Frauds no action can be brought on such an agreement unless there is a memorandum thereof in writing. The enactment applies to procedure. A cannot maintain an action in England against X for breach of the contract.²³

(3) Limitation.

12 X contracts a debt to A in Scotland. The recovery of the debt is not barred by lapse of time, according to Scottish law (proper law of the contract), but it is barred by the English Limitation Act (*lex fori*). A cannot maintain an action against X.²⁴

13. X incurs a debt to A in France. The recovery of such a debt is barred by the French law of limitation (proper law of the contract), but is not barred by any English Statute of Limitation. A can maintain an action for the debt against X.²⁵

14. A in a Manx court brings an action against X for a debt incurred by X to A in the Isle of Man. The action, not being brought within three years from the time when the cause of action arose, is barred by Manx law, and judgment is on that account given in favour of X. A then, within six years from the time when the debt is incurred, brings an action against X in England. This action is not barred by the English Limitation Act (*lex fori*). A can maintain his action against X.²⁶

15. X, under a bond made in India, is bound to repay A £100. Specialty debts have, under the law of India (proper law of the contract), no higher legal value than simple contract debts, and under that law the remedy for both is barred by the lapse of three years. The period of limitation for actions on specialty debts is under the law of England—Limitation Act, 1939,

²¹ *Brown v. Thornton* (1837) 6 A. & E. 185. Compare *Dunbar v. Harvey* (1820) 2 Bli. 351; *Finlay v. Finlay* (1862) 31 L.J.P. & M. 149; *Abbott v. Abbott* (1860) 29 L.J.P. & M. 57; *Bain v. Whitehaven, etc., Ry.* (1850) 3 H.L.C. 1; *Re Scholefield* [1905] 2 Ch. 408 (not reversed nor doubtful on this point).

²² *Wiedemann v. Walpole* [1891] 2 Q.B. (C.A.) 534.

²³ *Leroux v. Brown* (1852) 12 C.B. 801.

²⁴ *British Linen Co. v. Drummond* (1830) 10 B. & C. 908; *Bouchet v. Tullidge* (1894) 11 T.L.R. 87; *Campbell v. Stein* (1818) 6 Dow 116; *Don v. Lippmann* (1837) 5 Cl. & F. 1; *Ruckmaboy v. Mottichund* (1852) 8 Moore P.C. 4; *Pardo v. Bingham* (1869) L.R. 4 Ch. 735.

²⁵ *Huber v. Steiner* (1835) 2 Scott 304; *Société Anonyme Metallurgique de Prayon v. Koppel* (1933) 77 S.J. 800. Compare *Fergusson v. Fyffe* (1841) 8 Cl. & F. 121, where a similar doctrine is laid down for Scotland. See also the discussion in *Higgins v. Ewing's Trustees* [1925] 8 C. 440. Compare *African Banking Corp. v. Owen* (1897) 4 O.R. 253; *Carroll v. Wallace* (1873) 9 N.S.R. 165; *Finch v. Finch* (1876) 45 L.J.Ch. 816. See also *Bondholders Securities Corporation v. Manville* [1938] 4 D.L.R. 699.

²⁶ *Harris v. Quine* (1869) L.R. 4 Q.B. 658.

s. 2 (3) (*lex fori*)—twelve years. A, ten years after the execution of the bond, brings an action in England upon it against X. A can maintain the action.²⁷

(4) *Set-off*.

16. X in 1855 contracts in Prussia with A for the carriage by A of goods by sea from Memel to London. A brings an action against X for the freight, and X under Prussian law (proper law of the contract) claims to set off money, due to him by way of damages from A, which could not at that date be made, according to the rules of English procedure (*lex fori*), the subject either of a set-off or a counterclaim. X is not allowed to set off, against the money due to A, the damages due from A to X.²⁸

LEX FORI DOES NOT GOVERN EXISTENCE OF RIGHT

17. A brings an action on a contract made by word of mouth between X and A in and under the law of a foreign country. It is a kind of contract which under the law of England (*lex fori*) is valid though not made in writing, but under the law of the foreign country (*lex loci contractus*) is void if not made in writing. A cannot maintain his action, i.e., the validity of the contract is governed in England, not by the *lex fori* but by the *lex loci contractus*.²⁹

18. A brings an action against X for breach of a contract made in a foreign country. It is proved that under the law of that country (*lex loci contractus*) the contract for want of a stamp is unenforceable. If the want of the stamp merely deprives A of his remedy in the foreign country, then he can maintain an action in England for breach of the contract, i.e., the want of the stamp merely affects procedure which is governed by the *lex fori*. If the want of the stamp makes the contract void ab initio, then A cannot maintain an action in England, i.e., the want of a stamp affects a matter of right and is governed by the *lex loci contractus*.³⁰

19. X in 1866 commits an assault upon A in Jamaica. For some time after the assault is committed, A might, had X been in England, have maintained an action for it there against X. Before X returns to England the legislature of Jamaica passes an Act of Indemnity under which the assault is made lawful. X then returns to England, and A brings an action against X for the assault. A cannot maintain the action, i.e., the character of the act done by X, or A's right to treat it as a wrong, is governed, not by the *lex fori*, but by the *lex loci delicti commissi*.³¹

²⁷ See *Alliance Bank of Simla v. Carey* (1880) 5 C.P.D. 429. Whether this case is rightly decided?

When an appeal must be brought within a defined time, failure to take the necessary steps bars the right: *Lopez v. Burslem* (1843) 4 Moo.P.C. 300.

²⁸ *Meyer v. Dresser* (1864) 16 C.B.(n.s.) 646; 33 L.J.C.P. 289. Contrast *MacFarlane v. Norris* (1862) 2 B. & S. 783; in a suit in England a debtor in a foreign bankruptcy is entitled to set off against the trustee any claim admissible under the foreign Bankruptcy Act. Since the Judicature Acts came into force, the value of the goods not carried could (*semble*) be claimed under a counterclaim. Conf., also, *Allen v. Kemble* (1848) 6 Moo.P.C. 314 (as explained in *Rouquette v. Overmann* (1875) L.R. 10 Q.B. 525, 540, 541); *Maspons v. Mildred* (1882) 9 Q.B.D. (C.A.) 530; (1883) 8 App.Cas. 874.

²⁹ Compare *Bristow v. Sequeville* (1850) 5 Ex. 275.

³⁰ See *Alves v. Hodgson* (1797) 7 T.R. 241.

³¹ See *Phillips v. Eyre* (1870) L.R. 6 Q.B. 1 (Ex Ch.).

Would the action have been maintainable if X had returned to England and A had commenced the action, but not brought the case to trial, before the passing of the Jamaica Act of Indemnity? The answer is presumably in the negative, at any rate if the Act of Indemnity declares that the actions questioned are to be deemed to have been legal *ab initio*. Compare *The M. Mozham* (1876) 1 P.D. (C.A.) 107, 111, *per James, L.J.*

20. A, a feme covert, who by the law of her domicile can sue by herself for trade debts, brings an action against X. It is no defence that a married woman could not then sue in England. But she cannot sue jointly with her husband as trade partners.³²

21. A and B, two syndics of a French bankrupt, bring an action against X in respect of a chose in action of the bankrupt. It is proved that they are under French law the proper representatives of the bankrupt's estate. They are proper parties to the action.³³

22. In an administration action A claims for a debt against X's estate. He has in respect of another debt, which is time barred in England, obtained abroad satisfaction by execution levied on X's foreign assets. A's claim is valid and he is not required to bring into hotchpot what he obtained abroad.³⁴

23. A, a mother, and X, her daughter, both German nationals domiciled in Germany, were killed in London in an air raid by the same explosion, and it could not be proved which of the two survived the other. X was entitled to movables under the will of A, if she survived A. By German law, it is presumed that A and X died simultaneously. By English law, the younger is presumed to have survived the elder. The question was whether the administration of the estate of A was to proceed on the footing that X survived A, and this was a question for German law. It was held that both the German and English provisions with respect to survivorship were matters of substance, and that the German rule therefore applied, so that X had no claim to the movables.³⁵

RULE 194.—In any matter to which in the opinion of an English court foreign law is applicable, any differences alleged to exist between foreign and English law must be proved by expert evidence to the satisfaction of the court, as matters of fact, not of law, and in the absence of satisfactory proof the foreign law will be held to be identical with the English law respecting the matter in question.³⁶

Comment

It is the duty of the court to decide when foreign law should be applied to any matter coming before it for judicial determination.

³² *Cosio v. De Bernales* (1824) 1 C. & P. 266. The joinder of parties is a matter of procedure, the right to acquire property and bring actions depends on substantive law.

³³ *Alien v. Furnival* (1834) 1 C.M. & R. 277, 296. So foreign trustees in bankruptcy can sue: *Re Davidson's Settlement Trusts* (1873) L.R. 15 Eq. 383; *Macaulay v. Guaranty Trust Co. of New York* (1927) 44 T.L.R. 99; *Re Lawson's Trusts* [1896] 1 Ch. 175; a trustee under a foreign assignment: *Dulaney v. Merry & Son* [1901] 1 K.B. 536; a foreign administrator in the domicile in respect of the balance of administration: *Re Lorillard* [1922] 2 Ch. (C.A.) 688.

³⁴ *Re Bowes* [1889] W.N. 53. That is, the time-barred debt is recognised as valid and capable of enforcement whenever it is not a question of conflict with the *lex fori* as to limitation of action.

³⁵ *Re Cohn* [1945] Ch. 5; 61 L.Q.R. 840. Compare *Leong Sow Nom v. Chin Yee Yow* [1984] 3 W.W.R. 686; criticised by Falconbridge, pp. 267–68 (presumption of marriage).

³⁶ *Cheshire*, Chap. 5; Wolff, ss. 207–10; Falconbridge, Chap. 46; Restatement, ss. 621–25; Goodrich, s. 80.

but the court is not under any obligation to take judicial notice of the provisions of foreign law. Any matters in which there may be difference between foreign and English law must be proved by the party³⁷ who relies on the difference by means of expert evidence to the satisfaction of the court, which is bound to apply English law if the burden of proving the foreign law is not fully carried out.³⁸ 'Foreign law', it has been said,³⁹ 'is a question of fact to an English court; the judgment of a foreign judge is not binding on an English court, but is the opinion of an expert on the fact, to be treated with respect, but not necessarily conclusive'. The rule that it is for the court alone and not for a jury to pronounce on the foreign law is due to the Administration of Justice Act, 1920, s. 15,⁴⁰ superseding the old rule which left the matter as one of fact to the jury; it has been held that this enactment applies to criminal proceedings also, and a conviction in which the rule was ignored was quashed on this ground alone.⁴¹ It is of importance to note that, if no evidence is offered of the difference between English and foreign law, or if the evidence is inadequate, the judge is bound to apply English law, however clear it may be that such law is not really the same as the foreign law on the subject. There is one exception to this rule; the House of Lords has judicial cognisance of the laws of which it is the final Court of Appeal, and it has been expressly decided in the case of Scottish law that it will take judicial notice of it, and will not be bound by the evidence of that law given in the court below if it does not hold it accurate.⁴² The same rule applies to Northern Ireland.

Who are expert witnesses? The rule is now clear⁴³ that any person adduced as an expert must be in some real sense officially

³⁷ *Dynamit^{er} Aktiengesellschaft v. Rio Tinto Co.* [1918] A.C. 260, 301, per Lord Parker. For Scotland, see *Higgins v. Ewing's Trustees* [1925] S.C. 440.

³⁸ *Nouvelle Banque de l'Union v. Ayton* (1891) 7 T.L.R. (C.A.) 877. Compare *The Colorado* [1928] P. 108, 111, per Atkin, L.J. The same doctrine is, of course, possibly to be applied in colonial courts with curious results: *Schnaider v. Jaffe* (1916) 7 C.P.D. 696: is it presumed that a foreign marriage is in community of property unless that is excluded by ante-nuptial contract? For refusal to presume similarity of statute law, see *Purdum v. Pacey & Co.* (1896) 26 S.C.R. 412.

³⁹ *Guaranty Trust Co. of New York v. Hannay & Co.* [1918] 2 K.B. (C.A.) 623, 667, per Scrutton, L.J.; 638, per Pickford, L.J. *Lazard Bros. v. Midland Bank* [1933] A.C. 289, 297-8. See also *Macnamara v. S.S. Hatteras* [1931] Ir.R. 78, 887; [1933] Ir.R. 675.

⁴⁰ For county courts, see County Courts Act, 1934, s. 94.

⁴¹ *R. v. Hammer* [1928] 2 K.B. (C.C.A.) 786.

⁴² *Cooper v. Cooper* (1888) 18 App.Cas. 88; *Elliot v. Joicey* [1935] A.C. 209.

⁴³ *Sussex Peerage Case* (1844) 11 Cl. & F. 85, 134, per Lords Cottenham and Langdale (Roman Catholic bishop's evidence). For cases of insufficient qualification, see *Bristow v. Sequeville* (1850) 19 L.J.Ex. 289; *Cartwright v. Cartwright* (1878) 26 W.R. 634: English barrister not qualified to give evidence of Canadian law because of practice in Privy Council appeals from Canada. See *R. v. Naoum* (1911) 24 O.L.R. 306; *Reinblatt v. Gold* (1928) Q.R. 45 K.B. 136; [1929] S.C.R. 74 (Canada); *R. v. Ilich* [1935] N.Z.L.R. 90 (New Zealand).

expert in the law he is adduced to establish, though he need not necessarily be a practising lawyer or a judge. Something no doubt turns on the matter to be proved; a former Governor of a colony and an English barrister have been permitted to prove the law of marriage⁴⁴; consular officers and diplomatic representatives accustomed officially to deal with legal questions are competent witnesses,⁴⁵ as well as notaries used to prepare documents according to the foreign law.⁴⁶ Lawyers entitled by examination or diploma to be admitted to the bars of foreign countries have been allowed to give evidence,⁴⁷ and the Reader in Roman Dutch law of a university whose work included preparing pupils for the examinations for admission to practise law in countries where such law is observed.⁴⁸ But mere study of a foreign law at a university not of that country is insufficient, and, though a Spanish lawyer may give binding evidence as to Spanish law, he will not be reckoned an expert in the law of Nicaragua without proof that he is qualified to practise there,⁴⁹ at any rate on a point where the whole issue is whether there is any evidence of a special sense being given to a term used in a will made in Nicaragua, a decision to which no exception need be taken. A private person is not qualified as a witness, and, accordingly it is impossible to address to such a person interrogatories in an action asking him to pronounce an opinion on foreign law even of his own country.⁵⁰

How far can judges examine foreign laws for themselves? On this point it is impossible to lay down any absolute rule, the courts wisely having avoided any pronouncement which might unduly fetter their discretion. They recognise as obvious the impossibility in normal cases of judges forming any useful opinion on foreign law except on the basis of expert evidence, but by a prudent exercise of common sense they have shown themselves willing to waive proof by experts where such is manifestly unnecessary, as, for instance, on points which must be formally proved, but need really no expert testimony, which may be costly or difficult to procure. This is specially noteworthy in the willingness shown of late to allow colonial marriage laws to be produced in evidence in copies, whose authenticity is secured by the Evidence (Colonial Statutes) Act, 1907, the court then being satisfied by mere examination of the Act without expert aid.⁵¹ On all matters of doubt, of course, expert

⁴⁴ *Cooper-King v. Cooper-King* [1900] P. 65; *Wilson v. Wilson* [1908] P. 157.

⁴⁵ *In Goods of Prince Oldenburg* (1884) 9 P.D. 234; *In Goods of Dost Aly Khan* (1880) 6 P.D. 6.

⁴⁶ *In Goods of Whitelegg* [1899] P. 267.

⁴⁷ *Barford v. Barford* [1918] P. 140.

⁴⁸ *Brasley v. Rhodesia Consolidated, Ltd.* [1910] 2 Ch. 95.

⁴⁹ *Re Mannors* [1923] 1 Ch. 226; *Re Turner* [1906] W.N. 27; *In Goods of Bonelli* (1875) 1 P.D. 69.

⁵⁰ *Periale Petroleum Maatschappij v. Deen* [1924] 1 K.B. (C.A.) 111.

⁵¹ *Roe v. Roe* (1917) 115 L.T. 792; *Gibson v. Gibson* [1921] W.N. 12; *Taylor v. Taylor* [1923] W.N. 65. Contrast *Brown v. Brown* (1917) 116 L.T. 702.

evidence is essential, and the court will, if it thinks fit, put its own interpretation on the language, 'and is not bound to accept the view of either set of witnesses, though it must be guided by the views of the foreign experts as to which of the documents have the force of law and as to the meaning of any technical terms'.⁵² The right of independence in this sense was asserted by Lord Stowell,⁵³ and exercised freely by the Privy Council in *Bremer v. Freeman*,⁵⁴ where they decided in accord with a ruling of the Court of Cassation against the validity of a will made in English form by a British national domiciled in France.

Judicial Ascertainment of Foreign law. By the British Law Ascertainment Act, 1859, a court in any part of British territory may send a case to a court in any other part in order to ascertain the view of that court as to the law applicable to the facts as stated in the case sent.⁵⁷ The court applied to may give an opinion after hearing either party or both, but the opinion need not be accepted as binding by the House of Lords or the Privy Council in cases in which an appeal would lie to them from judgments of the court by which the opinion is given. The opinion is not made binding on the court from which the case was sent, for it is authorised to submit it to the jury either as evidence or conclusive evidence of the law; the effect of the Administration of Justice Act, 1920, s. 15, must be to destroy this possibility of submission, and presumably to make the opinion binding.

In the case of foreign law in the narrower sense of the term the Foreign Law Ascertainment Act, 1861, provides for a similar procedure as regards the sending of cases to foreign courts. The opinion given must be accepted as binding or submitted under the old procedure to the jury as conclusive evidence, but this is subject to the right of the court if not satisfied that the foreign court has correctly understood the facts or has given a correct view of the

⁵² *Russian Commercial and Industrial Bank v. Comptoir d'Escompte de Mulhouse* [1923] 2 K.B. 630, 656, per Scrutton, L.J. Though witnesses are essential, the court will look at the passages cited to discover their proper meaning: *De Béeche v. South American Stores, Ltd.* [1935] A.C. 148; *Concha v. Murrieta* (1889) 40 Ch.D. 543; *Buerger v. New York Life Insurance Co.* (1927) 96 L.J.K.B. 930; *Macnamara v. S.S. Hatteras* [1931] Ir.R. 73, 337; [1933] Ir.R. 675; *Lazard Bros. v. Midland Bank* [1933] A.C. 289, 297-8. The court will have regard not only to their own view but to that of a competent foreign legal authority: *Princess Paley Olga v. Weisz* [1929] 1 K.B. 718. See for a similar view in Scotland, *Kolbin & Sons v. Kinnear & Co.* [1930] S.C. 724, 737, 738; in Canada, *Meagher v. Aetna Insurance Co.* (1873) 20 Gr. 354. A court should follow the foreign courts' interpretation of statute law: *Allen v. Standard Trusts* [1919] 3 W.W.R. 974.

⁵³ *Lindo v. Belisario* (1795) 1 Hagg.Cons. 216; *Dalrymple v. Dalrymple* (1811), 2 Hagg.Cons. 54, cited by Lord Langdale, *Nelson v. Bridport* (1845) 8 Beav. 527, 537.

⁵⁴ (1857) 10 Moo.P.C. 306; compare *Di Sora v. Phillips* (1863) 10 H.L.C. 640; *Concha v. Murrieta* (1889) 40 Ch.D. 543.

⁵⁷ *Duncan v. Lawson* (1889) 41 Ch.D. 394; *Sawrey-Cookson v. Sawrey-Cookson* (1905) 13 Sc.L.T. 605; *Topham v. Portland* (1863) 32 L.J.Ch. 257. An application was refused in *MacDougall v. Chitnavis* [1937] S.C. 390.

foreign law to remit the case to the same or another court of the foreign country for a further opinion. British courts are similarly required to give opinions if desired by foreign courts.⁵⁸ But the procedure under the Acts of 1859 and 1861 seems never to have attained favour, and in the latter case it is dependent on the making of conventions with foreign States; one instance of action under it is alone apparently recorded.⁵⁹

⁵⁸ See Ord. XXV, r. 5; *Guaranty Trust Co. of New York v. Hannay* [1915] 2 K.B. (C.A.) 536, 573, as to the right to make declaratory judgments.

⁵⁹ *Annual Practice*, note to Ord. XXXVII, r. 5.

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